

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2000 MTWCC 31

WCC No. 9907-8288

JOHN McFERRAN,

Petitioner,

vs.

CONSOLIDATED FREIGHTWAYS,

Respondent/Insurer/Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: 57-year-old hostler/driver suffered knee and groin injuries. Physician approved three positions as medically appropriate for claimant: pharmacy delivery driver, bookmobile driver, and newspaper delivery driver. Vocational evidence, including testimony from vocational expert, indicated only one bookmobile job existed but that job had no turnover and that newspaper delivery job was not a job but a business claimant would have to enter.

Held: Injured worker is not PPD if he is capable of performing part-time employment which is substantial and significant. Claimant is not PPD where he can perform pharmacy delivery driver position and that job, though part-time, is substantial and significant.

Note: Montana Supreme Court upheld the standard enunciated by WCC, i.e. ability to perform part-time employment which is substantial and significant precludes finding of PTD status, but found record did not support a finding that pharmacy driver was substantial and significant job where it could involve as few as six hours per week.

Topic:

Employment: Part Time. [Rev'd 2000 MT 365](#) Injured worker is not permanently totally disabled if he is capable of performing part-time employment which is "substantial and significant." WCC's finding that delivery driver job was "substantial and significant" reversed by SC where documentary evidence indicated job could involve as few as six hours per week.

¶1 The trial in this matter was held on February 1, 2000, in Billings, Montana. Petitioner, John McFerran (claimant), was present and represented by Mr. Patrick R. Sheehy.

Respondent, Consolidated Freightways (Consolidated), was represented by Mr. Leo S. Ward.

¶12 Exhibits: Exhibits 1 through 24, 28 through 30, and 32 through 34 were admitted without objection. Previously made objections to Exhibits 26, 27, and 31 were withdrawn and those exhibits were also admitted. Exhibit 25 was admitted over the objection of claimant.

¶13 Witnesses: Claimant, Juanita Hooper Addy, and Calvin Metzger testified. No depositions were submitted.

¶14 Issues: The issues, as stated in the Pretrial Order, are as follows:

1. Whether Petitioner is entitled to permanent total disability benefits.
2. Whether Petitioner is entitled to an award of reasonable attorneys' fees and costs from the Respondent.
3. Whether Petitioner is entitled to the 20% penalty from the Respondent.

¶15 Having considered the pretrial order, the exhibits, the demeanor and credibility of the witnesses, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

¶16 Claimant is 57 years old. He is a high school graduate but had difficulty in school.

¶17 Claimant has worked for Consolidated for most of his adult life. He started working for Consolidated in 1972. He worked approximately 10 years as a hostler in Consolidated's Billings freight yard. As a hostler he gassed trucks, changed tires, changed out trailers, and moved dollies. The work was heavy, involving lifting of greater than 50 pounds.

¶18 During the other years of work for Consolidated, claimant worked as a pickup and delivery driver in the Billings area. In that job he loaded and unloaded goods weighing up to and in excess of 100 pounds.

¶19 On April 7, 1990, claimant injured his low back while at work when he was picking up the tongue of a dolly. At the time of his injury he was splitting his time between hostling and pickup and delivery work.

¶110 At the time of the 1990 injury, Consolidated was self-insured under Plan I of the Montana Workers' Compensation Act. It accepted liability for the injury.

¶111 In 1990 and 1991 the claimant was treated for his back injury primarily by Dr. W.T. Daniels, an orthopedic surgeon. (See Ex. 3 at 9-14.) An MRI of his lumbar spine disclosed dessication of the L4-L5 and L5-S1 disks, and a possible small, but insignificant, osteophyte or small disk bulge at the right L5-S1 level. (Ex. 3 at 14.)

¶12 Claimant was off work until 1992 when, at his request, he was released without restrictions to return to work. He returned to work approximately May 19, 1992, and thereafter worked both hostling and pickup and delivery.

¶13 After returning to work, claimant continued to experience low-back pain, having "good and bad days." Occasionally, he obtained chiropractic manipulation. Between 1992 and 1998, he did not see a medical doctor for treatment of his back.

¶14 In July 1997 claimant suffered a muscle strain of the groin (lower abdominal wall) while lifting tires weighing 110 pounds apiece. (Ex. 4 at 94.) He was off work for two months. Upon his return to work he was limited to light duty for four to five weeks, then went back to his normal duties as a pickup and delivery driver.

¶15 On January 27, 1998, the claimant suffered another groin strain while loading tires. Claimant continued to work. Two days later, on January 29, 1998, he suffered a knee strain while getting out of his truck. (Ex. 2.)

¶16 Claimant submitted a claim for compensation with respect to the January 27 and 29, 1998 incidents. (*Id.*) Consolidated was self-insured under Plan I of the Montana Workers Compensation Act at the time of the injuries and has accepted liability. Only the January 27th groin injury is considered in this case.

¶17 Claimant was seen by numerous doctors at the Billings Clinic concerning his groin complaints. His primary treating physician for his injury was Dr. Donald A. Grewell, a family practitioner and apparently claimant's regular physician. (Ex. 4, *passim.*) However, claimant saw a host of other physicians. (*Id.*)

¶18 According to claimant, Dr. Grewell took him off work for about six weeks, then released him to light duty. It was impossible to verify his testimony through the medical records. The records are confusing as to claimant's work status. Moreover, many doctors saw claimant in February and March 1998 and treated him not only for his groin strain but for other physical ailments.

¶19 The history of medical restrictions arising from claimant's groin strain, as I glean them from the records, is as follows:

- On February 10, 1998, a medical note indicates he was unable to work. (Ex. 4 at 69.)
- On February 13, 1998, Dr. Grewell released him without restrictions. (*Id.* at 60.)
- On February 18, 1998, Dr. Peter B. Mitchell, an internist who saw claimant for his groin pain,⁽¹⁾ limited claimant to 30 pound for two weeks. (Ex. 4 at 51.)

- On February 20, 1998, Dr. Grewell noted that claimant was back to work "with a restriction of lifting, which I told him I thought was also reasonable" (*Id.* at 49.)
- Meanwhile, on March 8, 1998, claimant was seen regarding right wrist pain. (*Id.* at 38.)
- On March 31, 1998, claimant completed a physical capacities evaluation. (Ex. 4 at 26-28.) The evaluator found claimant capable of performing heavy lifting but noted claimant's complaints during testing of pain in his back, wrist, and groin.
- On April 2, 1998, Dr. Grewell noted he "gave him [claimant] some work restrictions and return to work," but did not note what the restrictions were. (*Id.* at 22.) It is also not clear which condition or conditions triggered the restrictions. Dr. Grewell noted three conditions in his impression, as follows:
 - Right groin strain, stable at this time.
 - Right wrist pain. Work-up is continuing. . . .
 - Low back pain.

(*Id.*) A subsequent, April 27, 1998 letter by Dr. Grewell indicates that the restrictions he imposed back in March and renewed in April were for light duty and related principally to claimant's January 27, 1998 groin strain. In the letter he wrote that the "work restrictions that I posed on Mr. McFerran [sic] in March of 1998 were a result of at least the first [January 27, 1998] incident, lifting." (*Id.* at 17.)

¶20 On April 28, May 14, June 9, July 21, and August 18, 1998, Dr. Grewell approved claimant's return to work but each time provided for "temporary" restrictions limiting claimant to repeated lifting of 35 pounds for 4 hours a shift and occasional lifting of 50 pounds for ½ hour per shift. He also prohibited repetitive twisting of the back and bending, twisting, stooping, stair climbing, and ladder climbing. (Ex. 4 at 8, 10-12, and 15.) On September 4, 1999, Dr. Grewell found claimant to be at maximum medical improvement (MMI) with respect to his groin strain and made the physical restrictions permanent. (Ex. 4 at 9.)

¶21 On December 11, 1998, claimant underwent a limited functional capacity evaluation (FCE). The physical therapist performing the evaluation assessed claimant as at a "medium duty work capacity." (Ex. 4 at 6.)

¶22 Dr. Grewell disapproved claimant's return to his time-of-injury job. (Ex. 12 at 1.) Consolidated did not have light-duty work for claimant and he has taken retirement from

the company. (Exs. 24, 30, and 34; Trial Test.) He applied for and was granted social security disability benefits. (*Id.*)

¶23 Consolidated hired Juanita Hooper Addy (Addy), who is a certified vocational consultant, to provide a vocational and return to work analysis for claimant. She determined that no lighter duty work was available at Consolidated and identified several other driving jobs, including wrecker driver, route relief driver, pharmacy delivery driver, newspaper delivery driver, and bookmobile driver, for which claimant was qualified. (See Ex. 27 for a summary of the jobs.) She prepared job analyses for the listed jobs.

¶24 Addy submitted the job analyses to Dr. Grewell for his review. Dr. Grewell disapproved the wrecker driver. He initially approved the route relief driver position but later disapproved it. He approved and continues to approve the other three jobs. (Exs. 26, 27.)

¶25 Dr. Dean C. Sukin, an orthopedist who is claimant's treating physician with respect to his low-back complaints, reviewed job analyses for wrecker driver and route relief driver and disapproved those jobs. (Ex. 3 at 2.) It does not appear he reviewed the other three jobs. (*Id.*) However, he indicated that driving over one hour "would be contraindicated" unless claimant "is able to take frequent stops on an as needed basis." That restriction, however, is based on claimant's back and is not considered since the Court lacks jurisdiction to determine if the claimant's back condition is totally disabling. (See ¶ 37.)

¶26 Physically, claimant is able to perform any of the three jobs which have been medically approved. Claimant did not persuade me that his limitations exceed those which have been medically identified or that his pain is so great as to preclude his regularly performing any of those jobs.

¶27 At this time, claimant has little, if any, incentive to return to work. His motives in retiring was to obtain a union pension and preserve his health plan benefits. Maintaining or replacing health benefits is essential since his wife has cancer. With his pension and social security disability benefits, his income is as much or more than when he was working. He has not actively sought employment.

¶28 Nonetheless, as set out in the conclusions of law, the Court must address the individual jobs identified by Addy to determine (1) if they are available in sufficient numbers as to be available to claimant and (2) whether claimant, by reason of his physical and mental abilities, education, training, and experience, is qualified and competitive for those jobs. (See Conclusions of Law.)

¶29 The only vocational evidence concerning the approved jobs was provided by Addy. In identifying the approved jobs she took into consideration the claimant's education and experience. All the jobs involve driving, and therefore draw on claimant's work experience.

¶30 Addy testified that positions for pharmacy delivery drivers actually exist in Billings, Montana, at least with one pharmacy - Western Pharmacies. Western employs part-time drivers who work between two and six hours daily. Annually, it has two to three openings for drivers. (Ex. 27 at 2.) Addy had no other information on the availability of these positions either in Billings or state-wide.

¶31 The Parmly Billings Library employs one permanent bookmobile driver and two temporary summer drivers. The permanent driver has been employed five years. The library is presently considering suspending or eliminating the program. Addy had no information as to whether other Montana libraries have bookmobile programs.

¶32 Addy's research into newspaper delivery driver was limited to the Billings Gazette, which hires 15 to 20 drivers annually to deliver papers to drop offs outside of Billings. The Gazette contracts with drivers, requiring them to provide their own vehicles. Drivers are responsible for their own expenses and deliver papers seven days a week. During bad weather they may sometimes drive 10 to 12 hours in a day. Addy admitted that the driving may exceed claimant's restrictions regarding sitting. The restrictions are those mentioned by Dr. Sukin (see ¶ 25) and arise with respect to claimant's low-back condition.

¶33 Addy also identified other possible driving jobs for claimant, specifically school bus driver, taxi driver, chauffeur, and shuttle van driver. (Ex. 27 at 3.) However, she did not develop job analyses or job market information for these jobs, and none of them has been submitted for physician review. I do not consider these jobs in determining whether claimant is permanently totally disabled.

¶34 Addy acknowledged, as a general matter, that claimant's age and physical limitations could adversely affect his ability to obtain and hold a new job. However, she found that he "is employable based on his work skills, physical capacities and work release, [but] the retirement restrictions [attached to his pension] prohibit job placement to his work potential." (Ex. 14 at 1.) There is no contrary expert evidence.

¶35 I find that the bookmobile and newspaper delivery jobs are not jobs available to claimant. The bookmobile job is not available because only a single permanent job was identified and there is no turnover for that job even in the long term. A temporary summer job does not constitute regular employment. I find the newspaper delivery work is not a job available to claimant because it is not employment but rather requires claimant to establish himself in his own business. On the other hand, I find that claimant is physically able to perform and compete for pharmacy delivery driver. There is sufficient turnover in that job even at the one pharmacy identified by Addy for claimant to have a reasonable chance at employment. Claimant has not shown that he is not competitive for a position.

CONCLUSIONS OF LAW

¶136 The law in effect at the time of the claimant's injuries governs his entitlement to benefits. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986). Therefore, the 1989 version of the Montana Workers' Compensation Act applies to the claimant's low-back injury and the 1997 version applies to his groin injury.

¶137 Under the 1989 Act, the claimant is required to exhaust the rehabilitation panel procedures set out in sections 39-71-102 through 39-71-1033, MCA (1989), before seeking permanent total disability benefits in the Workers' Compensation Court. *Bare v. Liberty Mutual Fire Ins. Co.*, 1998 MT 186, 288 Mont. 440, 958 P.2d 71. Claimant has not been to the rehabilitation panel with respect to the 1990 injury, therefore the Court lacks jurisdiction to consider whether his low-back condition is permanently totally disabling.

¶138 Section 39-71-702, MCA (1997), governs claimant's request for permanent total disability benefits for his groin condition. That provision states in relevant part:

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

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

Section 39-71-116(24), MCA (1997), defines permanent total disability 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. [Emphasis added.]

Claimant has a "reasonable prospect of physically performing" all of the jobs identified by Addy. The question remains, however, whether the jobs identified constitute "regular employment" within the meaning of the section.

¶139 While the legislature has not defined what it meant by "regular employment," the term must be construed with other provisions and in the context of the Workers' Compensation Act. *State v. Stanko*, 1998 MT 223, ¶ 54, 292 Mont. 214, 225, 974 P.2d 1139 ("[W]hen construing a statute, it must be read as a whole, and its terms should not be isolated from the context in which they were used by the legislature.") It should also be construed in a fashion that avoids absurd results. *Dover Ranch v. Yellowstone County*, 187 Mont. 276, 283, 609 P.2d 711, 715 (1980).

¶40 "Regular employment" certainly cannot mean *any* job which claimant is *physically capable of doing*. That construction would fail to take into consideration claimant's limited education and work experience, or whether he is minimally qualified for the job. Claimant may be capable of physically performing the job of a lawyer, but he clearly cannot do so because he has neither the requisite education nor a license to practice law. I can say with certainty that in referring to "regular employment" the legislature was referring to employment in a job for which the claimant is qualified not only physically but vocationally.

¶41 Considering that the purpose of the Workers' Compensation Act is to compensate workers unable to work on account of their injuries, or who suffer wage loss or physical restrictions on account of their injuries, the term "regular employment" must also encompass whether particular jobs for which a claimant may be qualified are in fact available on a long-term basis. The last sentence of subsection (24) of section 39-71-116, MCA (1997), which provides, "Lack of immediate job openings is not a factor to be considered in determining if a worker is permanently totally disabled," (emphasis added) implies that the lack of job openings over a longer period of time **is** a factor to consider in determining whether claimant is permanently totally disabled, otherwise the legislature would have omitted the word "immediate." Thus, the long-term lack of job openings for bookmobile drivers requires that I disregard that job in determining whether claimant is permanently totally disabled.

¶42 That leaves the more difficult question, which is whether regular employment includes part-time employment. It is necessary to address the question only if the only employment reasonably available to claimant is part-time work as a pharmacy delivery driver. I therefore consider whether the other jobs identified as appropriate for claimant would constitute regular employment within claimant's physical capabilities.

¶43 The Workers' Compensation Act distinguishes between employees and independent contractors. See, e.g. §§ 39-71-118, -120, MCA (1997), (defining employees and independent contractors respectively.) Section 39-71-116(24), MCA, refers to "employment" only. It does not provide for consideration of independent contractor or business ventures.

¶44 The newspaper delivery work identified by Addy is not a usual employment relationship and is more in the nature of an independent contractor relationship. Claimant would be required to pay for and provide his own vehicle. He would be required to assume all expenses associated with delivery, such as gas and oil. His income would depend on how well he managed his expenses and whether he hired others to help deliver the papers. In effect, he would have to embark on a business venture. I find that the job, as identified and described by Addy, is not "employment" within the meaning of section 39-71-116(24), MCA (1997). Therefore, I do not consider the job in determining whether claimant is permanently totally disabled.

¶45 I also do not consider the other possible jobs listed by Addy at page 3 of her October 6, 1999 report. No job analyses were developed for those jobs (school bus driver, taxi driver, chauffeur, and shuttle van driver) and no information was provided concerning the availability of the jobs. Even if a physician need not sign off on each and every job identified by a vocational consultant, I have no basis for determining whether the physical requirements of the jobs are within the restrictions imposed by claimant's physicians since I do not have a list of the requirements. I also have no way of ascertaining whether jobs are available.

¶46 I therefore must return to the question raised earlier, which is whether part-time work is regular employment which must be considered in determining whether claimant is permanently totally disabled. The legislature refers to neither full-time nor part-time employment, only to regular employment. Words in a statute are usually given their everyday, ordinary meanings. *Duck Inn, Inc. v. Montana State University-Northern*, 285 Mont. 519, 523, 949 P.2d 1179, 1181 (1997) ("we give words their usual and ordinary meaning"). In the context of employment, the possible meanings of "regular" include:

1. usual; normal; customary 4. recurring at fixed times; periodic: regular bus departures; regular meals. . . . 6. occurring with normal frequency

Random House Unabridged Electronic Dictionary, ver. 1.7 (1994). None of the definitions are particularly helpful. I have done a Westlaw words and phrases search in the Allstate's database for the term "regular employment" and found no cases from Montana or any other jurisdiction which considers the question.

¶47 I must therefore resort once more to the context in which the words are used and attempt to harmonize them with other provisions of the Act. In doing so, I note that provisions for permanent partial disability provide for compensation to claimants who are able "to return to work in some capacity" but who suffer a wage loss. §§ 39-71-116(23) and -703, MCA (1997) (emphasis added). A return to work on a part-time basis is a return to work "in some capacity." Permanent partial disability benefits include compensation based upon lost wages, § 39-71-703(5)(c), MCA. I therefore conclude that regular employment encompasses part-time employment, at least where that employment is substantial and significant. I need not determine whether minimal or trivial employment such as 1, 5, or 10 hours a week, or even something more than that, would constitute regular employment since in this case the evidence is that the part-time pharmacy drivers work up to 6 hours a day, which is substantial and significant.

¶48 Claimant bears the burden of proving that he is permanently totally disabled within the meaning of section 39-71-116(24), MCA (1997). See *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). The Court recognizes claimant's plight in returning to work. With social security disability benefits and his pension, claimant's income is equivalent to his

preinjury take-home pay and he is able to maintain desperately needed health insurance coverage for himself and his wife. If he goes back to work, he loses his health insurance and at least part of the income; he would be worse off. However much I sympathize with his dilemma, I must apply the provisions of the Workers' Compensation Act as written.

JUDGMENT

¶49 1. Claimant is not permanently totally disabled and is not entitled to permanent total disability benefits. His petition is **dismissed**.

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

¶51 3. Any party to this dispute may have 20 days in which to request a rehearing from these findings of fact, conclusions of law and judgment.

DATED in Helena, Montana, this 25th day of May, 2000.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Patrick R Sheehy

Mr. Leo S. Ward

Submitted: February 1, 2000

1. Dr. Mitchell commented that claimant's "history is rather complicated." (Ex. 4 at 51.)