

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2003 MTWCC 27

WCC No. 2001-0456

LYMAN GREENE

Petitioner

vs.

UNINSURED EMPLOYERS' FUND

Respondent

and

ALDER KOA KAMPGROUND d/b/a NANNINI BROTHERS

Employer/Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: In January 2000, claimant and his ex-wife were hired to manage the Alder Montana KOA Kampground. Claimant was the maintenance manager and his ex-wife assumed responsibility for the small convenience store. On April 7, 2000, claimant fell from a ladder and suffered a 50% compression fracture of the L1 vertebra and an ankle fracture. He continued to be paid and was allowed to return to work in a modified position doing such work as he felt physically able to do. Claimant's treating physician approved claimant's working in a sedentary to light capacity. The owner of the campground hired others to assist claimant.

On June 22, 2000, the claimant quit his modified position after his ex-wife was reprimanded for allowing drunken motorcyclists to camp at the campground. Thereafter, in April 2002 and May 2002, Dr. Sorini, a neurosurgeon to whom claimant was referred for back complaints, and Dr. Buehler, an orthopedic surgeon who was claimant's regular treating physician, found him totally incapable of working.

Claimant now seeks medical benefits for a L5-S1 spondylosis with Grade 1 spondylolisthesis, urging that while the condition was preexisting the industrial accident made it symptomatic. He also seeks temporary and/or permanent total disability benefits from June 22, 2000. The UEF, which assumed liability for the claimant's industrial accident

since Alder KOA was uninsured, began paying total disability benefits as of April 2002. It seeks indemnification from Alder KOA.

Held: Multiple issues are raised. They are resolved as follows:

(1) The industrial accident did not cause the claimant's L5-S1 condition or make it symptomatic. The condition was made symptomatic by claimant's subsequent fall at home. Therefore, the UEF and Alder KOA are not liable for the claimant's L5-S1 condition or for disability arising from that condition.

(2) The claimant quit his modified job: he was not fired. Since claimant could determine what work he could physically perform, he did not qualify or requalify for temporary total disability benefits so long as he continued to be released to do some form of work

(3) Claimant has proved he is totally disabled as of April 2002, on account of back pain. The claimant's L1 compression fracture is a significant contributor to that pain and total disability. He is therefore entitled to total disability benefits as of April 2002.

(4) For purposes of determining the claimant's compensation rate, any back pay the claimant is entitled to on account of the employer's failure to comply with minimum wage and overtime pay requirements must be included.

(5) At the time of his industrial accident, claimant was working only part time, averaging no more than twenty-eight hours a week.

(6) The UEF is entitled to reimbursement from Alder KOA for both medical and compensation benefits paid to date and which may reasonably be paid in the future.

Topics:

Injury and Accident: Aggravation: Generally. An insurer is responsible for treatment of a preexisting condition where the industrial accident makes a preexisting condition symptomatic, however, where the most credible medical evidence shows that the condition did not become symptomatic until six months after the industrial accident and became symptomatic immediately after a non-industrial accident, the insurer is not liable for the condition or for disability arising from the condition.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-701(4), MCA (1999). Under section 39-71-701(4), MCA, a claimant is disqualified from TTD benefits so long as he is released to a modified position and the position is available. A claimant cannot bootstrap TTD entitlement by refusing the position or quitting the position without good cause.

Benefits: Temporary Total Disability Benefits. Under section 39-71-701(4), MCA, a claimant is disqualified from TTD benefits so long as he is released to a modified position

and the position is available. A claimant cannot bootstrap TTD entitlement by refusing the position or quitting the position without good cause.

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-701(4), MCA (1999). Under section 39-71-701(4), MCA, a claimant is disqualified from TTD benefits so long as he is released to a modified position and the position is available. A claimant cannot bootstrap TTD entitlement by refusing the position or quitting the position without good cause.

Benefits: Temporary Total Disability Benefits. Where claimant who had been previously released to a modified position becomes physically unable to perform that position, he again becomes entitled to TTD benefits. § 39-71-701(4), MCA.

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-701(4), MCA (1999). Where claimant who had been previously released to a modified position becomes physically unable to perform that position, he again becomes entitled to TTD benefits. § 39-71-701(4), MCA.

Benefits: Temporary Total Disability Benefits. Where claimant is totally disabled on account of back pain and the industrial condition is a significant contributor to that pain, the claimant is entitled to TTD benefits.

Wages: Average Weekly Wage. For purposes of determining the claimant's compensation rate, any back pay the claimant is entitled to on account of the employer's failure to comply with minimum wage and overtime pay requirements must be included. § 39-71-123(1)(b), MCA (1999).

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-123(1)(b), MCA (1999). For purposes of determining the claimant's compensation rate, any back pay the claimant is entitled to on account of the employer's failure to comply with minimum wage and overtime pay requirements must be included. § 39-71-123(1)(b), MCA (1999).

Uninsured Employers: Indemnification. The Uninsured Employers' Fund is entitled to reimbursement from the uninsured employer for all benefits reasonably paid or to be paid a claimant. § 39-71-504(1)(b), MCA (1999).

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-504(1)(b), MCA (1999). The Uninsured Employers' Fund is entitled to reimbursement from the uninsured employer for all benefits reasonably paid or to be paid a claimant. § 39-71-504(1)(b), MCA (1999).

¶11 The trial in this matter was held on September 5 and 6, 2002, in Butte, Montana. Petitioner, Lyman Greene, was present and represented by Mr. Frank J. Joseph and Mr. David L. Vicevich. Respondent, Uninsured Employers' Fund (UEF), was represented by Ms.

Julia W. Swingley. Respondent, Alder KOA Kampground (Alder KOA), was represented by Ms. Elizabeth A. O'Halloran.

¶12 Exhibits: Exhibits 1 through 25, 27 through 29, 31, 33 through 39, and 41 were admitted without objection. Exhibits 30 and 32 were admitted after the objections were withdrawn. Exhibit 40 was admitted over objection. The Court reserved ruling on Exhibit 26 pending its offer in connection with testimony at trial. The exhibit was not re-offered, is not in the Court's exhibit book, and is therefore not considered.

¶13 Witnesses and Depositions: Lyman Greene, Edward Nannini, Dennis Schmidt, Cory Petterson, Jean Shipp, Brenda Barnaby, and Dorla Hartford testified at trial. In addition the parties submitted depositions of Mark Hayden, Dr. Peter M. Sorini, Dr. Charles E. Buehler, Dr. Dana Headapohl, Edward N. Nannini, Cynthia Greene, and Lyman Greene for the Court's consideration.

¶14 Issues Presented: The issues as set forth in the Proposed Pre-Trial Order are:

¶14a Is Petitioner entitled to temporary and/or permanent wage loss benefits pursuant to the Workers Compensation Act?

¶14b If Petitioner is entitled to temporary and/or permanent wage loss benefits, what is the appropriate rate and amount of benefits available to Petitioner?

¶14c If the Petitioner is entitled to temporary and/or permanent wage loss benefits, is the Employer legally obligated to reimburse the UEF for all indemnity and medical benefits paid or to be paid by the UEF to Petitioner?

¶14d Was Petitioner's pre-existing condition of bilateral spondylosis with Grade I spondylolisthesis at L5-S1 aggravated by the industrial accident of April 7, 2000?

¶14e Is conduct of Respondent Employer in its refusal to pay medical and wage loss benefits unreasonable and, if so, does said unreasonable conduct warrant the imposition of penalties against the Employer.

¶14f Is the conduct of Respondent UEF in its refusal to pay medical and wage loss benefits unreasonable, and, if so, does said unreasonable conduct warrant the imposition of penalties against the UEF.

(Proposed Pre-Trial Order at 3.)

¶15 Having considered the Proposed Pre-Trial 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

¶16 Alder KOA is a campground operating under the KOA Kampground franchise. It is located in Alder, Montana.

¶17 Alder KOA is 22.2 acres, however, the campground only covers 7 acres. (Nannini Dep. at 38; Trial Test.) It has approximately 56 campsites, many of them with water and electricity suitable for recreational vehicles and trailers. (*Id.*) It has a convenience store with an apartment. The store sells gasoline and propane, as well as basic groceries and other items. The campground also has a double wide trailer, a camping cabin, a cook tent where some meals are served, a playground, and a pond for fishing. (Trial Test.) A diagram of the campground is found at Exhibit 39.

¶18 Alder KOA has been owned and operated by Nannini Brothers, Incorporated since March or April 1999. (Nannini Dep. at 7-8.) The corporation has two shareholders. (*Id.* at 8.) Edward Nannini (Nannini) is the majority shareholder, owning 51% or 52% of the stock (*id.*; Trial Test.), and is in charge of the actual operations of the Alder KOA.

¶19 The Alder KOA is open year round, however, in the winter, spring, and fall its primary operation is its convenience store. Camping at the Alder KOA occurs mainly between Memorial Day and Labor day.

¶10 Nannini spends his winters in Sacramento, California, which is his primary residence.

I. Hiring and Wages

¶11 In January 2000, the claimant contacted Nannini about the possibility of a job at the Alder KOA. At the time, claimant was living in Oklahoma and had prior experience managing a KOA campground in Tulsa. (Trial Test.; L. Greene Dep. at 46-47.) He was looking for a job for himself and his ex-wife, Cynthia Greene (Cynthia), with whom he was still residing. (*Id.*)

¶12 Claimant traveled to Sacramento to meet with Nannini. After the meeting, Nannini hired claimant and Cynthia to manage the Alder KOA for \$50.00 *each* a week plus room and board. The parties agree that the value of claimant's share of room and board was \$280.00 monthly. (Petitioner's Proposed Finding of Fact ¶ 6; Ex. 6 at 4; Employer's Proposed Findings of Fact ¶ 110.) Claimant and Cynthia also received a 20 gallon a month gasoline allowance. (Uncontested Fact 3.) Claimant's share of that allowance averaged \$17.06 per month during the five months he was employed. (Petitioner's Proposed Finding of Fact ¶ 6; Ex. 6 at 4; Employer's Proposed Findings of Fact ¶ 110.) On a weekly basis, the value of board, room, and gas was \$68.37 ($\$297.06 \times 12 \text{ months} \div 52.14 \text{ weeks}$).

¶13 Thus, claimant's pay at the time of his injury was \$118.37 a week ($\$50 + \68.37).

II. Industrial Injury

¶14 Claimant and Cynthia traveled to Alder in January 2000, moved into the apartment above the store, and began managing the Alder KOA.

¶15 On April 7, 2000, claimant fell from a ladder while helping trim trees at the Alder KOA. He suffered a compression fracture of the L1 vertebra, as well as a fracture of the left ankle. (Ex. 28 at 2, 6.)

¶16 There is no dispute that claimant was in the course and scope of his employment when injured. (Employer's Proposed Finding of Fact ¶ 33.)

¶17 At the time of the claimant's industrial injury, Alder KOA (Nannini Brothers, Incorporated) did not have workers' compensation insurance coverage.

¶18 Claimant submitted a claim for compensation to the UEF at the end of June 2000. (Ex. 1.) On or about July 24, 2000, the UEF agreed to pay benefits under a reservation of rights. (Proposed Pre-Trial Order, Uncontested Fact 8.)

¶19 UEF, however, has not paid all the benefits claimant alleges he is entitled to. Initially, it did not pay temporary total disability (TTD) benefits because Alder KOA modified his duties so he could continue working within his medical restrictions. According to the UEF's Proposed Findings of Fact at 3, UEF began paying TTD benefits on April 25, 2002, after Dr. Peter Sorini testified in deposition that claimant was unable to work. UEF and the employer also dispute claimant's wages and disability rate and the relationship of some of his back problems to his injury.

III. Credibility

¶20 Resolution of many issues in this case depend upon my assessment of the witnesses' credibility. I did not find claimant a credible witness. Nannini was a far more credible witness.

IV. Hours of Work

¶21 Claimant asserts that the Court must base its calculation of his benefits on statutory minimum wage and overtime requirements rather than his actual wages. Since claimant may have been covered by minimum wage and overtime statutes, I determine the actual number of hours he worked.

¶22 If claimant is believed, at the time of his accident he was working an average of 75 hours a week. In a wage claim filed with the Department of Labor and Industry (Department), he claimed he was working from 7:30 a.m. to 7:00 p.m., or 11.5 hours a day, 7 days a week. (Ex. 3 at 6.) He listed only 69 hours worked for the week of April 2, 2000, but that was the week he was injured and he did not work a full day on April 7th or at all on April 8th, according to his claim. The hours he claimed for the four full weeks prior to the week of his injury were:

Week of March 5, 2000 70 hours
Week of March 12, 2000 77 hours
Week of March 19, 2000 77 hours
Week of March 26, 2000 77.5 hours

(*Id.* at 5-6.)

¶23 I did not find his claim of all those hours credible. I was also unpersuaded by his supporting witnesses, whom I also found not credible.

¶24 The claimant and Cynthia were responsible for keeping the store open from 8:00 a.m. to 5:00 p.m. during the winter. (Nannini Trial Test.) From March 15th to Memorial day, they were required to keep the store open from 7:00 a.m. to 6:00 p.m. (*Id.*) During the winter, Nannini left it up to them whether to keep it open five or seven days a week, but I am persuaded that after March 15th it was to open seven days a week.

¶25 The hours the convenience store was open is not an accurate indication of the hours worked by claimant. Cynthia was responsible for staffing the store and in fact did so. Claimant's responsibilities were for maintenance. A Daily Duties Check List for the Alder KOA required him to keep the store clean, check and clean bathrooms, mow and keep the grounds around the office area, pick up campground garbage, clean windows, phone booth, and gas pumps on a weekly basis, sanitize and clean soft serve ice cream machine once a week, stock the store, turn on the phone booth light, and lock the gas pumps at night. (Ex. 18.) In a detailed list of duties prepared after his accident, claimant expanded upon the duty list to include opening the store, making coffee, setting up the cash register, reading gas and diesel pumps, filling the fountain drink dispenser with ice, setting up newspapers, cleaning dryer screens in the laundry, cleaning the men's room, filling bags of ice to be sold in the store, pumping gas or diesel fuel, pumping propane, building and fixing lodgepole fencing, making supply runs, engaging in public relations, and fixing road signs. (Ex. 20.)

¶26 Nannini testified that in the winter months managing the Alder KOA was essentially "babysitting" the store since there were few campground or store customers. (Nannini Trial Test.) "Deep cleaning" was done by a woman hired for that task. (*Id.*) Also, in mid-March Nannini arrived at the Alder KOA and helped get the campground ready for the season, helping mostly with outdoor tasks. (*Id.*)

¶27 I am persuaded that claimant exaggerated both the nature of his work and the time he spent working. In assessing his credibility, I note his testimony that he worked two weeks on jack-leg fencing. There are pictures of the fence sections (Ex. 34 at 3-4) and, according to a written description of post-injury duties which was prepared by claimant, eight sections were built (Ex. 21, ¶ 8), a number confirmed by Nannini. (Trial Test.) These were simple fence sections, consisting of two poles crossed in an X fashion on each end, a long,

horizontal pole between the two ends, and a single pole at each end to brace the end to the horizontal pole. Claimant only helped in building some of the sections. Maybe all told they took four hours to build, but four days is patently incredible.

¶128 With certainty the claimant grossly exaggerated other aspects of his work, for example the extent of his lawn mowing. His testimony that he serviced vehicles, including three days spent repairing a dashboard on a jeep, was not believable. The testimony that he traveled to and from Costco and other stores to pick up supplies for the convenience store was not believable. I note that the Alder KOA had regular suppliers who delivered supplies to the store.

¶129 I also note the claimant's multiple, preexisting ailments, which are described later on in this decision. These ailments were sufficiently debilitating that the claimant was receiving social security disability payments at the time he applied for work at Alder KOA. He continued to receive those benefits even while working. With all his documented physical problems, it is difficult to believe claimant could have worked as long and as hard as he claims. Indeed, Cynthia, with whom he has continued to live since 1993, testified in her deposition that claimant's back condition did not improve between 1995 and 2000 and that

[h]e would lay on the floor in the living room, complain of back pain all the time. He would take his medication on a regular basis and sleep most of the time.

(C. Greene Dep. at 45.)

¶130 Ultimately, claimant was responsible for his own hours of work. When not working on specific outdoor projects designated by Nannini, claimant was free to determine his work schedule.

¶131 Unfortunately, there is no perfect benchmark for determining the hours the claimant worked prior to his injury. Neither claimant nor Nannini kept track of claimant's actual hours of work. I am therefore left to determine, as best I can, the actual number or hours the claimant actually worked. In sifting and weighing all the evidence, I am unpersuaded that claimant actually averaged no more than four hours a day. Even on a seven-days-a-week basis, I am unpersuaded he worked more than twenty-eight hours a week.

V. Post-Injury Employment

¶132 Following his April 7, 2000 injury, claimant was hospitalized for three days. (Ex. 28 at 25.) Following his discharge on April 10, 2000, he returned to his apartment at the Alder KOA.

¶133 Upon his return to the Alder KOA, Nannini instructed claimant to rest until he felt like helping out again. Nannini allowed claimant to return to his duties as he was able and

continued to pay claimant and Cynthia on the same basis as before, increasing their wages to \$100 per week each effective June 1, 2000.

¶134 Claimant in fact returned to some of his duties in late April 2000. On April 25, 2000, Dr. Charles E. Buehler, who had treated him for his fractures, noted that claimant was on crutches but released him to mow lawns with a riding mower. (Ex. 11 at 25.) On May 9, 2000, Dr. Buehler prescribed an "air cast splint" for claimant's left ankle, okayed him working without crutches but with a cane, and noted that he was "full weight bearing on the left [leg] side." (*Id.* at 24.) He approved claimant's return "to full duty at KOA . . ." (*Id.*) On June 8, 2000, Dr. Buehler noted that claimant was out of his air cast but was having more back pain. (*Id.* at 23.) He noted that claimant reported moving 125 pound pumps and commented that "this is too heavy with his back condition." (*Id.*) He released claimant "for lighter sedentary type work."

¶135 Claimant continued to work. Nannini told him to do what he was able to do. He did not place any specific requirements on his work and hired other part-time employees to help with campground maintenance. Cynthia continued to manage the convenience store.

¶136 On June 24, 2000, Nannini reprimanded Cynthia for allowing drunken motorcyclists to camp at the Alder KOA. The conversation was short and Cynthia ended it by saying, "I quit. We'll be out of here Monday morning." Monday was the next day. Nannini saw claimant later that evening and claimant told him, "We'll be off the property tomorrow morning." The next morning the Greenes packed up their things and left. They never returned to work.

¶137 Claimant now asserts he was fired and did not quit. I note that in a wage and hour claim filed with the Department claimant indicated he "quit" his job at Alder KOA. (Ex. 3 at 1.) Claimant tried to explain away the "quit" statement, testifying that Cynthia filled out the response and that he intended to stay and continue working at Alder KOA while she moved elsewhere. As with other parts of his testimony, I simply did not believe his explanation. I find that both he and Cynthia quit and were not fired. I am persuaded that claimant could have continued to work for Alder KOA and would have continued to be allowed to perform only work he was physically able to do.

VI. Relatedness of Current Medical Conditions

A. Medical History

¶138 There is no dispute that claimant suffered a compression fracture of his L1 vertebra and an ankle fracture. Claimant, however, asserts he also suffered an aggravation of pre-existing spondylosis with Grade I spondylolisthesis at L5-S1 and also traumatic bursitis of his left shoulder. (Petitioner's Proposed Finding of Fact, Conclusions of Law and Judgment, ¶ 75.) The UEF and Alder KOA dispute his contention.

¶139 At the time claimant was employed by Alder KOA, he suffered from multiple medical conditions, including diabetes, congestive heart failure, hypertension, and a Grade I spondylolisthesis at L5-S1. (Ex. 11 at 53.) He was receiving Social Security disability benefits. The benefits were awarded November 18, 1996, retroactive to April 28, 1995. The Social Security Administration found him unable to engage in substantial gainful activity due to "degenerative disc disease of the cervical and lumbar spines, and bilateral carpal tunnel syndrome." (Ex. 32 at 112.)

¶140 A review of medical records submitted in connection with the claimant's social security proceeding shows the following history concerning his L5-S1 spondylosis and spondylolisthesis:

¶140a In January 1995, claimant experienced low-back and leg pain. (Ex. 32 at 177.) His physician, Dr. Ravi A. Reddy, sent him for back x-rays on March 30, 1995. The x-rays showed mild degenerative arthritis of the lumbar spine, disk disease between L5 and S1, first degree spondylolisthesis and spondylolysis of L5, mid-level scoliosis, and degenerative arthritis of the SI joints. (*Id.* at 166.)

¶140b In June 1995, an orthopedic surgeon examined claimant and found increased spondylolisthesis, which he felt was "relatively" unstable, and recommended evaluation by a back surgeon. (*Id.* at 152-53.)

¶140c Claimant was evaluated in July 1995 by a neurosurgeon who concluded claimant had "low back pain **with bilateral leg pain**, secondary to Grade I spondylolisthesis L4-L5 with bilateral spondylolysis, consider associated disk herniation." (*Id.* at 146, emphasis added, caps in original.) He recommended a further MRI and consideration of a spinal fusion. (*Id.*)

¶140d An MRI was done on October 18, 1995. It disclosed "[m]oderate to severe degree of spondylolisthesis at L5-S1 with anterior slipping of L5 in relation to S1 segment with associated spondylolysis of L5 in correlation with prior x-rays." (*Id.* 140.) The MRI also disclosed degenerative changes and disk disease at L5-S1 level and a "suggest[ion of] focal central disc protrusion at L5-S1 level causing some pressure-effect over the anterior thecal sac." (*Id.*)

¶140e No low-back surgery was ever done. Claimant continued to seek medical treatment for his low back throughout the remainder of 1995 and 1996. (*Id.* at 143-44; Ex. 36 at 1-6.)

¶140f In January 1997, claimant was seen by a pain management specialist on account of progressive low back pain which **radiated into the claimant's left leg**. (Ex. 36 at 10.)

¶140g In October 1999, while being treated for other conditions at the Adult Medicine Clinic in Tulsa, Oklahoma, claimant reported "sciatic nerve pain distribution" (Ex. 40 at 13), thus indicating that he was continuing to experience low-back and leg pain just three months prior to his being hired by Alder KOA.

¶41 Medical notes following the claimant's April 7, 2000 accident note the claimant's preexisting L5-S1 spondylosis with a Grade I spondylolisthesis by way of x-rays (Exs. 11 at 105, 12 at 89). However, the records do not identify it as a condition caused or aggravated by the accident. Dr. Buehler's discharge summary does not even mention it, focusing instead on the ankle and L1 compression fractures and on his diabetes and congestive heart failure. (Ex. 11 at 57.)

¶42 Until October 31, 2000, the only mention in Dr. Buehler's medical records of the L5-S1 spondylolisthesis is in the list of his diagnostic impressions. That list includes all of claimant's significant preexisting conditions. There is also mention of the L5-S1 spondylolisthesis as a preexisting condition contributing to claimant's back pain. (Ex. 12 at 74-87.)

¶42a On June 8, 2000, Dr. Buehler wrote:

He still has pain in his back. [H]e seems to have more pain now than prior to his fall. I think some of this is due to the compression fracture. **Certainly some of it is due to spondylosis that was present prior to his injury. . . .**

(*Id.* at 86, emphasis added.)

¶42b On July 10, 2000, Dr. Buehler wrote that claimant's "low back seems to be slowly improving" and that his "main problem is the shoulder now." (*Id.* at 84.)

¶42c On July 31, 2000, claimant's main complaints were with respect to his shoulder and possible "seizures." Claimant told Dr. Buehler "that he was also struck on the back of the head at that time [of the April 7, 2000 accident] and now he is having what he thinks are seizures." (*Id.* at 81.) Dr. Buehler mentioned claimant's low-back complaints. He wrote that they "could be coming from the spondylolysis, which I think is most likely, but also could be coming from his L1 compression fracture." (*Id.*)

¶42d On August 22, 2000, claimant was still being evaluated for shoulder complaints, as well as for cervical degenerative changes. Dr. Buehler noted that additional diagnostic studies showed that claimant suffered "rather severe osteoporosis" and commented that claimant was also

having some problem in the back & I am sure that the L1 compression fracture is showing some stenotic changes at that level. He probably is having some stenotic changes also at the level of his L5-S1 spondylolysis, but at this time I do not think surgical intervention is indicated.

(*Id.* at 76.)

¶42e On August 29, 2000, claimant reported that his shoulder was better but wanted a prescription for 24-hour-care because he feared falling. (*Id.* at 75.) Dr. Buehler rebuffed his

request and wrote that claimant "could be release[d] for light or sedentary type of work." (*Id.*) There was no mention of back complaints. (*Id.*)

¶142f On September 20, 2000, Dr. Buehler wrote a letter to Bernadette Rice, the claims adjuster for the UEF. (*Id.* at 74.) In that letter he indicated that claimant's neck and shoulder problems were not related to his April 7, 2000 injury. (*Id.*) The only conditions he related to the injury were the compression fracture of the L1 vertebra and the ankle fracture. (*Id.*) There was no mention of the L5-S1 problems. (*Id.*)

¶143 On October 31, 2000, claimant saw Dr. Buehler and reported that he feel [sic] off the steps of the trailer and landed on the left side of his body. He has had more problems with his back since that fall with radiation into the left leg.

(*Id.* at 73.) Although claimant had experienced leg pain prior to his employment at Alder KOA, this was the first mention after his April injury of pain radiating into his leg. Significantly, the development of that pain followed a fall at home.

¶144 Despite claimant's continuing medical problems and new leg pain, Dr. Buehler still felt on October 31, 2000, that claimant was capable of "light or sedentary work." (*Id.*)

¶145 After October 31, 2000, claimant continued to experience significant left leg and back symptoms. It was Dr. Buehler's impression that the L1 compression fracture was significantly contributing to his back problems.

¶145a On December 15, 2000, Dr. Buehler recorded that claimant was "having progressive difficulty with his left leg," was "developing more numbness & weakness into the left lower extremity", and was "having a difficult time getting around. (*Id.* at 60.) He suspected spinal stenosis at L1 and commented that he thought claimant's symptoms were more compatible with L1 stenosis than a L5-S1 spondylolysis.

¶145b On February 13, 2001, Dr. Buehler noted that claimant's "back conditions are progressing" and that he had "numbness, tingling in both lower extremities. Particularly the left side." (*Id.* at 58.) He recommended selective nerve blocks or steroid injections starting at the L1 to be followed by an L5-S1 block if the L1 block did not alleviate the symptoms. (*Id.*) He referred claimant to Dr. Harold Bolnick for the blocks. (*Id.*)

¶145c On February 26, 2001, Dr. Buehler reported that Dr. Bolnick had recommended L1 surgical decompression. (*Id.* at 57.) Dr. Buehler agreed and stated he would schedule claimant for L1 decompression and a fusion at that level. (*Id.*)

¶145d Although not mentioned by Dr. Buehler in his February 26, 2001 office note, an MRI was done on February 2, 2001. The MRI report confirmed not only a significant L1 compression fracture but also "bony compression of the spinal canal from the posterior mass of the body of L1 with an acquired spinal stenosis." (*Id.* at 34, all letters capitalized in

the original.) The MRI report also noted bulging disks at L3-L4 and L4-L5, and Grade 1 spondylolisthesis of L5 on S1. (*Id.*)

¶146 Claimant was hesitant to have surgery and requested a second opinion. (*Id.* at 27.) The UEF referred him to Dr. Peter M. Sorini, a neurosurgeon (*Id.*)

¶147 Dr. Sorini first saw claimant on June 28, 2001. (*Id.* at 4, 22.) He opined that the claimant's L5-S1 condition was a more significant factor in claimant's back and leg pain than the L1 compression fracture; he recommended L5-S1 surgery, to be followed later on by L1 surgery. (*Id.* at 22.) *Based on the history provided to him by claimant*, he also opined that the L5-S1 condition was made symptomatic by the claimant's April 7, 2000 industrial injury:

[H]e has definite neurogenic claudication with bilateral L5 radiculopathy, left greater than right. This is almost certainly due to the Grade I spondylolisthesis at L5-S1 and bilateral L5 par's defects. I took an extensive history from Mr. Greene and it appears to me that these symptoms started after the fall. Obviously the L5-S1 spondylolisthesis and bilateral par's defects were present before the fall but my opinion is that this radiographic abnormality became symptomatic after the fall.

(*Id.* at 22.) The "fall" he was referring to was the April 7, 2000 fall from the ladder. (See Ex. 12 at 4.)

¶148 Dr. Sorini saw claimant a second time on February 20, 2002. (*Id.* at 3, 21.) He reported the examination to the UEF's claims adjuster. I set out his report in full because it indicates the nature of claimant's complaints, the need for further electro diagnostic studies, and Dr. Sorini's opinions concerning the relationship of claimant's conditions to his April 7, 2000 industrial accident.

February 21, 2002

Ms. Bernadette Rice
Claims Adjuster
P.O. Box 8011
Helena, MT 59604

Dear Ms. Rice:

RE: Lyman Greene

Date of Service: February 20, 2002

I had a nice visit with Lyman Greene. He brought his ex-wife along with him. He has 75 percent low back pain and 25 percent lower extremity pain with the pain in the left leg being worse than the right. The pain in his back and legs is mechanical in nature, i.e., it seems to be worse with activity but he also has a lot of pain in his legs at rest. The pain in his back

and legs is otherwise constant. He has no problems with his bowel or bladder. He has no problems with sexual function.

Examination is somewhat difficult because he has a lot of splinting and give-and-take type strength loss but he appears to have normal reflexes at the knees and ankles with distraction. He has negative straight leg raising with distraction. He does appear to be weak about the left foot but again there is a give-and-take quality apparent.

Imaging studies were re-viewed. He has an L1 compression fracture with an 18-degree kyphosis therein. He has central stenosis because of the fracture. At L5-S1 he has a dynamic listhesis with increase with flexion. He has bilateral L5 par's defects. He has bulging disks at L3-L4 and more so at L4-L5.

I would like to get electrophysiologic studies of the lower extremities before I make a final opinion. If these are normal or show only chronic and mild changes, I believe that we can watch Lyman closely over time. If on the other hand he has evidence of severe nerve compromise, we should probably proceed with decompression.

I do believe that the spondylolisthesis at L5-S1, although of long-standing nature, has become symptomatic since his fall. The L1 compression fracture is obviously related to the fall.

If you have any questions or concerns, please do not hesitate to call.

Sincerely,

Peter M. Sorini, M.D.

(Id. at 21.)

¶49 Subsequent electrodiagnostic studies indicated "demyelinating peripheral neuropathy with possibly a bilateral L5-S1 radiculopathy." (Ex. 35 at 9.) Dr. Sorini testified that the peripheral neuropathy was consistent with the claimant's diabetes. (Sorini Dep. at 30.)

¶50 On May 22, 2002, Dr. Buehler saw claimant at the St. James Emergency Room and for the first time wrote that claimant was incapable of doing any type of work. *(Id. at 9.)*

¶51 On June 28, 2002, Dr. Dana Headapohl, a specialist in occupational disease, conducted a comprehensive review of claimant's post-industrial accident medical records to determine the relationship between his various conditions and his accident. She also addressed whether the need for surgery was related to the accident. Her report is found at Exhibit 35.

¶52 Dr. Headapohl opined the L1 compression fracture, and any surgery required for that condition were related to his industrial accident. *(Id. at 11.)* However, she opined that his

L5-S1 condition was unrelated to the industrial accident and opined that it was made symptomatic by his October 2000 fall at home, not by the industrial accident. (*Id.*)

B. Medical Testimony

¶153 Drs. Buehler, Sorini, and Headapohl all testified by deposition. Each was asked to address the relationship between claimant's L5-S1 symptoms to his industrial accident, as well as their recommendations need for further treatment.

i. Dr. Sorini

¶154 Dr. Sorini testified that claimant's primary back problem is his L5-S1 condition, which he said "overshadows" the claimant's L1 condition. He opined that the L5-S1 condition is a 75% contributor to the claimant's low-back and leg symptoms. (Sorini Dep. at 14-15, 17, 22, 31, 70, 74-75.) He said that claimant's L1 compression fracture is responsible for pain in the upper lumbar area and flanks and was creating a stenosis (narrowing) of the spinal canal which could contribute to leg fatigue with exercise. (*Id.* at 13, 32, 74-76.) He attributed claimant's lower lumbar pain and his radicular leg pain to the L5-S1 condition. (*Id.* at 15-17, 22-23.)

¶155 Dr. Sorini found no neurological symptoms from the L1 compression fracture. (*Id.* at 28.)

¶156 Dr. Sorini testified that surgery might help both the L5-S1 and L1 symptoms. (*Id.* at 35, 39, 53, 62, 63, 77.) Surgery would include fusion of adjacent vertebrae. (*Id.* at 35, 40.) He testified that if surgery is performed, the surgery on the L5-S1 should be done first. However, he said that claimant is at high risk for (1) death, (2) infection, and (3) failed fusion. (*Id.* at 39, 53, 62.) He also testified that any surgery at the L1 level would be especially difficult. (*Id.* at 40.) Ultimately, based on the significant risk factors, he recommended surgery not be undertaken at present and that claimant's condition continue to be monitored. (*Id.* at 63, 77.)

¶157 Dr. Sorini testified that claimant's L5-S1 condition preceded his April 7, 2000 industrial accident but opined that the accident caused the condition to become symptomatic. (*Id.* at 18-20, 52-53.) However, in cross-examination, Dr. Sorini admitted that his opinion was based on the history claimant gave him; that history indicated that claimant's primary symptoms (radicular pain into the legs) arose shortly after his April 7, 2000 industrial accident. (*Id.* at 60-61.) Claimant told the doctor that he had some "minor care" for back problems in the "remote past," and had been "partially disabled" due to his medical and back conditions. (*Id.* at 60.)

¶158 Dr. Sorini **did not have** records of claimant's medical care prior to his April 2000 industrial accident. Claimant did **not mention** his October 2000 fall, and Dr. Sorini did not consider that fall in arriving at his opinion. (*Id.* at 66, 68.) Dr. Sorini conceded that if prior to

October 2000, the claimant did not have the symptoms described to him by claimant on June 28, 2001 and February 20, 2002, the October 2000 fall would "be significant." (*Id.* at 68.) He acknowledged that if claimant's symptoms "materially changed in location, intensity, etcetera, following that [October 2000] fall out of his trailer", then those facts "would be important." (*Id.* at 68.)

¶159 Finally, Dr. Sorini testified that claimant is not presently able to do any work on account of his back conditions. (*Id.* at 54, 79.)

¶160 Dr. Sorini did not treat claimant's ankle condition and did not express any opinions regarding that condition.

ii. Dr. Buehler

¶161 Dr. Buehler thought that the claimant's L1 compression fracture was his major problem and, as of the last time he saw claimant on February 26, 2001, proposed surgery at that level. (Buehler Dep. at 46-47, 52-53.) Dr. Sorini opined that the surgery proposed by Dr. Buehler would be "disastrous." (Sorini Dep. at 17-18.)

¶162 As to the L5-S1 condition, Dr. Buehler confirmed that it preexisted the claimant's April 7, 2000 industrial accident. (Buehler Dep. at 17-18.) He testified that the April 7, 2000 accident "probably aggravated" the condition but admitted "that's a difficult thing to say because I never did see him prior to it" and that he certainly was "not as strong on that." (*Id.* at 18, 62.) He noted that the claimant did not suffer from radicular leg symptoms prior to his October 2000 fall at home and that the October 2000 fall increased claimant's symptoms. (*Id.* at 18, 44, 110.) He opined that the claimant suffered an **additional injury in the October 2000 fall.** (*Id.* at 44.)

¶163 With respect to the L1 compression fracture, Dr. Buehler testified that it would be unusual for that condition to cause later radicular leg symptoms. (*Id.* at 109-110.)

¶164 As to claimant's ankle, Dr. Buehler confirmed that as of June 6, 2000, the claimant's ankle was improved and stable. (*Id.* at 29.) On September 20, 2000, the ankle was at maximum medical improvement (MMI). (*Id.* at 39.)

¶165 As to claimant's ability to return to work at the Alder KOA, Dr. Buehler testified that it would depend on whether claimant was required to perform heavy labor and whether he could assign labor to others. (*Id.* at 65.)

iii. Dr. Headapohl

¶166 Dr. Headapohl did not examine claimant, rather she reviewed his medical records. Unlike Dr. Sorini, she reviewed and considered the medical records immediately following his October fall at home. Unlike both Drs. Sorini and Buehler, she reviewed the claimant's pre-2000 medical records which has been summarized previously in this decision.

¶167 Dr. Headapohl reaffirmed her June 28, 2002 opinions. (Headapohl Dep. at 7.) She further testified that the claimant's pre-2000 medical records showed that his L5-S1 spondylolisthesis and symptomatology preexisted his industrial injury and that the surgery recommended by Dr. Sorini at that level had been recommended in 1995. (*Id.* at 16-18, 28.) She acknowledged that claimant's L5-S1 symptoms may have waxed and waned over the years. (*Id.* at 49.)

¶168 She further testified that the claimant's post-April 2000 medical records fail to substantiate any material aggravation of his L5-S1 spondylolisthesis, noting that no physiological changes were documented and that radicular symptoms from the L5-S1 level were not present following the claimant's April 7, 2000 industrial accident. (*Id.* at 42-43, 51, 88-89, 96.) She found no indication that the claimant's radicular leg symptoms were attributable to his L1 compression fracture. (*Id.* at 42-43, 55-56.)

¶169 Importantly, Dr. Headapohl testified that **if** the April 7, 2000 industrial accident materially aggravated his L5-S1 spondylolisthesis or made it symptomatic, then he should have had radicular leg pain immediately following the April 7th accident, which he did not. (*Id.* at 65-66, 88-89.) She pointed out, "[T]here **aren't** symptoms reported on an ongoing basis that would be consistent with a permanent aggravation following the 4-00 incident." (*Id.* at 96, emphasis added.)

¶170 Dr. Headapohl agreed with Dr. Sorini that any surgery on claimant's back would be high risk. (*Id.* at 27.) She recommended conservative, non-surgical treatment at the present time.

¶171 Finally, she found no relationship of claimant's cervical condition to his April 7, 2000 accident. (*Id.* at 24.) As to the claimant's bursitis of his shoulder, she noted it was resolved and did not offer an opinion concerning its cause. (*Id.* at 94-95.)

C. Resolution of Medical Issues

¶172 Dr. Buehler, claimant's treating physician, indicated that the claimant's L5-S1 condition was aggravated by the April 7, 2000 industrial accident, but he did so only weakly. I am not persuaded by his opinion. As set out in paragraph 62, he testified that relating the claimant's L5-S1 symptoms to the industrial accident was "a difficult thing to say because I never did see him prior to it" and that in tendering his opinion he "certainly was not strong on that." (Buehler Dep. at 18, 62.) Dr. Buehler did not have the claimant's pre-2000 medical records. Significantly, in a letter of September 20, 2000 to the UEF he did not mention any L5-S1 problems. (Ex. 12 at 74.) Finally, he testified that claimant suffered an "additional injury" in October 2000.

¶173 Dr. Sorini was more positive in his opinion that the L5-S1 condition was made symptomatic by the industrial accident. However, he did not have claimant's pre-2000 medical records and did not consider the claimant's October 2000 fall at home. He

conceded that he based his opinion on the history given him by claimant, that his radicular symptoms arose soon after his industrial accident. Dr. Sorini conceded that the lack of radicular symptoms prior an October 2000 fall would "be significant." (Sorini Dep. at 68.) He acknowledged that if claimant's symptoms "materially changed in location, intensity, et cetera, following that [October 2000] fall out of his trailer", then those facts "would be important." (*Id.*) In fact, the claimant's radicular leg pain was not present after the claimant's April 7, 2000 industrial accident, rather it arose immediately after his October 2000 fall at home.

¶174 In contrast, Dr. Headapohl reviewed and considered the claimant's pre-2000 medical records, his post-April 2000 records, and the records pertaining to his October 2000 fall at home. She considered the significant change in claimant's symptoms (the new radicular symptoms) immediately following his October 2000 fall at home and concluded that those symptoms were triggered by the October 2000 fall, not his April 2000 industrial accident. She concluded that the April industrial accident did **not** materially aggravate the claimant's L5-S1 condition. Her testimony was supported by medical history and was more supported than the testimony of Drs. Sorini and Buehler.

¶175 I therefore find that claimant, who bears the burden of proof, has **failed** to prove that his L5-S1 spondylolisthesis and other conditions at that level were materially and permanently aggravated by his April 7, 2000 industrial accident.

VII. Disability

A. Conditions Caused by Industrial Accident

¶176 In reviewing the claimant's pre-2000 medical history, it is difficult to believe that he was capable of gainful work when he was hired by Alder KOA. On the other hand, there is evidence that he lost significant weight (he was grossly obese in 1995 when he was pursuing his social security benefits), and that his physical condition improved, as evidenced by the diminished medical treatment between 1995 and 2000.

¶177 I conclude as a matter of fact that prior to April 7, 2000, the claimant could physically perform his duties as the maintenance manager at the campground, although I am also convinced that at times he engaged in lifting and other activities incompatible with his preexisting medical conditions.

¶178 Following his April 2000 industrial accident, the claimant plainly could not perform all of the maintenance functions assigned to him. However, his employer modified his job to allow him to do only those tasks which he was physically capable of performing.

¶179 It is clear that the claimant was in fact able to perform his modified duties after his industrial accident. He determined what he would do. He in fact continued to work until June 24, 2000. And, as I have found previously, his termination of employment was

unrelated to his physical limitations, rather it was in reaction to Nannini's reprimand of Cynthia. Claimant and Cynthia simply quit their jobs.

¶180 The critical question is whether the claimant's accident-related conditions thereafter deteriorated to the point that he would no longer have been able to perform his modified duties.

¶181 There is no medical or other evidence indicating that claimant's ankle worsened and prevented him from continuing to work. However, Dr. Sorini testified in his April 2002 deposition that claimant's back and leg pain, on top of his other medical conditions, precluded him from engaging in regular, meaningful employment. Dr. Buehler, who saw claimant a month later, agreed that claimant could not work. In reviewing claimant's back and leg complaints, Dr. Sorini's testimony seems reasonable and supported. I am therefore persuaded that claimant has been physically incapable of working at any gainful employment, including the modified job at Alder KOA as of April 2002.

¶182 Both Dr. Buehler and Dr. Sorini opined that the claimant's L1 compression fracture is a significant contributor to the claimant's disabling back and leg pain, although it appears that Dr. Buehler assigns it a larger role than does Dr. Sorini. There is little question that the claimant's L1 compression fracture is contributing to both the claimant's back pain and his total disability. It is impossible to separate out the contribution of the L1 fracture to his pain and disability, I therefore conclude that claimant's total disability is related to his industrial accident.

B. Maximum Medical Improvement

¶183 Dr. Buehler's records and testimony establish that the claimant reached MMI with respect to his ankle fracture on September 20, 2000. (Buehler Dep. at 39.) There is no contrary medical evidence.

¶184 With respect to the claimant's L1 compression, the evidence concerning MMI is conflicting. Dr. Buehler recommended L1 surgery, however, Dr. Sorini testified that the surgery recommended by Dr. Buehler would be "disastrous." (Sorini Dep. at 17-18.) Dr. Sorini recommended that L5-S1 surgery precede any L1 surgery, and recommended a different type of L1 surgery. Ultimately, however, Dr. Sorini recommended that surgery be deferred on account of the high risk of complications; for now he recommends that claimant simply be monitored. Dr. Headapohl agreed. I find their opinions regarding surgery persuasive. I therefore conclude that no further treatment is presently warranted and that claimant is at MMI with respect to his L1 compression fracture.

CONCLUSIONS OF LAW

¶185 This case is governed by the 1999 version of the Montana Workers' Compensation Act since that was the law in effect at the time of the claimant's industrial accident. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶186 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).

¶187 I address the fourth issue first. That issue is whether claimant's "preexisting condition of bilateral spondylosis with grade one spondylolisthesis at L5, S-1 [was] aggravated by the industrial accident of April 7, 2000." Resolution of that issue is necessary before addressing the other issues.

¶188 Initially, there is no dispute that the claimant's L5-S1 spondylosis and spondylolisthesis preexisted his April 7, 2000 industrial accident. However, it has long been the rule that the employer or insurer are liable for material, permanent aggravations of preexisting conditions. The employer takes its workers as it finds them with all of their preexisting conditions.

The well established rule in Montana is that an employer takes his employee subject to the employee's physical condition at the time of the employment. The fact that an employee is suffering from or [is] afflicted with a pre-existing disease or disability does not preclude compensation if the disease or disability is aggravated or accelerated by an industrial accident.

Robins v. Anaconda Aluminum Co., 175 Mont. 514, 518, 575 P.2d 67 (1978).

¶189 Thus, if an industrial accident lights up or worsens the claimant's disability or preexisting condition, the insurer is liable for the full extent of the disability existing after the aggravating accident. *Birnie v. U.S. Gypsum Co.*, 134 Mont. 39, 44, 328 P.2d 133, 136 (1958) "That an employee was suffering from or afflicted with a pre-existing disease or disability does not preclude compensation if the disease or disability was lit up, aggravated or accelerated by an industrial injury." (*Id.* at 45.)

¶190 As a matter of fact, the claimant has failed to prove that his April 7, 2000 industrial accident symptomatically lit up or materially worsened his L5-S1 condition. The radicular leg pain emanating from the L5-S1 level had waned prior to April 7, 2000, and did not re-emerge until October 2000, immediately following claimant's fall at his home.

¶191 While Dr. Sorini felt that claimant's L5-S1 condition was lit up by the industrial accident, he was unaware of the October incident when he rendered his opinion and admitted that a fall in October 2000 "would be important" to determining the cause of the claimant's L5-S1 symptoms. Dr. Headapohl testified without contradiction that if the April

2000 accident lit up the claimant's L5-S1 symptoms, then those symptoms should have been present immediately following that accident: in fact those symptoms were not present and did not emerge until six months later following another accident at home. On a more-likely-than-not basis, it was the October 2000 accident at home that triggered the reemergence of the claimant's L5-S1 symptoms. I therefore conclude that the UEF and employer are not liable for claimant's L5-S1 condition.

¶192 The claimant is entitled to medical benefits for his L1 compression fracture and his ankle fracture. It is not clear to me whether all of those benefits have been paid. Where the medical services relate to the back and it is impossible to distinguish between examination and treatment for L1 symptoms and L5-S1 symptoms, then the UEF and the employer are liable for the services. If the parties cannot determine which services are covered, they may request a further hearing. I retain continuing jurisdiction to make that determination.

¶193 I turn to claimant's request for temporary and/or permanent disability benefits. (Issue 1.) As applicable to the present case, TTD benefits are payable where the claimant suffers a total wage loss "as a result of the injury" until such time as the claimant reaches MMI. § 39-71-701(1), MCA (1999). If claimant can work at a modified position, he is not entitled to TTD benefits even though he cannot return to this time-of-injury job and has not reached MMI. Subsection (4) of 39-71-701, MCA, provides:

(4) If the treating physician releases a worker to return to the same, a modified, or an alternative position that the individual is able and qualified to perform with the same employer at an equivalent or higher wage than the individual received at the time of injury, the worker is no longer eligible for temporary total disability benefits even though the worker has not reached maximum healing. A worker requalifies for temporary total disability benefits if the modified or alternative position is no longer available to the worker for any reason except for the worker's incarceration as provided for in 39-71-744, resignation, or termination for disciplinary reasons caused by a violation of the employer's policies that provide for termination of employment and if the worker continues to be temporarily totally disabled, as defined in 39-71-116.

In this case, Alder KOA created a modified position for claimant following his April accident, allowing him to perform only those duties he was physically capable of doing. Dr. Buehler, released claimant to light or sedentary work.

¶194 Claimant continued to work until June 24, 2000, when he quit work after Cynthia was criticized for allowing drunken motorcyclists to camp at the campground. Since claimant quit, and has failed to demonstrate that his modified position would have been eliminated at some future time, he did not requalify for TTD benefits. I therefore conclude that he is not entitled to TTD benefits unless his condition deteriorated to the point that he could not perform even minimal duties associated with the modified position.

¶195 Dr. Buehler continued to release claimant for light or sedentary work until May 22, 2002, when he concluded that claimant was incapable of any type of work. (¶ 50.) But even prior to that time, on April 25, 2002, Dr. Sorini opined in his deposition that claimant's back pain, considered in conjunction with his other preexisting conditions, precluded him from performing any sort of work. That opinion was persuasive. I therefore conclude that as of April 25, 2002, the claimant was no longer able to perform any work at the Alder KOA, thus he was unable to perform the modified job.

¶196 I have previously found that in combination the claimant's L1 and L5-S1 conditions are disabling. Since the L1 condition cannot be isolated from his overall back pain and disability, the UEF and employer are liable for his total disability.

¶197 As I have found, the claimant is presently at maximum medical healing with respect to both his L1 compression fracture and his ankle fractures. MMI is the "point in the healing process when further material improvement would not be reasonably expected from primary medical treatment." § 39-71-116(18), MCA (1999). Dr. Buehler expressly found the claimant at MMI with respect to his ankle on September 20, 2000 (¶ 83), and that opinion was uncontradicted. Dr. Sorini's and Dr. Headapohl's testimony establish that short of surgery there is no present treatment that will materially improve the claimant's L1 condition, and neither doctor currently recommends surgery. Therefore, at present the L1 condition is at MMI.

¶198 Section 39-71-702(1), MCA (1999), provides:

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

"Permanent total disability" is defined in section 39-71-116(24), MCA (1999), as follows:

(24) "Permanent total disability" means a physical 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.

Since claimant has reached MMI with respect to both of his industrial injuries and his back conditions preclude him from performing regular work of any sort, claimant is entitled to permanent total disability benefits as of April 25, 2002.

¶99 I next consider the compensation rate. Benefits must be based upon the claimant's "wages received at the time of the injury." §§ 39-71-701 to -703, MCA (1999). Wages are defined in section 39-71-123, MCA (1999), which provides in relevant part:

39-71-123. Wages defined. (1) "Wages" means all remuneration paid for services performed by an employee for an employer, or income provided for in subsection (1)(d). Wages include the cash value of all remuneration paid in any medium other than cash. The term includes but is not limited to:

(a) commissions, bonuses, and remuneration at the regular hourly rate for overtime work, holidays, vacations, and periods of sickness;

(b) backpay or any similar pay made for or in regard to previous service by the employee for the employer, other than retirement or pension benefits from a qualified plan;

(c) tips or other gratuities received by the employee, to the extent that tips or gratuities are documented by the employee to the employer for tax purposes;

(d) income or payment in the form of a draw, wage, net profit, or substitute for money received or taken by a sole proprietor or partner, regardless of whether the sole proprietor or partner has performed work or provided services for that remuneration;

(e) board, lodging, rent, or housing if it constitutes a part of the employee's remuneration and is based on its actual value; and

(f) payments made to an employee on any basis other than time worked, including but not limited to piecework, an incentive plan, or profit-sharing arrangement. [Emphasis added.]

I have highlighted subsection (1)(b) because it answers the employer's and the UEF's contention that the Court must use only \$50 a week and the value of board and room in computing the claimant's wages for purposes of benefits. On a 28-hour-a-week basis, claimant's wages amounted to \$4.22 per week. If federal or state law required that claimant be paid minimum wage, then he is entitled to back pay and that back pay must be included in computing the claimant's wages and benefits.

¶100 Claimant pursued a wage and hour claim against Alder KOA. An initial determination was issued by the Department finding that claimant was subject to federal minimum wage provisions because he occasionally processed credit cards in the convenience store. The initial decision does not cite any legal authority for that proposition and the claim was subsequently mediated and settled after Alder KOA requested a contested case hearing. If the matter had gone to hearing and a final decision had been issued by the Department, that decision would have been *res judicata* as to the wage issue - both as to the minimum wage and the hours worked by the claimant. See *Nasi v. State Dept. of Highways*, 231 Mont. 395, 753 P.2d 327 (Mont. 1988). However, the initial determination of the Department was

not made after hearing and did not constitute a final Department adjudication; it is therefore not binding and the Court is left to determine for itself whether claimant was subject to the minimum wage laws.

¶101 None of the parties have addressed whether minimum wage laws apply to the claimant's employment, I therefore do not have the benefit of their legal argument on this point. I therefore request the UEF and the employer to notify the Court whether they contest the application of the federal minimum wage to claimant's employment or the \$5.15 amount used by the Department in its initial wage determination. If there is a dispute, further briefing will be ordered.

¶102 Section 39-71-123(3)(a), MCA (1999), provides that the four pay periods prior to the industrial accident shall be used in computing the average weekly wage for purposes of compensation, providing:

(3)(a) Except as provided in subsection (3)(b), for compensation benefit purposes, the average actual earnings for the four pay periods immediately preceding the injury are the employee's wages, except that if the term of employment for the same employer is less than four pay periods, the employee's wages are the hourly rate times the number of hours in a week for which the employee was hired to work.

The exception is governed by subsection (3)(b), which provides:

(b) For good cause shown, if the use of the last four pay periods does not accurately reflect the claimant's employment **history** with the employer, the wage may be calculated by dividing the total earnings for an additional period of time, not to exceed 1 year prior to the date of injury, by the number of weeks in that period, including periods of idleness or seasonal fluctuations.

Since the exception refers to the claimant's employment "history", the one-year period cannot reflect subsequent employment. Therefore, I cannot consider any increase in claimant's hours subsequent to his industrial accident. His benefits must be limited to the 28-hour a week average during the four weeks prior to his accident.

¶103 If there is no dispute over the application of minimum wage laws to claimant's employment and the actual amount of the minimum wage, then the weekly wage for purposes of determining claimant's benefits is \$144.20 a week (\$5.15 x 28 hours).

¶104 I next consider the UEF's request for indemnification from Alder KOA for benefits it has paid with respect to this claim. Section 39-7-1 504(1)(b), MCA (1999), provides:

(b) The fund shall collect from an uninsured employer an amount equal to all benefits paid or to be paid from the fund to an injured employee of the uninsured employer.

Alder KOA does not dispute the fact that it was an uninsured employer. Therefore, it is liable for benefits paid and to be paid to the claimant by the UEF.

¶105 Finally, I address the claimant's request for a penalty. He requests penalties both against the UEF and against the employer for their failure to pay medical and compensation benefits. The arguments presented indicate that the "penalties" contemplated include not only the penalty provided in section 39-71-2907, MCA (1999), but also the attorney fees which may be awarded pursuant to sections 39-71-611 and -612, MCA (1999). I therefore consider both attorney fees and the penalty.

¶106 Sections 39-71-2907, -611, and 612, MCA (1999), apply only to insurers. An insurer is defined in section 39-71-116(14), MCA (1999):

(14) "Insurer" means an employer bound by compensation plan No. 1, an insurance company transacting business under compensation plan No. 2, or the state fund under compensation plan No. 3.

While an uninsured employer is subject to various liabilities under part 5 of chapter 71 of Title 39, it is not an insurer within the meaning of the Workers' Compensation Act, therefore, it is not liable for the penalties or attorney fees which may be assessed against the insurer. See *Clarke v. Massey*, 271 Mont. 412, 416-17, 897 P.2d 1085, 1088 (1995). Similarly, the UEF is not an "insurer." *Thayer v. Uninsured Employers' Fund*, 1999 MT 304, ¶ 21, 297 Mont. 179, 991 P.2d 447 (1999)

JUDGMENT

¶107 Claimant is entitled to medical benefits with respect to his ankle and L1 compression fractures. In the event the parties cannot agree on which medical expenses are related to those conditions, the Court retains continuing jurisdiction to do so.

¶108 The claimant's L5-S1 spondylosis and spondylolisthesis were not aggravated by his industrial injury, therefore, the UEF and Alder KOA are not liable for that condition.

¶109 The claimant is entitled to permanent total disability benefits as of April 25, 2002. His request for total disability benefits prior to that date is **denied**.

¶110 The UEF and Alder KOA shall notify the Court within ten days of this decision whether they dispute the applicability of minimum wage laws providing a \$5.15 minimum wage to the claimant's employment. If they dispute the applicability or amount of the minimum wage, then they shall also provide legal briefs supporting their positions. Claimant shall then have ten days in which to file an answer brief. The UEF and Alder KOA then have another ten days in which to file reply briefs. If there is no dispute, then benefits shall be computed based on a \$144.20 average weekly wage.

¶111 The claimant is not entitled to attorney fees or a penalty.

¶1112 The UEF is entitled to indemnification from Alder KOA (Nannini Brothers, Incorporated) for benefits it has paid to the claimant and for benefits which become due in the future. If the UEF and Alder KOA cannot agree on the amounts of reimbursement, then they may request a hearing to determine those amounts. The Court retains continuing jurisdiction to determine such amounts.

¶1113 Claimant is entitled to his costs and shall file his memorandum of costs in accordance with Court rules.

¶1114 This JUDGMENT is **not** certified as final since an issue concerning application of minimum wage laws remains to be resolved.

¶1115 Any party 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 9th day of April, 2003.

(SEAL)

/s/ MIKE McCARTER

JUDGE

c: Mr. Frank J. Joseph

Mr. David L. Vicevich

Ms. Elizabeth A. O'Halloran

Ms. Julia W. Swingley

Submitted: September 30, 2002