

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 47

WCC No. 9212-6647

CHARLES RASMUSSEN

Petitioner

vs.

HEEBS FOOD CENTER

Employer

and

STATE COMPENSATION INSURANCE FUND

INSURER.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The trial in this matter was held on September 20 and 21, 1993, in Missoula, Montana, the Honorable Mike McCarter, Judge of the Workers' Compensation Court, presiding. Petitioner, Charles Rasmussen (claimant), was present and represented by Mr. Ken H. Grenfell. Respondent, State Compensation Insurance Fund (State Fund), was represented by Mr. Leo S. Ward. Claimant, Robert Rasmussen, Mark Schwager, Cindy Kern, Karen Black, and Carol Morris were sworn and testified. Exhibit Nos. 1-4, 7-14, 16 and 18-21 were admitted into evidence without objection. Exhibit No. 5 was not admitted as it was redundant to Ex. No. 1. Exhibit No. 6 was not admitted as it was redundant to Ex. No. 17. The claimant objected to Ex. No. 15 and the State Fund to Ex. No. 17. The objections were taken under advisement. After further consideration, claimant's objection to Ex. No. 15, which is a complaint made by claimant against Dr. Headapohl, is sustained. The claimant's specific contentions against Dr. Headapohl have little relevance to the issues in this proceeding and raise unnecessary collateral matters. The respondent's objection to Ex. No. 17 is overruled and that exhibit is admitted into evidence. Exhibit No. 17 is a prior statement of Cindy R. Kern who testified on behalf of the State Fund. Although it was not listed in the Pre-Trial Order, it was offered as a prior inconsistent statement of the witness and is therefore a rebuttal exhibit which claimant was not required to list. ***Wilson v. Swanson***, 169 Mont. 328, 333, 546 P.2d 990 (1976).

The parties stipulated that the depositions of claimant, Dr. Ronald Hecht, Dr. Thomas Hildner, Dr. Ethan Russo, Dr. William Cooney, Dr. Dana Headapohl, Len Haniuk, Sue Haniuk, Lyle Happel, and Carole Weber be considered by the Court in reaching its decision.

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

FINDINGS OF FACT

1. Claimant was 38 years old at the time of trial. He is divorced and the custodial parent of two sons who are six and ten years old. In 1981 he graduated from Montana State University with a degree in construction engineering.
2. Following his graduation from college, claimant worked for Cypress Minerals, a mining company, as a project engineer. Cypress terminated his employment within a year.
3. Claimant next worked at Tri-County Lumber for "a couple months" loading, unloading, hauling and delivering materials, including lumber, sheetrock and shingles.
4. Claimant then went to work for Copeland Lumber Company in Oregon and Idaho. He loaded trucks and had some managerial responsibilities, including the hiring and firing of employees. After nine months Copeland terminated claimant's employment.
5. Claimant returned to Bozeman. Initially, he performed odd jobs, including work at a music store and playing in a band.
6. In 1985 claimant obtained employment at Heebs Food Center as a delivery person. His duties included making grocery deliveries, unloading trucks, stocking shelves, ordering merchandise and working as a checker.
7. Claimant testified that while working for Heebs on June 9, 1987, he slipped and fell, breaking his fall with his right hand. At the time he was pushing boxes into a dumpster in an alley behind Heebs Food Center. Claimant testified that he hurt his back, neck and shoulder.
8. On June 9, 1987, Heebs was insured by the State Compensation Insurance Fund under Plan III of the Montana Workers' Compensation Act.
9. The State Fund accepted liability for the accident and thereafter paid compensation and medical benefits. Claimant ceased working in November 1987. The State Fund paid temporary total disability benefits from that time until May 1993, a period of five and a half years.

10. Claimant is seeking a determination that he is entitled to permanent total disability benefits. In the alternative, he asks for permanent partial disability benefits. The State Funds opposes the request on two grounds. First, it argues that claimant's current disability is not related to an industrial accident and is due to other causes. Second, it argues that claimant is able to work and has not suffered diminished earning capacity. The first ground is based on the requirement that claimant must show that his disability is "related" to his industrial injury, *Dumont v. Wickens Bros. Construction Co.*, 183 Mont. 190, 201, 598 P.2d 1099 (1979). State Fund asserts that claimant's current condition and disability are due to a preexisting injury arising from prior trauma, especially from ski jumping. It also vigorously urges that the June 9, 1987 industrial accident at Heeb's never in fact occurred. It accuses claimant of making a false claim. This latter assertion is discussed further in the Court's conclusions of law, wherein we conclude that the State Fund did not properly raise fraud as a defense to the claim. The State Fund's contentions and evidence regarding an alleged fraudulent claim are therefore disregarded. Thus, the Court accepts as true the claimant's assertion that an accident occurred.⁽¹⁾ Since the State Fund disputes that the accident occurred rather than how it occurred, the Court must also accept claimant's account of the accident.

Medical History and Present Condition

11. The claimant described his industrial accident as follows:

I was carrying a bunch of boxes on my right shoulder and walked through the back and around the dumpster, which is about six feet tall.

. . . .

. . . So I walked around and I pushed the boxes in. When I did, I slipped, fell, twisted, fell on my right hand, cut my hand all to heck, came in the store.

(Tr. at 61.) A few weeks after the accident, claimant reported to Dr. Ronald Hecht that "[t]he fall caused pain in my entire back and [I] felt nauseated for awhile because of the jarring effect."⁽²⁾ (Ex. No. 12 and Hecht Dep. at 9.)

12. Since his injury the claimant has experienced continuous and progressive symptoms related to both his lower back and his cervical spine.

13. Other than a dozen chiropractic treatments in 1981 and one in 1982 for headaches and tension, prior to the accident claimant had no significant history of low-back or cervical spine complaints. (Ex. No. 1 at 550-2.) The 1981 chiropractic records reflect that "[o]nce in a while low-back bothers [claimant] nothing to [sic] serious." (*Id.* at 551.)

14. Claimant's complaints and symptoms in the months following the accident are reflected in the notes of the various doctors who examined him.

a. His initial complaints, as reflected in Dr. Thomas Hildner's office notes of July 28, 1987, were "shoulder pain and pain in the mid-thoracic spine. Some to the back of his neck as well. Feels tightness in the back of his neck and occasionally this seems to cause some headaches. Also has some pain in the left lower lumbar area."⁽³⁾ (Ex. No. 1 at 226.) Dr. Hildner was claimant's family physician at the time and is presently his treating physician.

b. Claimant then saw Dr. Ronald Hecht, a chiropractor, on July 31, 1987. He reported his symptoms as "headaches, back pain, painful low back left hip, stiff neck . . . left leg painful." (Ex. No. 1 at 19.)

c. His symptoms persisted, and on October 18, 1987, claimant saw Dr. Robert K. Snider, an orthopedic surgeon practicing in Billings. Dr. Snider's office note of that date reflects, in part:

I evaluated this patient today for two complaints. He has been having troubles in his back and has seen Dr. Hecht, chiropractor in Bozeman, as well as having had an evaluation by a physician there. The manipulations didn't help him and the P.T. recommended by the physician has helped him with his low back. He has also been having therapy for his shoulder. In terms of his back, he has been having discomfort in the low back, left buttock and down the left leg to the lateral toes. He has some numbness and paresthesia there. Most of the pain is in the buttock and occasionally he gets some tingling in the heel that he is able to tolerate okay. Sitting tends to get his foot tingling and tends to make him hurt more. His shoulder has been bothering him in a throwing position and catching periodically.

(Ex. No. 1 at 581.)

d. On December 18, 1987, claimant was examined by Dr. Lowell Anderson, who reported claimant's complaints as follows:

The patient is a 33-year old male with a history of a recent low back injury. He slipped, falling backwards, breaking his fall with his right hand. He noted **low back** and **left leg discomfort**. He subsequently sought evaluation and treatment from his chiropractor. Conservative therapy by him has not improved his discomfort. He subsequently was evaluated by an orthopedist in Billings for his back and a CAT scan was obtained. He was told he had possible disk herniation centrally or left-sided at the L4-5 level. Since that evaluation, he has continued with his back and leg discomfort. He last worked approximately 6 weeks ago. There has been no significant improvement. He has intermittent pain that is all the way down the left leg to the foot. He recently has begun developing right leg discomfort with radiation

to the knee. He has intermittent cramping sensations to both calves. There is numbness present to the heel region of the left foot. Coughing or straining results in occasional left leg radiation. There is night discomfort. Weakness is present. Past history is essentially unremarkable for back problems.

[Emphasis added.]

(Ex. No. 1 at 368.)

15. Claimant continued to have leg discomfort and calf cramping. In August 1989 Dr. Snider performed a percutaneous discectomy of the L4-L5 intervertebral disc in an attempt to relieve his symptoms. According to Dorland's Illustrated Medical Dictionary (27th ed. 1988), a discectomy involves removal of the intervertebral disc. The operative report and subsequent medical records, however, indicate that only part of the disc was actually removed or dissolved. In any event, the surgery failed to relieve claimant's low-back symptoms.

16. Dr. Snider performed a second discectomy of the L4-L5 disc on March 28, 1990. At the same time he also fused the L4 vertebra to the sacrum and attached an EBI stimulator device to the spine.

17. The EBI stimulator was surgically removed on February 6, 1991.

18. Despite the surgeries, claimant has continued to experience low-back pain and left leg pain, along with neck and shoulder pain. At trial the claimant described his current complaints as pain in the lower back which sometimes radiates "through the legs and into the feet," and neck pain. (Tr. at 98.) His symptoms are more particularly described in the medical records of the various physicians who examined him in 1992. Those symptoms include pain in his lower back, left leg, neck, left shoulder, and, sometimes, left arm.⁽⁴⁾

(Ex. No. 1 at 346-7, 350, 355.) Dr. Thomas Hildner, who continues to treat claimant, was deposed on January 27, 1993, and described claimant's symptoms as follows:

Q. Would you, in a narrative fashion, discuss what you believe to be the exact nature of Mr. Rasmussen's spinal problem as it relates to the lumbar spine and the cervical spine?

A. In his lumbar spine he has persistent pain, varying in intensity, with radiation, I believe it's down the left lower extremity. And he has had limitation of range of motion. He's had limitation of range of motion of his cervical spine, persistent pain, and radicular pain into the extremity as well.

He has varying degrees of stiffness and aching. "Varying" means that some days his mobility is better. If he does exercises, which we had recommended but that he do gently and slowly, if he does it too much, then the next day he gets rebound stiffness, aching and pain. This has been of a chronic nature.

(Hildner Dep. at 21-22.)

19. Claimant has a herniated cervical disc at C6-7. (Ex. No. 1 at 443-445, 455.) It is doubtful, however, that surgery on the disc would alleviate any of claimant's symptoms. (*Id.* at 455.) Dr. Hildner, who continues to treat claimant, attributes claimant's neck pain to fibromyalgia, which is an inflammation of the soft tissue. (Hildner Dep. at 22-3.) Dr. Gary also subscribes to the fibromyalgia diagnosis. (Ex. No. 1 at 455.)

20. Claimant's pain and other symptoms are genuine.

Relatedness

21. Claimant was a ski jumper in his youth. In addition to a number of falls and at least one concussion suffered from ski jumping, claimant has fallen from a high bar, breaking two arms; from a horse, breaking an arm; and from a goal post, injuring an elbow. He has also been involved in two car accidents. The State Fund asserts that claimant's current condition is a result of those incidents rather than an industrial accident.

22. At the State Fund's request, claimant was examined on September 21, 1992, by a panel of four Missoula physicians consisting of Dr. Dana Headapohl, a specialist in occupational medicine; Dr. Ethan Russo, a neurologist; Dr. Michael Sousa, an orthopedic surgeon; and Dr. Robert Shea, a psychologist. In its October 12, 1992 report to the State Fund, the panel concluded that "there is not evidence in the medical record connecting the neck condition with the 6-9-87 accident." (Ex. No. 1 at 358.) By implication and from the context of the letter, the panel determined that claimant's low-back condition is related to the industrial accident.⁽⁵⁾ The report was signed by all four of the examiners.

23. Drs. Headapohl and Russo testified by deposition. Drs. Sousa and Shea did not testify either at trial or by deposition, although their medical records were submitted and considered.

24. Fairly summarized, Dr. Russo testified that the industrial accident **could** have contributed to claimant's low-back condition but that other factors, such as ski jumping, also contributed to the condition. As to the neck condition, Dr. Russo refused to render a medical opinion **ruling out** any relationship between the accident and the condition, but he also felt that neither he, nor any other medical practitioner, could render a medical opinion that it **is** related. This distillation of Dr. Russo's opinions is based primarily on the following testimony taken from his deposition:

a. Dr. Russo testified that ski jumpers are more susceptible to spinal injuries. (Russo Dep. at 35-6.)

b. When asked on direct examination about the cause of claimant's condition (his low-back and neck pain), Dr. Russo stated:

The best answer that I could give you is that, again, we're looking at a sum of parts here. I cannot state with any certainty whatsoever that this event of 6/9/87 was the chief or primary inciting event leading to his current complaints. I cannot state that. I would also go on to say that I'm not sure that anyone else could.

(*Id.* at 24).

c. Other events Dr. Russo identified as potentially contributing to claimant's condition included falls from horses, falls from high bars, carrying heavy boxes and carrying children. (*Id.* at 32-33.)

d. In cross-examination, Dr. Russo clarified his opinions regarding the role of the industrial accident in relationship to both the neck and low-back symptoms:

Q. Can you say, within a reasonable degree of medical certainty, that the complaints relative to the cervical spine are totally unrelated to the accident?

A. No, I'm not going to answer that. What I will do is stick with my prior statements and say that it is unclear to me the relationship between the accident in question and the cervical spine complaints. End of answer.

Q. What about the lumbar spine?

A. It could have had a role in it, as I discussed previously, but I do not believe that it accounts for it.

(*Id.* at 44:15-25.)

24. Dr. Headapohl's opinion took the following form:

Q. We took the deposition of Dr. Russo and discussed concussions and the ski jumping and the falls and so forth, and he seemed to be of the opinion that a person that would have that type of history could have some contributory factors towards a **neck** condition, that would be that a person ski jumping would fall hard enough to have a concussion. Do you agree with that?⁽⁶⁾

A. Yes, I do.

(Headapohl Dep. at 23, emphasis added.)

25. The other medical practitioners testifying in this case opined that claimant's neck and low-back conditions are both attributable to his 1987 accident.

a. Dr. Cooney testified that both the cervical and low-back conditions were related to claimant's June 1987 accident:

Based on the information which I have available, it is my opinion that both the lumbar and the cervical and dorsal scapular symptoms are related to injuries that he sustained in June of 1987.

(Cooney Dep. at 22.) In reaching his opinion, Dr. Cooney relied on claimant's description of the accident. (*Id.* at 29.) He was aware of claimant's history of ski jumping and concussions, although he was not aware of claimant's fall from a horse and a high bar. (*Id.* at 25-6.)

b. Dr. Hildner testified that claimant's neck and back conditions are consistent with the industrial accident described by the claimant, and that to "a reasonable degree of medical probability" claimant's fibromyalgia is related to the accident. (Hildner Dep. at 23-24.)

c. Dr. Hecht, who treated claimant chiropractically from July 31, 1987 until March 11, 1991, opined that claimant's back and neck conditions were related to the accident. (Hecht Dep. at 11-12, 19-20.) He conceded on cross-examination that maladies such as those claimant is suffering can be caused by automobile accidents, falls or long-term degeneration, but he did not retract his opinion.

26. After weighing the medical evidence, and giving consideration to the accident and claimant's relative lack of symptomatology prior to June 1987, the Court is persuaded and finds that claimant's neck and back conditions were triggered by, and are related to, his industrial accident. Three of the five experts addressing the relatedness issue, including claimant's treating physician and an IME neurologist, gave opinions relating claimant's conditions to his accident. While sheer numbers of experts do not determine the outcome, the opinions of the three doctors concerning the lower-back condition find support in the panel report, which implicitly finds that the lower back condition is related to the accident, and grudging support even in Dr. Russo's testimony. With regard to the neck, Dr. Russo did not exclude the accident as a possible cause.

Ability to Return to Work

27. Karen Black, a vocational rehabilitation consultant hired by the State Fund, identified several possible jobs which in her opinion claimant was qualified and able to perform. The only jobs which received medical approval were those of 1) guitar assembler; 2) computer circuit board assembler; and 3) assistant construction estimator. (Ex. No. 1 at 358.) Those positions were medically approved by the medical panel which examined claimant in September 1992 but not by any of the other physicians; they were specifically disapproved by Dr. Gary. (Ex. No. 5.)

28. The panel's approval of the three jobs was based on Dr. Headapohl's analysis. Dr. Russo, the only other panel member to testify, indicated his deference to Dr. Headapohl because of her specialty in occupational medicine.^{[\[7\]](#)}

29. Dr. Headapohl testified that her approval was contingent on modifications to each of the positions. For the guitar assembler position, the sound hole caps would have to be stored at approximately waist height so claimant would not have to stoop down or reach up. Claimant would also have to be allowed to change positions for comfort. (Headapohl Dep. at 30.) The computer circuit board assembler position was approved on the condition that claimant be allowed to change positions frequently, and with the proviso that claimant might have to begin on a part-time basis and work up to an eight-hour day. (*Id.* at 31.) The estimator position was approved on the condition that items used at work be arranged ergonomically, with no overhead lifting, and that claimant start part-time and work up to an eight-hour day. (*Id.* at 35.) Dr. Headapohl emphasized the need for an ergonomically designed work area and the opportunity to frequently change positions as essential for the claimant. (*Id.* at 26-8.)

30. During deposition Dr. Headapohl also approved the job of drafter provided that discs and paper are stored at a level higher than knee level and the work station is ergonomically suitable. (Headapohl Dep. at 39-40.)

31. Based on labor market investigations, Ms. Black testified that the accommodations suggested by Dr. Headapohl are easy to make and are generally provided by employers. (Tr. at 432.) She also testified that the suggested accommodations are reasonable. (Tr. at 432-433.) Her testimony was credible and is supported by common sense and experience: the accommodations are minor adjustments in an office type environment.

32. Dr. Gary was presented with the same job descriptions except for the drafter and flatly disapproved them. (Ex. No. 5.) In an office note of September 3, 1992, Dr. Gary states: "The total of these [medical problems] seem to make him totally disabled from any kind of meaningful, gainful employment at the time."⁽⁸⁾ (Cooney Dep. Ex.)

33. Dr. Cooney expressed his opinion that claimant did not appear capable of tolerating even a light duty or sedentary occupation in the competitive job market in view of the symptoms he was experiencing. (Cooney Dep. at 17.)

34. Dr. Hildner testified that he agreed with Dr. Cooney's opinion regarding claimant's inability to return to any sort of work. (Hildner Dep. at 28-29.)

35. Chiropractor Hecht testified, "Is there some job out in the world that Chuck Rasmussen may be able to do? Chances are probably pretty good. I just don't know what it is." (Hecht Dep. at 56.)

36. Mark Schwager, a certified rehabilitation counselor retained by claimant, testified that the significant restrictions placed on claimant by a number of physicians render claimant unemployable in any type of occupation. He also testified that the positions of computer assembler and guitar assembler were not within claimant's normal labor market. He stated that the estimator position could be within claimant's normal labor market, but considering

it had been ten years since claimant had utilized his degree, claimant would be at a disadvantage when competing with persons with a more current degree. Based solely on claimant's physical limitations, Mr. Schwager concluded that claimant had no transferable skills. Mr. Schwager admitted that he did no labor market analysis for claimant.

37. After evaluating the opinions of the physicians and vocational counselors, along with the Court's perception of the claimant, I find that claimant is presently permanently totally disabled. In doing so I have considered Dr. Headapohl's views concerning the employability of disabled persons:

I guess I don't see anybody as totally disabled, not that I see people not deserving Social Security, because I do, but I think I'm more optimistic.

. . . .

I think for most people there is some job that can be tried. That's not to say that they won't succeed in the job, that's not to say that they won't fail, because they might. . .

.

My focus is getting people back to work. And so I suspect I'm more optimistic than either Dr. Gary or Dr. Cooney, who see people who have had extremely serious injuries whose prognosis is pretty grim.

(Headapohl Dep. at 10.) She acknowledged that claimant's condition "is very serious. I think he has very significant limitations." (*Id.* at 11.) She acknowledged that claimant would have difficulty in the job market:

I think he will have difficulties on the 8-to-5 basis. Again, it depends on the job, it depends on the employer's understanding. I, too, think that given the new ADA law, there are jobs that he can be found compatible with, depending, again, on how much the employer is willing to accommodate.

(*Id.* at 11.) Pointing to examples of people with severe back injuries and back pain, Dr. Headapohl further acknowledged that an individual's ability to work depends on personal factors, including the ability to deal with pain.⁽⁹⁾

The claimant in this case has convinced his treating physician and two other IME physicians that he cannot tolerate even the most sedentary work environment on account of his pain and physical restrictions. I am also persuaded that at present he is incapable of working. The claimant has a history of difficulty in adjusting to the workplace, and showed little motivation for advancement even prior to his injury. A highly motivated individual able to get along with employers might endure the level of pain claimant is experiencing. Claimant does not presently have those traits.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this proceeding pursuant to section 39-71-2905, MCA.
2. Claimant is requesting a determination that he is permanently totally disabled or, in the alternative, that he is permanently partially disabled. The injury occurred in June 1987; therefore, the 1985 version of the Montana Workers' Compensation Act applies. ***Buckman v. Montana Deaconess Hospital***, 224 Mont. 318, 321, 730 P.2d 380 (1986).

The State Fund accepted the claim as compensable and has paid both medical and temporary total disability benefits. However, in resisting claimant's request for permanent disability benefits, the State Fund contends that the claimant's disabling conditions are not related to an industrial accident because the accident never happened.

During the trial of this matter the State Fund was permitted to present evidence tending to prove that no accident ever occurred. Claimant's counsel, Ken Grenfell, objected to the State Fund injecting the issue of whether the injury occurred and the Court reserved ruling on the matter.

At trial respondent's counsel was less than clear as to what the State Fund was trying to prove. At times counsel's position appeared contradictory. In his opening statement, Leo Ward, counsel for the State Fund, referred to the claimant's industrial injury as "the alleged injury," drawing an objection from claimant's counsel, who objected:

. . . referring to this as an alleged injury, and I do believe the State Fund has accepted liability for the injury that Mr. Rasmussen suffered. And I believe the issue was what extent of this disability was related as a result from that injury.

(Tr. at 30-31.) The Court permitted Mr. Ward to continue with his opening. However, as he outlined evidence indicating that claimant "made up the entire claim" (Tr. 34), the Court interrupted to ask about the issues to be litigated:

THE COURT: Let me stop you right there. Is the State Fund's acceptance of the claim at issue in this case, whether they accepted the claim or whether they should have accepted the claim?

MR. WARD: Well, they accepted the claim and I understand that is --

THE COURT: I'm trying to unravel that, if you are trying to unaccept the claim in this proceeding.

MR. WARD: No, this trial is about the credibility issue, Your Honor. In other words, when he claims that the only issue is disability, we're saying no. You can go back and look at the credibility issues related to the happening of this claim and how it occurred and consider the fact that the State Fund picked up the claim, should not be a liability and of wave or stem on that part, being able to come back and argue

that in fact based on the information they now have, should not have accepted the claim.

There are credibility issues related to whether the claim even happened, the way it occurred. And that affects all the credibility issues that follow from it. As I said in my first statement, was this thing fits together like the vertebrae on the spine. Your Honor. If one is displaced, all could be potentially displaced. And if what occurred at the time again did not occur. And that's why I used the statement alleged injury. If that did not occur, then everything else that falls from this has to be seen in that light of the injury itself, the cause of the current condition and so forth and so on, Your Honor.

We're not claiming State Fund did not pick up the claim. It did. But it picked up the claim based on imperfect information I'm just saying that relates to credibility, Your Honor, not whether the claim has been accepted or not.

THE COURT: Okay. But in this proceeding, you're arguing that the injury did not occur, or the accident did not occur?

MR. WARD: We are arguing that evidence that the accident did not occur which affects the credibility of this Claimant, Your Honor, that's what we are arguing. We're not arguing that we should be able to unravel and go back. And, you know, the claim, we paid the claim. We've paid a bunch of the total disability benefits, a whole bunch of medical benefits and reflected by that stack of records right there. We're not claiming that we're owed that money.

(Tr. at 34-37.)

Later on, as Mr. Ward cross-examined claimant about reporting the accident to co-workers, Mr. Grenfell renewed his objection to evidence of fraud:

MR. GRENFELL: I'm going to object. I believe that the State Fund has accepted liability for this injury and I believe that they've indicated they don't intend to pursue a fraud or defense to this matter. And I believe that, therefore, all this testimony as to whether or not the injury occurred or not is not relevant to any of the issues in this case.

The issues in this case, I believe, are set forth in the pretrial order. And, that is, the nature and extent of this Claimant's disability and whether or not the injuries caused in that accident have caused this. I mean that's I believe, the extent of the issues in this case. And I believe the present tactics of opposing counsel are irrelevant in this case.

THE COURT: Mr. Ward?

MR. WARD: Your Honor, as I said in my opening statement and I'll repeat it now, in most total disability cases that go to hearing, one of the central issues to the case is the credibility of the claimant, because that's the only person that can tell the doctor how or what happened. And unless there happened to be a number of witnesses to the event or unless the event was generally known by the employer or the co-employees, which is not the case here.

And I think that credibility carries over into all aspects of this case. That is why I'm pursuing this line of testimony.

THE COURT: Okay. Let me see if I can clarify the issues a little bit with the two of you at this point in time. If we can't, we may have to brief it and may have to take the testimony in any event until it's briefed and sort that out.

As I understand it, the State Fund has accepted liability and paid benefits for which it's not seeking any payback, but it's taking the position at this point in time that the injury didn't occur and that it's not liability [sic] for at least any future benefits, either, compensation benefits.

MR. WARD: That's correct, Your Honor. And also the testimony is directed towards the issue of credibility and how that affects all issues related to this case.

THE COURT: Okay. But the real issue in this case is whether or not he suffered these back and neck injuries that have led to the medical treatment and led to the issue of disability; am I correct?

MR. WARD: And whether or not in fact his current condition is related to an injury at all or what it's related to.

THE COURT: I understand that.

MR. WARD: And one of the contentions was, in the beginning, is that his current condition is not related to an injury.

THE COURT: Okay. And do I understand correctly one of the positions is there was no injury here, at least no injury to any back or neck?

MR. WARD: Based on the evidence, Your Honor.

THE COURT: I'm going to overrule the objection and let him testify. I am going to let you go ahead and brief whether he can do that or not. In view of the acceptance of the claim, they can dispute that there was an injury. I would certainly say that generally where there is an injury, the dispute may arise as to what injuries were suffered later on.

This seems to go a little beyond that because they're denying essentially any injury occurred or any accident occurred, at least to cut off any future benefits. So I'll let you brief the legal issue and I'm going to go ahead and accept the testimony. And if I decide that in some fashion they cannot dispute the accident or can't dispute his injuries, then I would not consider that testimony.

(Tr. at 168-171.) As can be seen from the quoted portions, the State Fund attempted to skate around the fraud issue but was indeed attempting to prove fraud. It is also clear that the Court reserved ruling as to whether fraud was properly before the Court.

The State Fund's allegations of fraud raise a serious procedural matter which the Court recently addressed in ***Carmody v. Employers Insurance of Wausau***, WCC No. 9302-6686 (May 6, 1994), wherein we held that an insurer cannot argue that a claim is fraudulent unless fraud is specifically set out as one of the insurer's contentions and as an issue.⁽¹⁰⁾ In this case fraud is not mentioned in the Pre-Trial Order either as an issue or a contention. The only issues set forth in the Pre-Trial Order are:

1. Whether Claimant is permanently totally disabled.
2. In the alternative, whether claimant is entitled to permanent partial disability benefits under 39-71-703, M.C.A.
3. Whether Claimant is entitled to attorney fees and costs in this matter.

In the contentions portion of the Pre-Trial Order, the State Fund does contend that "[c]laimant's disability, if any, was not caused by an industrial injury." But, as the Court stated in ***Carmody***, fraud is an affirmative defense that is not fairly within such a broadly phrased contention; it is also a matter on which the alleging party bears the burden of proof.

A pretrial order may be amended. ARM 24.5.318 provides that "[a]mendments to the pretrial order shall be allowed by either stipulation of the parties or **leave of court for good cause shown.**" (Emphasis added.) However, the State Fund has not requested an amendment of the Pre-Trial Order and good cause is lacking in any event.

In ***Nentwig v. United Industry***, 256 Mont. 134, 845 P.2d 99 (1992), the Montana Supreme Court considered whether a district court abused its discretion in considering an issue not expressly raised in a pretrial order. (Rule 16, Mont.R.Civ.P., provides that the pretrial order shall control the course of the action but may be modified to prevent manifest injustice.) ***Nentwig*** held that the district court did not abuse his discretion where the issue was "implicit in those raised" and it was raised explicitly prior to actual trial. ***Id. at 140.*** In ***Nentwig*** the plaintiff sought to enforce a lease option. The trial judge sua sponte questioned whether the option was void for vagueness. Since interpretation and enforceability of the option was critical to the relief sought by the plaintiff, the Supreme

Court held that the vagueness issue was fairly within the broader issues stated in the pretrial order. Compare with **State Bank of Townsend v. Maryann's Inc.**, 204 Mont. 21, 664 P.2d 295 (1983) (holding that a negligent misrepresentation was not properly raised at trial when not mentioned in the pretrial order, even though the pretrial order alleged fraud and purposeful misrepresentation). Fraud is not "implicit" in the issues and contentions set forth in the Pre-Trial Order in this case and no excuse has been provided for the failure to raise a fraud defense.

Since the State Fund did not properly raise a fraud defense, the Court will not consider it and has disregarded all evidence offered to prove fraud. The claimant's account of the accident is therefore accepted.

3. While the State Fund may not challenge the occurrence of claimant's industrial accident, it has properly raised a relatedness issue. That issue arises out of claimant's ski jumping, horseback riding and gymnastics. The State Fund argues that claimant's current condition was caused by falls occurring during these previous activities rather than by the June 9, 1987 accident.

The claimant has the burden of proving that he is entitled to benefits. **Ricks v. Teslow Consolidated**, 162 Mont. 469, 512 P.2d 1304 (1973). The burden is by a preponderance of the probative, credible evidence. **Dumont. v. Wickens Bros. Construction Co.**, 183 Mont. 190, 201, 598 P.2d 1099 (1979). The burden extends to proof that "the injury was the proximate cause of his disabling condition." **Eastman v. Transport Ins.**, 255 Mont. 262, 266, 843 P.2d 300 (1992). The claimant has carried his burden. As found in Finding of Fact No. 26, a preponderance of credible evidence establishes that claimant's low-back and neck conditions were caused or at least triggered by the June 1986 accident.

4. The claimant has also proved that he is presently permanently totally disabled. Permanent total disability is defined as follows:

"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.

§ 39-71-116(13), MCA (1985). This definition of disability has non-medical as well as medical components. "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." **Metzger v. Chemtron Corp.**, 212 Mont. 351, 355, 687 P.2d 1033, 1035

(1984) (citations omitted); **accord *Wood v. Consolidated Freightways*, 248 Mont. 26, 29, 808 P.2d 502 (1991)**. The normal labor market consists of those jobs for which a petitioner is qualified based on his age, education, work experience, **and residual physical capabilities. *Spooner v. Action Sales, Inc.*, WCC Docket No. 1309 (January 23, 1983)**. Once the claimant presents evidence demonstrating that there is no reasonable prospect of employment in his normal labor market, the burden of proof then shifts to the employer to show that suitable work is available. ***Id.***

A preponderance of credible evidence, including a preponderance of medical evidence, shows that claimant is presently incapable of performing any sort of work, even sedentary work, primarily on account of his pain. The principal evidence supporting the State Fund's position that claimant can work is the opinion of Dr. Headapohl, who approved three jobs for claimant. However, the doctor admitted in deposition that she is much more optimistic than other physicians concerning the ability of disabled persons to work. She conceded that claimant's condition is serious and that he might not be successful in returning to work. She also acknowledged that disabled person's ability to work depends on the individual's ability to cope with his or her disability, including any associated pain. In contrast to her optimism, claimant's treating physician, an IME neurologist and an IME neurosurgeon stated that claimant is incapable of working. Some deference must be given to the treating physician's opinion in this case since he is the doctor most familiar with claimant's condition and his ability to cope with his condition. Based on claimant's testimony and demeanor at trial, and his job and personal histories, it is the Court's own assessment that claimant is ill equipped to deal with his disability and pain in a job setting. His job history is spotty and evidences his difficulty in getting along with employers. His motivation and attitude towards employment were poor even prior to the accident.⁽¹¹⁾ The Court is persuaded that claimant presently lacks the personality traits and coping skills necessary for him to tolerate his disability in an employment setting.

JUDGMENT

1. This Court has jurisdiction over this matter pursuant to section 39-71-2905, MCA.
2. Claimant is entitled to permanent total disability benefits.
3. Claimant is entitled to attorney fees and costs in an amount to be determined by the Court.
4. The JUDGMENT herein is certified as final for purposes of appeal pursuant to ARM 24.5.348.
5. Any party to this dispute may have 20 days in which to request a rehearing from these Findings of Fact and Conclusions of Law and Judgment.

DATED in Helena, Montana, this 18th day of May, 1994.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Ken H. Grenfell

Mr. Leo S. Ward

1. See discussion *infra* in Conclusion of Law No. 2.

2. Claimant first saw Dr. Hecht on July 31, 1987. (Hecht Dep. at 7.) The quoted material is from a form claimant filled out and returned to Dr. Hecht on August 3, 1987. (*Id.* at 8-9.)

3. The full paragraph of the history taken by Dr. Hildner reads:

JUL 28 1987 Wt. 218#. BP 140/80. Onset in January of shoulder pain and pain in the mid-thoracic spine. Some to the back of his neck as well. Feels tightness in the back of his neck and occasionally this seems to cause some headaches. Also has some pain in the left lower lumbar area. The patient frequently carries lots of boxes on his right shoulder and is tilted. Also carries his young child in the right hand and this seems to sometimes add to the pain in the left lower lumbar region.

The State Fund argues that reference to "onset in January" indicates that claimant's problems antedated the accident. The reference, however, is not clear and could, as claimant testified, refer only to the shoulder pain. The State Fund also argues that the lack of mention of any accident is evidence that claimant later fabricated the entire incident of June 9, 1987. As discussed in the conclusions of law, the State Fund's failure to allege fraud precludes the Court from considering that assertion.

4. Dr. Ethan Russo, a Missoula neurologist who examined claimant in September of 1992 as a part of a medical panel examination requested by the State Fund, noted claimant's complaints as follows:

At the current time the patient feels his greatest pain complaint is in the low back, which rates 6 on a 10-point scale. He still complains of pain radiating down the left leg to the buttock, thigh, and top of the foot. This is aggravated by walking, standing, etc. He braces himself when he has to cough. However, there is no specific Valsalva change. A bowel movement aggravates neck pain, which often rates an 8 on a 10-point scale, particularly over the last month. He is subject to transient episodes of 10/10 left shoulder pain. The pain may radiate into the limb anteriorly to the fifth finger. The "new one" is pain in the right anterior thigh.

(Ex. No. 1 at 350.) Dr. Dana Headapohl, a specialist in occupational medicine who participated in the September 1992 panel examination, reported claimant's symptoms as:

Current symptoms: Mr. Rasmussen complains of 2 major problems: 1) Neck and left shoulder pain, bending over, especially when using his left arm, causes an increase in the pain. The pain is not constant. When [he] has it, it's generally at the level of 4 on the visual analog scale. It may go up higher with certain activities. He occasionally gets shooting pain and tingling into his shoulder and into his hand, specifically into the left smallest 2 fingers, 4-5. He complains of left posterior shoulder and neck puffiness. He noticed this initially after the injury, and it has gradually been increasing. Low back pain with associated left leg pain. Again this is not constant pain and is approximately 4 on the visual analog scale. It is increased by prolonged standing, sitting, bending over, putting his head back, walking. It resolves with reclining. He also has some pain radiating into the lateral anterior portion of his right thigh. He finds that he has decreased endurance. While a bowel movement used to cause problems with his low back, he now finds that it causes pressure or pain at the base of his neck. He denies any other bowel or bladder problems, weakness, numbness, or pain other than left sciatic pain which does go into his foot occasionally. On many activities, he is unable to bend over. He suffers if "he" pushes it. He is able to drive 30 miles to Livingston with a car with an electric seat in it. He is able to do his own grocery shopping, but finds it difficult to carry a gallon of milk if his back is hurting. He has been unable to work since 11/87. He currently walks approximately 1/4 of a mile before becoming uncomfortable.

(Ex. No. 1 at 346-47.)

Dr. Henry Gary, a Missoula neurosurgeon who examined claimant on a referral from Dr. Gary Cooney, recorded the following complaints in his office note of September 3, 1992:

9/3/92 OFFICE VISIT: Mr. Rasmussen was seen at his request today. He has brought an MRI scan of both the neck and low back that were done in Bozeman in August of this year. The neck scan was done because of episodic neck pain, left arm pain, radiating down the left arm associated with some generalized weakness of the arm. He occasionally has some numbness on the side of the fourth digit of the left hand, he does not describe index and long finger numbness. He had one episode where he woke up the other day with numbness of the long finger of the right hand which went away after getting up and moving around. He had a lot of problem with cramping of the right hand and pain in the extensor tendon area of the right hand when he uses the computer. He describes pain in the back of the neck that radiates down into the interscapular area at times. He continues to have episodic pain in the left leg, episodic numbness of the lateral three toes of the left foot. With stretching he has occasional pain and numbness in the right anterior thigh. He has been unable to get on any type of exercise program.

(Ex. No. 1 at 455.)

5. The paragraph pertaining to the relatedness of the injury to the claimant's condition reads as follows:

His impairment rating is 12% whole person if it assumed [sic] that the cervical problem is not related to the 6-9-87 industrial accident. His rating is 17% whole person if the cervical problem is added. It should be noted that there is not evidence in the medical record connecting the neck condition with the 6-9-87 accident. (See attached impairment form). Please note if he elects to have surgery in the future he will have an additional rating.

(Ex. No. 1 at 358.)

6. A "do you agree with" question such as asked of Dr. Headapohl has limited evidentiary value. Such question depends on the accuracy of what the attorney depicts as the opinion of the other doctor, and is almost always incomplete since it does not contain other answers of the other doctor which may clarify or limit the opinion. It is preferable to ask the doctor to directly state his or her opinion.

7. Russo testified:

Q. I note also, Doctor, that three jobs were approved, guitar prep, computer assembly circuit board, and estimate assistant. Would you agree with the rest of the panel that these would be appropriate for Mr. Rasmussen?

A. Well, yes. Dr. Headapohl probably had additional information at her disposal. Additionally, she's trained in judging these things. It sounded reasonable to me, and, therefore, I signed it.

(Russo Dep. at 30.)

8. The State Fund argues that Dr. Gary excluded only full-time employment. The argument is based on Dr. Gary's September 3, 1992 letter disapproving several job descriptions and stating, "It is unlikely that he could handle any of these jobs on a full time basis." The statement, however, must be read together with the doctor's office notes, as quoted above.

9. Her testimony in this regard was as follows:

Q. So basically what you're saying is people with protruding discs, people with disc surgery, laminectomy, discectomy, people that have had fusions, problems of that nature, are capable of being employed under the right circumstances?

A. Right. A good example of that is one of the professors at UCSF has spinal stenosis, which is a narrowing of the canal, very significant back pain. In fact, it was obvious that he was always in back pain, very unpleasant throughout the whole -- I mean it was a five-year episode. What he found helpful when he lectured was something to lean back on, change positions. He spent 40 hours plus a week

working in severe pain. A lot of it depends on how you can figure out ways of getting through it and also how you see pain.

Q. How you visualize it?

A. How you view it. He saw pain as a challenge. He saw pain as something he certainly did not like, but something that was to be overcome, to be worked with.

(Headapohl Dep. at 29.)

10. Our analysis would differ if the dispute herein was over "what happened" rather than whether it happened at all. In this case the State Fund is not arguing that claimant's particular account of the accident is inaccurate, rather it argues that no accident occurred at all.

11. The present discussion of motivation and attitude is in the context of claimant's ability to cope with his disability and pain. If all that were keeping claimant from employment was a lack of motivation to find and pursue employment, then such lack of motivation would not provide a basis for finding that claimant is unable to work.