

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1996 MTWCC 55

WCC No. 9110-6271

LINDA MILLER

Petitioner

vs.

WESTERN GUARANTY FUND SERVICES

Respondent/Insurer for

MAURINE FRASURE d/b/a O'HAIRE MOTOR INN RESTAURANT

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT ON REMAND

Summary: On remand from the Supreme Court (*Miller v. Frasure*, 264 Mont. 354, 871 P.2d 1302 (1994)), the WCC was required to calculate claimant's permanent partial disability rate and to address issues of attorneys fees and costs. Claimant elected to seek PPD benefits pursuant to section 39-71-703, MCA (1983), which provides lost earning capacity benefits. The parties agreed to assess earning capacity based on 1996 wages.

Held: Claimant was released to work in several clerical positions, with the most reasonable prospect for her employment being as a receptionist. Based on the more persuasive vocational evidence and in light of claimant's actual experience as a waitress, the court finds claimant's time of injury wages translate into \$10.00 an hour in 1996 dollars, while her post-injury earning capacity is \$6.15 in 1996 dollars. Under section 39-71-703, MCA (1983), on a forty hour per week basis, claimant's weekly loss of earning capacity was \$154.00, yielding a PPD rate of \$102.67 ($\$154.00 \times 2/3 = \$102.67$). Where this is less than one-half the state's average weekly wage at the time of injury, this is the applicable rate. Claimant's rate is higher during the first four weeks post MMI, because the prior decision found her not able to reach full-time employment until the fifth week. Costs and attorneys fees were found for the reasons stated in a separate order.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-703, MCA (1983). Where claimant elected to seek PPD benefits

pursuant to section 39-71-703, MCA (1983), which provides lost earning capacity benefits, and the parties agreed to assess earning capacity based on 1996 wages, the Court set the PPD rate by finding claimant's likely wage as a waitress in 1996 if not injured and subtracting her probable 1996 wage as a receptionist, the position the Court deemed most likely claimant could obtain and perform.

Benefits: Permanent Partial Benefits: Lost Earning Capacity. Where claimant elected to seek PPD benefits pursuant to section 39-71-703, MCA (1983), which provides lost earning capacity benefits, and the parties agreed to assess earning capacity based on 1996 wages, the Court set the PPD rate by finding claimant's likely wage as a waitress in 1996 if not injured and subtracting her probable 1996 wage as a receptionist, the position the Court deemed most likely claimant could obtain and perform.

Wages: Wage Loss. Where claimant elected to seek PPD benefits pursuant to section 39-71-703, MCA (1983), which provides lost earning capacity benefits, and the parties agreed to assess earning capacity based on 1996 wages, the Court set the PPD rate by finding claimant's likely wage as a waitress in 1996 if not injured and subtracting her probable 1996 wage as a receptionist, the position the Court deemed most likely claimant could obtain and perform.

The trial in this matter was held on April 30, 1996, in Great Falls, Montana. Petitioner, Linda Miller (claimant), was present and represented by Mr. William O. Bronson. Respondent, Western Guaranty Fund Services (Western), was represented by Mr. K. Dale Schwanke.

Exhibits: Exhibits 56, 65 and 66 were admitted by stipulation. Exhibit 60 was admitted over the objection of Mr. Bronson. Exhibits 53 through 55, 57 and 58, and 61 through 64 were refused. Exhibit 59 was taken under advisement. Exhibit 59 concerns attorney fees and prior offers of settlement. The exhibit is refused since the prior decision of this case determined that attorney fees are to be awarded pursuant to section 39-71-611, MCA (1983), and settlement offers are irrelevant under that section. (See further discussion in Conclusion 6.)

Witnesses and Depositions: Petitioner, Peter F. Sesselman and Gerry B. Blackman testified at hearing. The parties also submitted various post-trial motions and briefs.

Issues presented: This case is on remand from the Supreme Court (*Miller v. Frasure*, 264 Mont. 354, 871 P.2d 1302 (1994)) following its decision in *Miller v. Frasure*, WCC No. 9110-6271 (decided March 19, 1993). The case was "remanded for calculation of the permanent partial disability rate." Attorney fees and costs must also be determined since they were not part of the appeal and are matters reserved by this Court for determination following appeal. On remand this Court is limited to these issues and declines to reopen other matters already resolved by the prior decisions or to consider new issues.

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

FINDINGS OF FACT

1. This is a continuation of the proceeding in which my predecessor, Judge Timothy W. Reardon, entered Findings of Fact and Conclusions of Law and Judgment on March 19, 1993 ("1993 Findings") following a trial on February 26-27, 1992. The 1993 findings determined that claimant was not permanently totally disabled but was permanently partially disabled. However, the amount of claimant's permanent partial disability benefits was reserved for later determination because claimant had not elected whether to proceed under section 39-71-703 or 39-71-705 through 708, MCA (1983). The amount of attorney fees and costs was also reserved. Otherwise the 1993 Findings were certified as final for purposes of appeal. On appeal the Supreme Court reversed this Court's refusal to compel Western's adjuster to appear in Montana for his deposition but otherwise affirmed the 1993 Findings and remanded for a determination as to claimant's permanent partial disability rate. Therefore, the 1993 Findings are still applicable. A copy of the 1993 Findings is attached and will not be repeated here except for facts which specifically pertain to the remaining issues.
2. Prior to her injury, claimant was earning \$207.44 per week working full time. Her maximum possible permanent partial disability rate is \$138.30 per week ($\$207.44 \times = \$138.30$). §§ 39-71-703(1), -705(1), MCA (1983).
3. Claimant has previously received an advance on permanent partial disability benefits in the amount of \$750.
4. Claimant was medically approved by Dr. Hinde in 1992 to return to work in several clerical positions available in the Great Falls area, including the positions of receptionist, nursing secretary, civil clerk, office clerk, and patient billing clerk. (1993 Findings at 11.) He recommended that she initially work four hours a day, increasing her hours of work to eight hours a day in two-hour increments every two weeks. (*Id.*) Under his recommendation claimant would have reached full-time employment in four weeks.⁽¹⁾
5. Vocational testimony at the 1992 trial established that the jobs approved by Dr. Hinde were readily available in Great Falls, where claimant lives, at starting wages between \$5.00 and \$6.89 per hour. (*Id.*) The testimony further established that claimant had a reasonable prospect of employment in those jobs. (*Id.*)
6. However, claimant has never returned to remunerative employment since her injury.

7. Claimant has elected permanent partial disability benefits under section 39-71-703, MCA (1984). (April 30, 1996 Pre-trial Order, Petitioner's Contention 2 at 4.) The parties have agreed to use 1996 comparative wage information for purposes of determining claimant's loss of earning capacity.

8. Peter F. Sesselman, a certified rehabilitation counselor hired by the claimant to gather wage information for purposes of this case, surveyed several Great Falls restaurants and consulted a professional journal to determine the average wage earned by waitresses in 1996. Five of the six restaurants he contacted reported paying their waitresses \$4.25 per hour plus tips. Waitresses at the sixth restaurant, Eddie's, were unionized and earned \$4.70 per hour plus tips.

a. Bert & Ernie's employs its waitresses on a 25 to 30 hour a week basis. That establishment reported that with tips its waitresses earn \$10 to \$15 per hour in wages and tips.

b. El Commodore employs its waitresses on a 40-hour a week basis. It estimated that with tips its waitresses earn \$10 per hour on average.

c. Yellowstone Truck Stop employs its waitresses on an eight-hour day shift. It reported that with tips its waitresses earn between \$8.00 and \$10.50 an hour.

d. Lobby Cafe employs waitresses on four-hour shifts and Sesselman did not determine whether they could work a sufficient number of four-hour shifts to achieve a 40-hour work week. On an hourly basis, with tips, their waitresses earn between \$5.25 to \$9.25.

e. Eddie's Supper Club reported a base wage of \$4.70 per hour but could not provide any information concerning tip income.

f. Borries reported a base wage of \$4.25 per hour wages but also could not provide information concerning tips.

9. The information provided by the first four restaurants, which reported or estimated tips, shows an hourly wage range of \$5.25 (Lobby Cafe) to \$15.00 (Bert & Ernie's). I take specific note, however, that, \$10.00 an hour was within the range of wages at three of those restaurants. Only the Lobby Cafe reported a high end (\$9.25) of less than that. I also note that the average of the low and high ends is \$10.63.

10. Sesselman further testified that he had reviewed the jobs approved by Dr. Hinde. Of those jobs, he felt the receptionist position was most appropriate given claimant's condition in 1992, her past experience, and job availability. (Claimant has actual experience working as a receptionist.)

11. Sesselman contacted ten Great Falls area employers and requested information about the wages paid to receptionists. He received information from four employers indicating an average hourly wage of \$6.15 per hour. On a forty-hour a week basis that amounts to \$246.00 per week.

12. Gerry B. Blackman is a certified rehabilitation counselor hired by Western to assess claimant's wage loss. Using an October 1995 Montana Department of Labor publication entitled Montana Informational Wage Rates, she determined that the average wage for each of the approved jobs was as follows:

Nursing secretary	\$8.38
Civil clerk	\$7.77
General office clerk	\$7.02
Billing clerk	\$8.54
Receptionist	\$6.44
AVERAGE OF ALL FIVE	\$7.63

These figures represent the averages for all such positions in the state. Thus, they are not representative of entry-level wages and do not necessarily reflect even the averages of jobs in Great Falls.

13. Blackman also conducted a wage survey of 33 employers in the Great Falls area who employed persons in sedentary to light-duty jobs. She testified that these positions were chosen as appropriate based on Dr. Hinde's medical release of the claimant in 1992. She received 16 responses to her survey. The responses included jobs for receptionists, keno callers, casino cashiers, telephone solicitors, ticket sellers, switch board operators, general office clerks, and bookkeepers. The wages for the jobs ranged between \$4.25 and \$7.11 per hour. Three of the positions - receptionist, general office clerk, and arguably, bookkeeper - were actually approved by Dr. Hinde. Blackman was unable to provide wage information specific to only these three positions.

14. Blackman testified that wages in Great Falls were competitive with the rest of the state, except that jobs in the public sector paid perhaps \$0.20 per hour more than those in the private sector. Based on the number of positions existing in the Great Falls area as reported in the Montana Department of Labor publication Residual Access to Employability in Cascade County, Blackman testified that claimant could most realistically find employment as a general office clerk or receptionist.

15. Blackman also conducted a survey of restaurants in the Great Falls area asking for the average wages and tips earned by waitresses. She surveyed Elmer's, the Iron Kettle, 4-B's,

Catkin's, the Town House Coffee Shop, Perkins, the Hill Top Cafe, Candie's Soup Dejour, Country Kitchen, O'Haire Coffee Shop, Pam's Diner, and the Lobby Cafe. She testified that most restaurants typically pay waitresses \$4.25 per hour and waitresses average between \$10.00 to \$35.00 in tips per shift. However, she did not provide specific information regarding the tip income reported by each of the establishments she surveyed and her testimony further indicated that shifts may vary in length. For instance the shifts at O'Haire ranged from four to seven hours. She also focused on coffee shops and family restaurants and excluded restaurants serving alcoholic beverages, such as Bert & Ernie's, because claimant was working at a coffee shop type establishment at the time of her injury.

16. Claimant has previously worked as a waitress at establishments serving alcoholic beverages and her preinjury labor market therefore includes more than coffee shop and family dining type restaurants where tips appear to be more limited.

17. Having considered the vocational testimony in this case and claimant's work experience, I find that claimant's preinjury earning capacity in 1996 dollars was \$10 an hour. I found Sesselman's testimony concerning current wages and tips of waitresses the more persuasive since he provided specifics as to his survey and also included full-service restaurants within his survey whereas Blackman concentrated on coffee shops likely to have lower tips. While Bert & Ernie's waitresses earned up to \$15, they also earned as low as \$10 an hour and the \$10 an hour figure is supported by reported wages and tips from the other restaurants which provided tip information.

18. I was also persuaded that following her injury the claimant's most reasonable prospect for employment is as a receptionist. Claimant has prior experience as a receptionist. Sesselman opined that receptionist is the most appropriate position and Blackman included receptionist as one of two most appropriate positions. I adopt Sesselman's testimony pegging average receptionist wages at \$6.15 an hour since he based his testimony on an actual survey, albeit a limited survey, of receptionists employed in Great Falls.

19. Simple subtraction of the pre and post-injury earning capacities specified in Findings 17 and 18 yields an hourly loss of \$3.85. Since claimant was working full time at the time of her injury her weekly loss is \$154.00, yielding a permanent partial disability benefit rate of \$102.67 ($\$154.00 \times = \$102.67$).

20. However, since Dr. Hinde prescribed 20 hours of employment during the first two weeks, 30 hours during the second two weeks, and full-time employment only thereafter, the claimant has a greater loss of earning capacity for the first four weeks of any return to employment and is therefore entitled to \$138.30 for four weeks. The remaining 496 weeks are payable at \$102.67.

CONCLUSIONS OF LAW

1. Claimant was injured in 1984 and the 1983 version of the Workers' Compensation Act therefore governs her permanent partial disability benefits. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).
2. The claimant has the burden of proving her entitlement to compensation. *Ricks v. Teslow Consolidated*, 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wicken Bros. Construction Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).
3. Claimant has previously been found to be permanently partially disabled. This Court, in its 1993 decision, also determined that claimant is employable and able to perform the five jobs approved by Dr. Hinde. Finding 44 recites the evidence of vocational consultant Gerry Loch (now Gerry Blackman) that claimant had a reasonable prospect of employment in the five jobs and that the wage range for those jobs was \$5.00 to \$6.89 per hour. While Finding 44 is written in the form of a recitation of evidence, Judge Reardon's conclusions of law show that he intended the recitation to constitute a finding of fact. He also rejected claimant's argument that she was permanently totally disabled and indicated his acceptance of Dr. Hinde's opinion that claimant could initially return to work part time and work back to full-time work. In Conclusion 3 at page 16 he wrote:

In the present case, the claimant reached maximum medical healing by October 8, 1988. It is apparent that the claimant suffers from some loss of earnings or earning capacity due to her injury. Prior to her injury the claimant earned \$207.44 per week working full-time. Post-injury the claimant has the capacity to earn from \$5.00 to \$6.89 per hour to start. It is not contemplated that the claimant will be able to immediately work full-time. Rather, a work hardening program such as that advocated by Dr. Hinde, where the claimant will begin by working part-time and increase to full-time employment over the course of one month or longer appears to be warranted. Based on the foregoing, it is apparent that the claimant satisfies the definition of permanent partial disability.

4. Judge Reardon did not compute actual benefits for two reasons. First, claimant had not elected between lost earning capacity benefits (§ 39-71-703, MCA (1983)) and indemnity benefits (§§ 39-71-705 to 708, MCA (1983)). Second, the parties had not submitted information translating claimant's 1984 wages into 1992 dollars so that they could properly compare the 1992 wages submitted for the five post-injury jobs. (Conclusion 3 at 16.) On appeal the Supreme Court noted that determination of claimant's permanent partial disability rate "is a strictly formulaic procedure which can be easily and quickly accomplished with the admission of numerical evidence." *Miller v. Frasure*, 264 Mont. 354, 370, 871 P.2d 1302, 1312 (1994). It remanded the case with specific instructions directing this Court to make the calculation. *Id.*

5. Judge Reardon's determinations regarding permanent partial disability were affirmed on appeal. *Id.* Those determinations are binding on remand. Therefore, at trial I limited the evidence to a comparison of claimant's time-of-injury wages to the wages for the five jobs identified in the 1993 decision. The parties agreed to use 1996 wages rather than 1992 wages, so the comparison was between claimant's time-of-injury wages in 1996 dollars and current, 1996 wages for the five jobs.

6. Based on the vocational evidence presented at trial, I have determined that claimant's time-of-injury wages translate into \$10.00 an hour in 1996 dollars, while her post-injury earning capacity is \$6.15, also in 1996 dollars.

As the Supreme Court indicated, the amount of benefits due her are easily computed. Section 39-71-703, MCA (1983), provides:

(1) Weekly compensation benefits for injury producing partial disability shall be 66 2/3% of the *actual diminution in the worker's earning capacity* measured in dollars, subject to a maximum weekly compensation of one-half the state's average weekly wage.

(2) The compensation shall be paid during the period of disability, not exceeding, however, 500 weeks in cases of partial disability. However, compensation for partial disability resulting from the loss of or injury to any member shall not be payable for a greater number of weeks than is specified in 39-71-705 for the loss of the member. [Emphasis added.]

On a 40-hour a week basis, claimant's weekly loss of earning capacity was \$154.00, yielding a permanent partial disability benefit rate of \$102.67 ($\$154.00 \times = \$102.67$). This is less than one-half the state's average weekly wage at the time of claimant's injury and is therefore the applicable rate of claimant's permanent partial disability benefits which are payable for 500 weeks, with the exception of the first four weeks. Since Judge Reardon determined that claimant would not reach full-time employment until the fifth week, claimant's maximum permanent partial disability rate of \$138.30 applies to the first four weeks.

7. In the 1993 Findings, Judge Reardon also specified that all payments made by Western from the date the claimant reached maximum medical improvement to the date of trial are to be converted to permanent partial disability benefits. Again at page 16, he said:

From the date of maximum healing, the claimant is to be classified as permanently totally disabled or permanently partially disabled. *Wood*, 248 Mont. at 28. **The claimant's workers' compensation benefits from that date forward, to the time of trial, are to be converted to permanent partial benefits.** [Emphasis added.]

That determination is binding in this proceeding and can only be construed as meaning that all benefits paid by Western to claimant between the time she reached maximum medical improvement and the date of the first trial (February 26-27, 1992) must be credited against Western's liability for permanent partial disability benefits. Since Judge Reardon also determined *as of the date of trial* that claimant was permanently partially disabled, any payments subsequent to the date of trial must also be credited to Western's liability for permanent partial disability benefits.

8. In the 1993 Findings, Judge Reardon referred to two different dates on which claimant reached maximum healing. In Finding 47 at page 11, he said:

47. Dr. Dietrich's letter dated October 6, 1989, indicated that he felt that the claimant had achieved maximum medical healing by that date. (Ex. No. 3 at 107.)

This is the only finding which addresses maximum healing.

However, maximum healing is then mentioned twice in the conclusions of law. In Conclusion 2 at page 13 Judge Reardon said:

The third element is also satisfied. **The medical records of Dr. Dietrich reveal that he assessed October 6, 1989, as the date of maximum medical improvement.**

[Emphasis added.]

The "third element" to which he referred is the third of four elements which must be proved to establish permanent total disability. That element is "(3) the condition exists *after maximum healing*." (Conclusion 2 at 12, emphasis added.) So far, so good. But in Conclusion 3 at page 16, Judge Reardon then wrote, "In the present case, the claimant reached maximum medical healing by October 8, 1988."

Clearly, Judge Reardon found that claimant had reached maximum medical healing on either October 6, 1989 or October 8, 1988; the question the Court must resolve is which date did he intend. In light of Finding 47 and the further mention of Dr. Dietrich's report of maximum healing which is found at page 13, I can only conclude that the October 6, 1989 date is correct and the October 8, 1988 date constituted a typographical error. The 1988 date is unsupported by anything otherwise said in the 1993 decision.

I want to note here that in determining which date Judge Reardon intended I am not changing or correcting the 1993 decision, as Western argues. Judge Reardon used two different dates, creating an internal conflict in the decision. One or the other date must prevail. Western wishes me to ignore and disregard the later date used. If Western's argument that my adoption of the 1989 date constitutes an arbitrary change in the date determined by Judge Reardon⁽²⁾ is correct, then so to any adoption of the 1988 date.

Compensation benefits paid since October 6, 1989, must be credited against Western's liability for permanent partial disability benefits. The \$750 advance must also be credited.

9. Simultaneous with These Findings of Fact, Conclusions of Law and Judgment on remand, the Court is issuing a separate Order Awarding Attorney Fees and Costs. That Order shall supplement and be deemed a part of this decision.

10. Petitioner's Request for Clarification of Court's Minute Entries for April 30, 1996, is **granted**. The medical records excluded as evidence at trial are deemed part of claimant's offer of proof. The Court did not mean by its minute entry to exclude their consideration as part of an offer of proof.

11. Any and all other outstanding motions are **denied**.

JUDGMENT

1. Claimant's permanent partial disability rate is \$102.67. That amount shall be paid by Western for 500 weeks, with the exception of the first four weeks. Claimant's maximum permanent partial disability rate of \$138.30 applies to the first four weeks.

2. Payments made by Western from the date claimant reached maximum medical improvement (October 6, 1989) to the present date shall be credited against liability for permanent partial disability benefits. Western is also entitled to a credit for a prior \$750 advance. The Court retains jurisdiction to resolve any dispute concerning the credit in the event the parties cannot agree on the computation.

3. Western shall pay claimant's attorney fees of \$16,379.38. The fees shall be paid in a lump sum.

4. Western shall pay claimant her costs in the total sum of \$2,074.34.

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

6. 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 29th of July, 1996.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. William O. Bronson

Mr. K. Dale Schwanke

Date Submitted: June 17, 1996

Attachment: 1993 Findings

LINDA MILLER

Petitioner

vs.

WESTERN GUARANTY FUND SERVICES/

MAURINE FRASURE, d/b/a O'HAIRE MOTOR INN RESTAURANT

Defendant/Employer.

Presiding Judge: THE HONORABLE TIMOTHY W. REARDON

Counsel of Record:

Mr. William O. Bronson

Attorney at Law

P.O. Box 2885

Great Falls, MT 59403-2885

ON BEHALF OF THE PETITIONER

Mr. K. Dale Schwanke

Attorney at Law

P.O. Box 2269

Great Falls, MT 59403-2269

ON BEHALF OF THE DEFENDANT/EMPLOYER

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT

1. Claimant filed a petition to resolve a dispute between herself and the insurer under Title 39, Chapter 71, Part 29, MCA.

2. The Clerk of Court gave notice to interested parties of (a) the time, place and nature of the trial; (b) the legal authority and jurisdiction under which the trial was to be held; (c) the particular sections of the statutes and rules involved; and (d) the matters asserted by notifying all parties who appeared of record to have an interest by mailing to them a copy of the ORDER SETTING TRIAL AND PRETRIAL CONFERENCE with a copy of the PETITION FOR

HEARING attached and a copy of the Clerk's Certificate of Mailing the Order and Petition. § 2-4-601, MCA.

3. A pretrial conference was conducted on January 23, 1992, before Clarice V. Beck, Hearing Examiner. The Pretrial Order was docketed on February 26, 1992. Pertinent parts of the Pretrial Order are as follows:

JURISDICTION

The Court has jurisdiction over this matter pursuant to Section 39-71-2905, MCA.

* * * * *

UNCONTESTED FACTS

The following facts are admitted as fact and require no proof:

1. On July 10, 1984, Petitioner suffered an industrial injury arising out of the course and scope of employment with Maurine Frasure, d/b/a O'Haire Motor Inn Restaurant in Great Falls, Cascade County, Montana.
2. At the time of the injury, Petitioner's employer was enrolled under Compensation Plan No. 2 of the Montana Workers' Compensation Act, and its insurer was Intermountain Insurance Company. Intermountain's obligations have now been assumed by Western Guaranty Fund Services.
3. Petitioner's temporary total disability rate and permanent total disability rate (without benefit of Social Security offset) is \$138.30.

STIPULATIONS

The claim for compensation and the Petitioner's attorney fee agreement with her counsel are stipulated into evidence without need for foundation testimony, and are attached to this Pre-Trial Order.

Petitioner is entitled to payment of additional temporary total disability benefits (less social security offset) retroactive to her date of injury consistent with the Court's decision in its Cause No. 8706-4383, as affirmed on appeal. The amount to be paid has not yet been agreed upon by the parties.

Petitioner has received an advance against bi-weekly compensation of \$750.

* * * * *

4. The parties have proposed and the Court adopts the following issues to be determined by the Court:

1. Whether the Petitioner is permanently and totally disabled?

2. If the Petitioner is not permanently and totally disabled, whether she is permanently and partially disabled, and if so, what is the proper permanent partial disability rate?

3. What amount is Petitioner entitled to for payment of retroactive temporary total disability benefits after consideration for the proper social security offset, retroactive to her date of injury?

4. Whether the Defendant is liable for payment of a medical bill submitted by Dr. James Hinde?

5. Whether the Defendant's (sic) has unreasonably delayed or refused payment of compensation so as to warrant imposition of a penalty pursuant to Section 39-71-2907, M.C.A.?

6. Whether the Petitioner is entitled to an award of attorneys' fees and costs?

5. The trial in this matter came on February 26-27, 1992, before the Honorable Timothy W. Reardon. Raymond Walters, Gerry Loch, Carol Pritchett and claimant, Linda Miller, were sworn and testified. The depositions of Dr. Terry Jackson, Dr. John Avery, Dr. James Hinde, Dr. James Mungas, Dr. Dennis Dietrich, Jerry Hatch, Nancy Mann, Lisa Mosely, James Doerfler, Scott Tanner, Star Jackman, Linda Hunt, Linda Miller, Gerry Loch, Maurine Frasure, Mike Brumble and Ray Walters were filed with the Court. Exhibit Nos. 1 and 2 were stipulated to by the parties and admitted. Exhibit Nos. 7, 8, 22, 24-34, 37-46 and 49-52 were admitted without objection. The Court took judicial notice of Exhibit Nos. 4-6. Exhibit Nos. 3, 9-21, 23, 35 and 36 were admitted over objection. Exhibit Nos. 47 and 48 were withdrawn. Issue number 4 was deemed moot at trial.

6. The undersigned, having reviewed the pleadings, considered the Pretrial Order and the exhibits admitted into evidence, heard the testimony and observed the demeanor of the witnesses at trial and being fully advised in the premises, now makes the following Findings of Fact and Conclusions of Law and Judgment

FINDINGS OF FACT

1. The uncontested facts are found as fact.

Claimant

2. The claimant was 41 years old at the time of trial. The claimant is a single mother of three and resides in Great Falls with two of her children, ages 11 and 14. The claimant cares for as many as four foster children in her home, all of whom are 10 years of age or older.

3. At the time of her injury, claimant was working as a waitress. The claimant also has experience working as a physical therapy aide, a receptionist, an egg crater and worked at

Montgomery Wards in the advertising department, snack bar, receiving line and as a "gopher".

4. The claimant has a high school diploma which she received in 1969. Subsequent to her accident, the claimant graduated from the Great Falls Vocational Technical Center with a degree in business.

Injury

5. On July 10, 1984, the claimant was injured while working as a waitress at O'Haire Motor Inn Restaurant. Claimant slipped while mopping a floor and her right knee struck the side of the mop bucket.

Medical

6. The claimant has a history of problems with her right leg predating her industrial accident. Claimant's medical records indicate that she had surgery on her right knee in 1972 for chronic dislocation of the patella and following surgery suffered from deep venous thrombosis with pulmonary embolism. In July 1982, claimant saw Dr. Lauritzen complaining of pain in her right knee marked by some swelling. Dr. Lauritzen's note indicated that he suggested the claimant should try to keep working but if it gets too bad he would put her in the hospital to keep her off her feet to see if that would help. (Ex. No. 3 at 1.)

7. The claimant returned to Dr. Lauritzen on June 27, 1984, complaining of more trouble with her right knee. Dr. Lauritzen noted that everything looked normal and suspected that her knee pain was referred pain from her right hip. (Ex. No. 3 at 2.)

8. After her industrial accident, claimant initially sought medical treatment from Dr. Kenny, a chiropractor. Dr. Kenny diagnosed a lumbar sprain with radiculitis to right knee and right knee misplaced at the tibia-fibula articulation. Dr. Kenny noted that the back responded to treatment but the knee did not. The claimant was referred to Dr. Avery for further treatment. (Ex. No. 3 at 70.)

9. Dr. Mungas saw the claimant on July 16, 1984 and evaluated her for pain and swelling in her right leg. Dr. Mungas viewed the claimant's problem as being consistent with post-phlebotic syndrome and informed the claimant that she may have to give up her job because her symptoms were aggravated by being on her feet. (Ex. No. 3 at 5.)

10. The claimant initially saw Dr. Avery on August 27, 1984. Dr. Avery's diagnosis was chondromalacia patella of the right knee. Dr. Avery instructed the claimant to do knee exercises and recommended aspirin. Dr. Avery released the claimant to return to work on October 8, 1984. Dr. Avery's note of October 10, 1984, indicates that the claimant's knee gave out for no apparent reason when she was leaving his office on October 8, 1984. Dr. Avery's examination revealed no obvious swelling and a full range of motion. An arthrogram

was scheduled to rule out a possible cartilage tear. The arthrogram was normal. (Ex. No. 3 at 48-49.)

11. Dr. Avery opined that the claimant had recovered from her accident prior to being released to return to work on October 8, 1984. Dr. Avery believed that when the claimant's knee gave out on October 8, 1984 it was a new accident. (Dep. of Dr. Avery at 21, 27, and 37.)

12. The claimant saw Dr. Popnoe in October, 1984. Dr. Popnoe performed a lateral patellar release of the right knee on November 13, 1984. The claimant suffered complications after the surgery, notably a deep vein thrombosis with pulmonary embolism and a staph infection. Dr. Popnoe's diagnosis was "[c]hondromalacia of the right patella secondary to possibly [sic] injury as well as a result of patellar malalignment in the past." (Ex. No. 3 at 32.)

13. The claimant was referred to Dr. Dietrich in June 1985, due to continued complaints of pain. The claimant complained of burning discomfort in her right leg and lower back. The burning sensation began after her November 13, 1984 surgery by Dr. Popnoe. (Ex. No. 3 at 73.)

14. Dr. Dietrich first saw the claimant on June 21, 1985. Dr. Dietrich has treated the claimant for a period in excess of seven years without any major progress in resolving her right leg pain. (July 17, 1992 Dep. of Dr. Dietrich at 17.)

15. Dr. Dietrich's treatment plan consists of water exercises, bio feedback, heat, elevation of the leg, Clonidine, Tylenol and Advil. (July 17, 1992 Dep. of Dr. Dietrich at 18.) The claimant is satisfied with her current treatment. (July 17, 1992 Dep. of Dr. Dietrich at 17.)

16. A series of lumbar blocks were administered by Dr. Jonas. The lumbar blocks did not provide any permanent relief and the claimant experienced back pain during the administering of one of the treatments. (April 24, 1992 Dep. of Dr. Dietrich at 14.)

17. Dr. Dietrich's impression was myofascial pain syndrome and reflex sympathetic dystrophy. (Ex. No. 3 at 116.)

18. Dr. Dietrich concluded that he did not expect a major change in the claimant's condition in the foreseeable future. Dr. Dietrich believes that it is not realistic to expect that the claimant will be able to work even part-time beyond the three hours per day, two days per week that she works as a volunteer at the YWCA. (Ex. No. 3 at 117.)

19. Claimant has been referred to and has seen numerous other physicians for treatment.

20. The claimant was referred to Dr. Peggy Schlesinger in May 1986. Dr. Schlesinger treated claimant through April 1989. (Ex. No. 3 at 7-16.) Her impression was that the claimant suffers from patellofemoral joint disease. (Ex. No. 3 at 8.)

21. Claimant was referred to Dr. Hachigian for evaluation. Dr. Hachigian opined that the claimant has osteoarthritis of the right patellofemoral joint along with chondromalacia patella. Dr. Hachigian suggested that the claimant retrain in a line of work that would avoid stairs, climbing, lifting over ten pounds on a repeated basis, stooping, squatting and where there is a minimal amount of walking and standing. (Ex. No. 3 at 42.)

22. Dr. Forbeck, a neurologist, examined the claimant on June 3, 1987. Dr. Forbeck's impression was that the claimant was not affected with any significant organic neurologic abnormality. (Ex. No. 3 at 47.)

23. In August 1987, claimant saw Dr. Losee, a knee specialist. Dr. Losee diagnosed entrapment of the infrapatellar branch of the saphenous nerve of the right knee. Dr. Losee injected that nerve with 2% Xylocaine and it relieved the claimant's major complaint. Dr. Losee advised the claimant of a surgical procedure to excise the entrapped nerve and also advised her of the risks. Dr. Losee provided additional diagnosis of patella infera and degenerative [sic] joint disease between the patella and femoral trochlear surface. Dr. Losee also noted the claimant has a history "suspicious of lateral dislocation of the patella." (Ex. No. 3 at 58-59.)

24. The claimant saw Dr. Avery on June 6, 1988. Dr. Avery noted that the neurological exam of the claimant's lower extremities was completely normal. Dr. Avery's diagnosis was (1) chronic lumbosacral strain; (2) status post arthrotomy, right knee, with probable excision, medial meniscus; (3) chondromalacia, patella, right knee. Dr. Avery noted that the claimant was emotional during the exam and felt there may be some functional overlay present in the claimant. Dr. Avery made an appointment for the claimant to see Dr. Patterson at the Virginia Mason Clinic in Seattle on July 20, 1988. (Ex. No. 3 at 50.)

25. On July 20, 1988, the claimant saw Dr. Patterson, a neurologist with the Virginia Mason Clinic in Seattle, Washington. Dr. Patterson's impression was that the claimant's symptoms are suggestive of possible partial reflex sympathetic dystrophy syndrome with causalgic pain. Dr. Patterson noted that reflex sympathetic dystrophy was not common in the lower extremities but can follow injuries. Dr. Patterson did not feel that there was any injury to any nerve root or peripheral nerve. (Ex. No. 3 at 119.)

26. Dr. Patterson opined that "the original injury to her knee and possibly to associated cutaneous nerves is the source of her condition." (Ex. No. 3 at 121.)

27. Dr. Hinde performed an independent medical examination of the claimant on January 22, 1991. Dr. Hinde's assessment was that the claimant has chronic right lower extremity, low back and generalized soft tissue pain. (Ex. No. 3 at 130.) Dr. Hinde further noted:

I feel this patient's goal of first being pain free with respect to burning pain before considering re-entry into the work force or increased participation in avocational or homemaking activities is a self-defeating prophecy. It must be remembered by her

and by all that she had right lower extremity pain even prior to the 1984 accident. Complete relief of all right lower extremity pain, therefore, is not likely to be possible and would not even be a goal of therapy.

Ex. No. 3 at 131.

Dr. Hinde went on to state that after one month of reconditioning, it would be in the interest of the claimant to engage in sedentary work for four hours each day and it could be expected that the claimant could advance to eight hours per day one month later. Thereafter, light duty work may be possible. (Ex. No. 3 at 131-132.) Dr. Hinde felt that the claimant's functional capacities dictate that a return to work is possible and likely to be helpful physically and psychologically. (Ex. No. 3 at 132.) Dr. Hinde believes that the claimant is maximally healed. (Ex. No. 3 at 133.)

28. Dr. Hinde testified that claimant's injury could be expected to have contused soft tissues or caused a laceration and the studies performed did not indicate that her injury caused any severe bone, joint or nerve problem. (Dep. of Dr. Hinde at 29.)

29. Dr. Hinde testified that if no nerve, bone or joint injury had occurred, then given the claimant's medical history, full function of her knee would be reasonably expected. Dr. Hinde also stated that it would be unrealistic to use as an endpoint for healing a description by the claimant that she was pain free. The claimant was experiencing some pain prior to her injury. (Dep. of Dr. Hinde at 29-30.)

30. Dr. Hinde concluded that the claimant would be able to function successfully in a sedentary or well selected light work level. His opinion was based on the claimant's demonstrated abilities. (Dep. of Dr. Hinde at 33-34.)

31. Dr. Hinde disagrees with Dr. Dietrich's statement that based on her symptoms it is unrealistic to consider that she would be able to work in sedentary work even part-time beyond the six hours a week part-time volunteer work claimant was doing. Dr. Hinde stated that claimant's volunteer work, homemaking and child care demonstrated an equivalent of more than six hours per week of sedentary work. (Dep. of Dr. Hinde at 58.)

32. Dr. Hinde also stated that he had not "seen evidence of an overwhelming motivation on the part of Linda to work toward identifying a work return plan." (Dep. of Dr. Hinde at 57.)

33. Claimant was examined by Dr. Jackson on February 27, 1991. Dr. Jackson noted that the claimant's medical treatment in the past appears to have been appropriate and did not feel he could necessarily improve her condition. Dr. Jackson indicated that the only thing he could offer the claimant was supervision of an exercise program, possible changes in her medication management and nerve blocks. Dr. Jackson noted that the claimant appeared somewhat hostile and was not receptive to new medications, exercises or nerve blocks. (Ex. No. 3 at 158.)

34. Dr. Jackson testified that it was very inconsistent for a person that has pain which restricts them to not be interested in doing anything about the pain. (Dep. of Dr. Jackson at 18.) Dr. Jackson testified that he questions the claimant's motivation and wonders if she has a hidden agenda. (Dep. of Dr. Jackson at 24.)

Post-Injury Activities

35. It is not contested that the claimant is unable to return to her time of injury employment.

36. The claimant purchased a house in 1990. Claimant testified that she had to clean the house after moving into it. The cleaning consisted of vacuuming all of the carpets, wiping everything down and painting a couple of rooms and the kitchen. Claimant also fertilized the lawn, spread grass seed and has mowed the lawn. Claimant also planted shrubs and helped put in flower beds. Claimant has shoveled snow from the sidewalks around her home.

37. The claimant is a licensed foster care provider and has cared for foster children in her home since 1982. The claimant has cared for as many as four foster children in addition to her own two children. At the time of trial, the claimant was caring for three foster children. The foster children are usually ten years of age or older. The claimant does the laundry, cooking and grocery shopping for her own children and the foster children. Claimant testified that on an average she received \$360 per month per foster child.

38. Claimant noted that her knee problem does not affect the raising of her children or her foster children. (Dep. of Dr. Jackson, Dep. Ex. No. 13.) Claimant did note that "heavy activity" was a problem. (Dep. of Dr. Jackson, Dep. Ex. No. 2.)

39. The claimant was able to successfully complete Great Falls Vo- Tech courses and graduated in 1988 with a degree in business. The claimant averaged four courses per quarter for six quarters and graduated with a "B" average. (Ex. No. 32.) The claimant has not applied for work since receiving her degree.

40. The claimant is able to work on a volunteer basis at the YWCA. That job was located for the claimant by Gerry Loch, a rehabilitation consultant. The claimant's job duties at the YWCA include setting up appointments, answering the telephone and making out contracts. The claimant works two days per week for three hours per day except during the summer when her children are not in school.

41. The claimant testified that she has some difficulties performing her job duties and her job is modified accordingly. The claimant avoids lifting, climbing stairs and using the copy machine while at work. The claimant and the YWCA set her work schedule.

Vocational Evidence

42. Claimant did not retain a vocational expert to present evidence as to her employability.

43. Gerry Loch testified that a part-time paid job at the YWCA may become available. Ms. Loch attempted to get the approval of Dr. Dietrich for the claimant to take the job, but the opportunity passed during the two months it took to get Dr. Dietrich's response.

44. Gerry Loch testified that there is a wealth of clerical jobs available to the claimant in the Great Falls area. Ms. Loch opined that the claimant has a reasonable prospect of employment with a starting salary of \$5.00 to \$6.89 per hour for the clerical jobs for which the claimant qualifies. Ms. Loch prepared five job analyses for the following positions: (1) receptionist, starting pay \$5.51 per hour; (2) nursing secretary, starting pay \$6.00 per hour; (3) civil clerk, starting pay \$5.34 per hour; (4) office clerk, starting pay \$6.30 per hour, and (5) patient billing clerk, starting pay \$5.59 per hour.

45. Dr. Hinde reviewed the job analyses prepared by Ms. Loch and approved those jobs for the claimant. Dr. Hinde commented as follows regarding these job descriptions:

For this and all jobs evaluated on 1/15/92, I recommend 4 hrs. work to start with (increases up) to 8 in 2 hr. gradations of 2 wks. Ongoing professional contact and worker/work place evaluation is indicated in the early work return period to insure success by identifying and mitigating obstacles; evaluating pt. response to new activity and rxing (treating) same if indicated.

Ex. No. 33.

46. Dr. Dietrich reviewed the job analysis and concluded that he does not feel that the claimant could perform those jobs due to pain. Dr. Dietrich went on to say that he was hopeful the claimant may pursue full-time work in the future but that she could not at the present time. (Ex. No. 3 at 171.)

47. Dr. Dietrich's letter dated October 6, 1989, indicated that he felt that the claimant had achieved maximum medical healing by that date. (Ex. No. 3 at 107.)

Social Security Benefits

48. Claimant's initial entitlement to social security disability benefits began in January, 1985, and was in the amount of \$334 per month. (Ex. No. 7.)

49. Claimant received social security benefits for her two children beginning in January, 1985, at the rate of \$42.70 per child. (Ex. No. 8.)

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this proceeding pursuant to section 39-71-2905, MCA.

2. The claimant is not entitled to permanent total disability benefits.

The law in effect on the date of the claimant's injury defines permanent total disability as follows:

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

Section 39-71-116(13), MCA (1983).

The definition of permanent total disability requires proof of the following four elements by the claimant: (1) a condition resulting from an injury; (2) which results in loss of actual earnings or earning capabilities; (3) the condition exists after maximum healing; and (4) the claimant has no reasonable prospects of finding regular employment of any kind in her normal labor market. *Meagor v. Hartford Accident & Indemnity Insurance Co.*, WCC No. 9204-6430 (January 14, 1993) at 8.

The medical evidence submitted to the Court reveals that the claimant has an extensive history of medical problems relating to her knee. The record reveals the claimant had knee surgery in 1972 and periodically sought medical attention for her right knee in the years before her accident. The claimant saw Dr. Lauritzen less than two weeks prior to her accident complaining of pain in her right knee. The medical evidence further reveals that on October 8, 1984, about three months after her accident, the claimant was released by Dr. Avery to return to work.

In contrast, it is uncontested that the claimant suffered an injury due to an industrial accident occurring on July 10, 1984. The claimant has seen numerous doctors for treatment since her accident and the following diagnoses have been made: chondromalacia patella; myofascial pain syndrome; reflex sympathetic dystrophy; patellofemoral joint disease; osteoarthritis of the right patellofemoral joint; entrapment of the infrapatellar branch of the saphenous nerve of the right knee.

It is apparent to the Court that the claimant does have a knee condition that is most commonly diagnosed as chondromalacia patella. Further, the claimant experiences pain associated with that condition. Dr. Patterson of the Virginia Mason Clinic and Dr. Popnoe both relate the claimant's knee condition directly to her industrial accident. Given the above facts, the Court concludes that the claimant has proven by a preponderance of the evidence that she suffers a condition resulting from an injury and thus satisfies the first element.

The claimant also satisfies the second element requiring a loss of earnings or earning capability. The claimant has not been gainfully employed since her accident and is unable to perform her time of injury job. The claimant has suffered a loss of earnings or earning capability due to her injury.

The third element is also satisfied. The medical records of Dr. Dietrich reveal that he assessed October 6, 1989, as the date of maximum medical improvement. Since that date, the claimant has not returned to work alleging her inability to work due to pain. Dr. Dietrich has not released the claimant to resume working full- time.

To satisfy the fourth element a claimant must meet the requirements of the following test:

"To establish the existence of no reasonable prospect of employment in the normal labor market, a claimant must introduce substantial credible evidence of (1) what jobs constitute his normal labor market, and (2) a complete inability to perform the employment and duties associated with those jobs because of his work-related injury." *Spooner v. Action Sales, Inc.*, Ill Workers' Compensation Court Decisions No. 85 (January 24, 1983).

Metzger v. Liberty Mutual Insurance Co., 212 Mont. 351, 355, 687 P.2d 1033 (1984).

The burden of proof is initially on the claimant to produce evidence that he/she has no reasonable prospect of employment in his/her normal labor market. Once a claimant meets its burden of proof the defendant must show that suitable work is available. *Wood v. Consolidated Freightways, Inc.*, 248 Mont. 26, 808 P.2d 502 (1991).

The Court has previously defined a person's normal labor market as consisting of "those job possibilities for which he fits the job requirements because of his age, education, work history and physical condition." *Spooner v. Action Sales, Inc.*, Docket No. 1309 (January 24, 1983).

The record reveals that the claimant was employed as a waitress at the time of injury. It is not argued that she can return to work in that occupation. The record further reveals that the claimant is qualified to engage in a clerical occupation by virtue of her post-injury training and volunteer job. The claimant received a business degree from the Great Falls Vo-Tech and has worked in a volunteer capacity for the past three years at the YWCA performing clerical duties.

The claimant has not met her burden of proof to demonstrate a complete inability to perform the duties of a clerical occupation by virtue of her job-related injury. The claimant has not supplied to the Court evidence of her undertaking any job search that would indicate that she has no reasonable prospect of finding employment in her normal labor market.

The evidence presented to the Court indicates that the claimant does possess significant abilities. The claimant successfully completed her vo-tech training averaging four courses each quarter for six quarters and maintained a "B" average. The claimant works as a volunteer with the YWCA two days per week for three hours per day, except during the summer months when her children are out of school. The claimant cares for as many as four foster children in addition to her two children. The claimant indicated that her knee does not affect the raising of her children or her foster children except that heavy activities present a problem. The claimant does the laundry, cooking and shopping for her children and the foster children. Claimant's home activities of cleaning, painting, spreading grass seed and fertilizer, lawn mowing, shoveling the walk and planting shrubs demonstrates further abilities. The claimant also engages in a water aerobic program.

Based on the above demonstrated abilities, Dr. Hinde concluded that the claimant would be able to successfully function in a sedentary or well-selected light-work level. Dr. Hinde approved five job descriptions prepared by Gerry Loch, a vocational rehabilitation consultant.

The medical evidence indicates that the claimant is not affected with any significant organic neurological abnormality.

Claimant's condition is manifest by symptoms of pain and swelling of her knee with overuse. It is recommended that the claimant avoid stairs, climbing, lifting over ten pounds on a repeated basis, stooping, squatting and prolonged walking or sitting. Claimant has been able to cope with her volunteer work at the YWCA where she is allowed the flexibility to walk, stand or sit to accommodate her knee condition.

Since her accident, the claimant testified that she attempted to return to work as a waitress but was unable to perform her duties due to pain. The claimant has not sought employment since then and does not appear motivated to return to work. Even after completion of her course of study at the Great Falls Vo-Tech, the claimant did not apply for any jobs. It is apparent to the Court that the claimant has become complacent in accepting her condition and does not wish to change her status. At the current time, the claimant is receiving social security benefits, workers' compensation benefits and foster-care payments which have enabled her to purchase a home and support herself without the need to work. Dr. Hinde and Dr. Jackson have questioned the claimant's motivation toward returning to work, as does the Court. The following statement made by the Montana Supreme Court is particularly applicable to the present case. "Claimant's own uncertainty coupled with a minimal job search cannot combine to support a claim of no reasonable prospect of employment." *Metzger*, 212 Mont. at 356.

The vocational rehabilitation evidence indicates that there are numerous clerical jobs available in the Great Falls area for which the claimant qualifies. Dr. Hinde reviewed the job analyses prepared by the vocational rehabilitation counsellor and approved the claimant's

return to these occupations. The claimant's treating physician has not approved claimant's return to full-time employment, however, the standard for permanent total disability is that the claimant must introduce substantial credible evidence of a complete inability to perform jobs in her normal labor market due to her work-related injury. That standard does not require a release to full-time employment in order to find a claimant no longer permanently totally disabled. See *Quinn v. Builders Transport* (1989) 240 Mont. 221, 783 P.2d 406. The Court concludes that, based on the above evidence, the claimant has failed to carry her required burden of proof necessary to classify her as permanently totally disabled.

3. The claimant is permanently partially disabled.

Permanent partial disability is defined as follows:

(12) "Permanent partial disability" means a condition resulting from injury as defined in this chapter that results in the actual loss of earnings or earning capacity less than total that exists after the injured worker is as far restored as the permanent character of the injuries will permit. Disability shall be supported by a preponderance of medical evidence.

Section 39-71-116(12), MCA, (1983).

In the present case, the claimant reached maximum medical healing by October 8, 1988. It is apparent that the claimant suffers from some loss of earnings or earning capacity due to her injury. Prior to her injury the claimant earned \$207.44 per week working full-time. Post-injury the claimant has the capacity to earn from \$5.00 to \$6.89 per hour to start. It is not contemplated that the claimant will be able to immediately work full-time. Rather, a work hardening program such as that advocated by Dr. Hinde, where the claimant will begin by working part-time and increase to full-time employment over the course of one month or longer appears to be warranted. Based on the foregoing, it is apparent that the claimant satisfies the definition of permanent partial disability.

From the date of maximum healing, the claimant is to be classified as permanently totally disabled or permanently partially disabled. *Wood*, 248 Mont. at 28. The claimant's workers' compensation benefits from that date forward, to the time of trial, are to be converted to permanent partial benefits.

The Court is currently unable to determine the claimant's permanent partial disability rate. The claimant has the option of seeking compensation benefits pursuant to section 39-71-703, MCA, or indemnity benefits pursuant to section 39-71-705 through 708, MCA. See section 39-71-709, MCA. The claimant has not indicated to the Court which option she prefers and the Court will not make that decision for her. Further, in order to make a correct determination of the claimant's permanent partial disability rate, the parties should submit

information that brings the claimant's 1984 wages current to the time of trial. See *Anderson v. State Compensation Mutual Insurance Fund*, 252 Mont. 73, 826 P.2d 931 (1992).

4. The claimant's proper temporary total disability rate allowing for a social security offset is \$90.04 per week.

Pursuant to section 39-71-702, MCA, the defendant is entitled to take a social security offset in an amount equal to one-half the social security benefits paid due to the injury calculated from the date to the social security entitlement. Section 39-71-702 (2), MCA. The figures supplied to the Court indicate the claimant's initial social security entitlement was at the rate of \$334 per month beginning in January, 1985. (Ex. No. 7.) The claimant also received social security benefits in the amount of \$42.70 per child, per month beginning in January, 1985. (Ex. No. 8.) Based on those figures, the claimant's weekly social security benefits amount to \$96.52. Claimant's temporary total disability amount of \$138.30 less one-half of her social security amount nets a proper temporary total disability amount of \$90.04 per week beginning at the claimant's social security entitlement date.

5. The claimant is not entitled to a penalty pursuant to section 39-71-2907, MCA.

In reviewing the voluminous record the Court notes that the defendant's handling of the case was less than admirable, however, the Court does not believe that its conduct rises to the level of being unreasonable. The delay in payment of back due temporary total disability benefits appears to have been partially attributable to an agreement between counsel pending appeal of the determination of this Court regarding the tip issue. See *Miller v. Western Guaranty Fund Services*, 248 Mont. 132, 809 P.2d 1257 (1991). After the Montana Supreme Court rendered its decision, the issue concerning a social security offset came to the forefront. The defendant requested from claimant's counsel the amount of social security benefits being paid to the claimant so that the proper offset could be taken from the back due temporary total benefits. The defendant could have requested that information directly from Social Security but chose to request the information from opposing counsel. The Court is not convinced that the request was unreasonable or a deliberate attempt to cause delay. The present case is obviously not a model of efficiency. The animosity between counsel that is reflected in the record merely compounded the problems to be addressed by the Court and the resulting delay did little for the claimant.

6. The claimant is entitled to an award of reasonable attorney fees and costs pursuant to section 39-71-611, MCA.

JUDGMENT

1. This Court has jurisdiction over this matter pursuant to section 39-71-2905, MCA.

2. The claimant is not entitled to permanent total disability benefits.

3. The claimant is permanently partially disabled.

4. The claimant's proper temporary total disability rate allowing for a social security offset is \$90.04 per week.

5. The claimant is not entitled to a penalty pursuant to section 39-71-2907, MCA.

6. The claimant is entitled to an award of reasonable attorney fees and costs pursuant to section 39-71-611, MCA.

7. The JUDGMENT herein is certified as final for purposes of appeal pursuant to ARM 24.5.348.

8. Any party to this dispute may have 20 days in which to request a rehearing from these Findings of Fact and Conclusions of Law and Judgment.

DATED in Helena, Montana, this 19th day of March, 1993.

(SEAL)

/S/ Timothy W.Reardon

JUDGE

1. The 1993 Findings also state that claimant's primary treating physician, Dr. Dietrich, disapproved the same jobs, at least on a full-time basis. (Finding 46 at 11.) However, Judge Reardon's discussion in Conclusion 3 at page 16 shows that he resolved the conflicting opinions in favor of those of Dr. Hinde.

2. Western's Post-trial Brief at 2-4.