

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1996 MTWCC 22

WCC No. 9506-7319

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MICHAEL ROSS

Appellant

vs.

STATE COMPENSATION INSURANCE FUND

Respondent.

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ORDER ON APPEAL

**Summary:** Claimant appeals from DOL decision adopting recommendation of rehabilitation panel that he could return to a related occupation suitable to his education and marketable skills.

**Held:** Where case was submitted to the hearing officer on exhibits, depositions and briefs, the WCC was not required to defer to the hearing officer's determination of facts and was in as good a position as the department to review the evidence. WCC concludes the hearing officer's decision was clearly erroneous in light of the reliable, probative, and substantial evidence. In particular, the hearing officer's reliance on the written opinions of one doctor was misplaced where a contrary and more persuasive opinion was given by a physician who treated claimant over several years, and who testified at deposition. Moreover, the hearing officer's decision relies upon claimant's ability to perform a dispatcher position, which the rehabilitation panel itself concluded he was not able to perform.

**Topics:**

**Appeals (To Workers' Compensation Court): Standard of Review.** Section 39-71-1018, MCA (1987) provided for appeal from the department's final order in a rehabilitation matter to the WCC. While the WCC may not substitute its judgment for that of the agency as to the weight of the evidence (section 2-4-704(2), MCA), where the case was submitted to the hearing officer on exhibits, depositions and briefs, the WCC was not required to defer to the hearing officer's determination of facts and was in as good a position as the department to review the evidence.

**Benefits: Rehabilitation Benefits: Rehabilitation Panel.** WCC reversed DOL decision adopting recommendation of rehabilitation panel that claimant could

return to a related occupation suitable to his education and marketable skills. Where the case was submitted to the hearing officer on exhibits, depositions and briefs, the WCC was not required to defer to the hearing officer's determination of facts and was in as good a position as the department to review the evidence. The DOL decision was clearly erroneous in light of the reliable, probative, and substantial evidence. In particular, the hearing officer's reliance on the written opinions of one doctor was misplaced where a contrary and more persuasive opinion was given by a physician who treated claimant over several years, and who testified at deposition. Moreover, the hearing officer's decision relies upon claimant's ability to perform a dispatcher position, which the rehabilitation panel itself concluded he was not able to perform.

This is an appeal by Michael Ross, claimant, from Findings of Fact, Conclusions of Law, and Order issued on May 23, 1995, by the Department of Labor and Industry. In that decision the Department's hearing officer found that option (c) of section 39-71-1012, MCA (1987), is the first appropriate rehabilitation option for claimant. Claimant now appeals on the grounds that the decision was:

- a. in excess of the statutory authority of the agency;
- b. made upon unlawful procedure; and
- c. clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.

(Appellant's Brief at 7-8.)

### Factual Background

Claimant is 51 years old. He completed the eighth grade and obtained a GED in 1969. He attended bartending school in 1977. He has also attended adult education classes as recently as 1991.

Claimant has worked most of his life as a laborer, primarily as an ironworker. He has also been employed as a furniture deliverer, lounge manager and bartender.

Over the years he has suffered back problems. Initially, he suffered a low-back injury in 1968. In 1972 he suffered a second low-back injury. (Ross Dep. at 4, 5.) In 1972 or 1973 claimant underwent laminectomies and discectomies at the L4-5 and L5-S1 levels and a fusion of the L4 to the sacrum. (Ex. 3 at 1; Murphy Dep. at 3; Ross Dep. at 4.) Following the surgeries, claimant did not return to work until 1977. (Ross Dep. at 4.)

On June 20, 1990, claimant suffered a third industrial injury to his low back. At that time he was working as an ironworker for Stratford Steel on a job at the Pegasus mine. (Ross Dep. at 2-3.) He was on a 20-foot extension ladder, which he was moving down a wall by "jumping" it. (*Id.*) He momentarily lost control of the ladder and twisted himself in the process. (*Id.*) He felt a pop in his back and has not worked since. (*Id.*)

Following the 1990 injury claimant was treated by Dr. James P. Murphy, who is an orthopedic surgeon in Butte. Treatment included physical therapy, which was unsuccessful, and epidural block injections, which were also unsuccessful. An MRI was performed on July 3, 1990, but showed no disk herniation. (Murphy Dep. at 4.)

In July 1991, Dr. Murphy filled out a Physical Activities Checklist which showed the claimant could **occasionally** sit, stand, walk, drive, lift 10 pounds, as well as push/pull, bend, squat, kneel, crawl, twist, grasp, and reach. (Murphy Dep. Ex. 10.) However, at his deposition on January 24, 1995, Dr. Murphy testified that the list was no longer accurate and that claimant is "more restricted today." (Murphy Dep. at 20.)

Dr. Murphy referred claimant to Dr. Pius Baggenstos, neurosurgeon, for a consultation. (*Id.* at 4.) Dr. Baggenstos examined claimant sometime in 1990 and reported his impression as recurrent low-back sprain due to an industrial accident. (*Id.*)

On March 14, 1991, Dr. John S. Diggs performed an IME at the request of the insurer. He reported:

1. This patient has reached MMI . . . . There are no further recommendations for evaluation or treatment.
2. This patient cannot be expected to return to the heavy labor of steel work but is capable of light work activity. I agree with Dr. Murphy's opinion dictated September 14, 1990, for light duty work which requires lifting to 15-20 lbs. except I would modify the recommendation that he could carry up to 20 lbs. and could, on an infrequent basis, bend, crawl, stoop or work overhead.

(Ex. 2.)

On December 22, 1992, Dr. Murphy gave claimant an impairment rating of 18%. The rating was based on 10% for the prior diskectomies and 8% for the spinal fusion. Dr. Murphy did **not** release claimant to return to work to work at that time.

At Dr. Murphy's recommendation and the State Fund's request, the claimant was referred to Dr. Alan Weinert, a physiatrist, for an independent medical examination and possible enrollment in the Functional Restoration Program (FRP) at St. Peter's Community Hospital in Helena, Montana. Dr. Weinert examined the claimant on April 28, 1993, and recommended he enroll in the FRP, which he did.

Claimant underwent a Functional Capacities Evaluation (FCE) on May 18, 1993. The results of the FCE were considered valid and indicated that the claimant is employable in light work. The FCE report noted that the claimant demonstrated "Inappropriate Illness Behavior" and that his pain profile was high. (Ex. 6. at 55, 56, 68-69.) According to the report of the physical therapist who conducted the evaluation:

#### INAPPROPRIATE ILLNESS BEHAVIOR

Inappropriate Illness Behavior is an observable and measurable behavior which is out of proportion to the impairment and is measured by Non-Organic Signs,

Inappropriate Symptoms, High Pain Drawing scores, and movement patterns which improve by distraction.

Mr. Ross exhibited indications of Inappropriate Illness Behavior throughout the FCE. He initially rated his pain at 10/10+. This changed to 8/10+ and his pain ratings were either 8/10+ or 10/10+ throughout the remainder of the FCE. His pain ratings were out of proportion to the movement patterns demonstrated during the FCE. Additionally, movement patterns improved by distraction and Mr. Ross scored high on the Inappropriate Symptoms Questionnaire. Therefore, Inappropriate Illness Behavior is reported for this FCE.

## SYMPTOM EXAGGERATION

Symptom Exaggeration is a subjective determination by the evaluator of whether the patient's Pain Profile or Pain Rating is out of proportion to the observed movement patterns throughout the evaluation.

Mr. Ross's pain profile is HIGH. The pain profile is out of proportion to the patient's behavior and movement patterns observed. There is a significant disparity between the patient's estimation of his pain level and the evaluator's estimation of the patient's pain level. Additionally, Mr. Ross voluntarily continued with the FCE despite such high pain ratings which is characteristic of Symptom Exaggeration.

(Ex. 6 at 77.) The physical therapist who made the report did not testify.

Claimant completed the seven week FRP at St. Peter's Community Hospital. The program commenced in May 1993 and ended in June 1993. (Ex. 6.)

The program included work hardening, which simulates general work tasks. The claimant was able to "improve overall in the areas of relaxation during work tasks, pain management, pacing body mechanics and posture, strength and endurance." (*Id.* at 33.) In the discharge summary, the program coordinator recommended that the claimant continue with a supervised exercise program and work hardening.

At the time claimant participated in the program, he was living in Butte. The program was in Helena. Rather than drive back and forth between Helena and Butte, claimant stayed in a motel. (Ross Dep. at 8.) He testified that he stayed at a motel in preference to driving because his back bothers him when he drives. (*Id.*)

No one connected with the program testified. The claimant, however, testified concerning program activities.

During the first week program sessions lasted only a half day from approximately 9:00 a.m. to noon. (Ross Dep. at 9.) That week was devoted principally to stretching and physical exercise, including use of an exercise bike and treadmill. (*Id.* at 8-9.)

The second week the program expanded to two three hour sessions, one in the morning and one in the afternoon. (*Id.* at 10.) In addition to the fitness and stretching exercises

prescribed the first week, various activities were added, including pushing, pulling, squatting and lifting. (*Id.*) Claimant was unable to perform the lift from the floor. (*Id.*)

The last three weeks of the program were devoted to "work hardening" activities. The claimant testified this part of the program included a morning of exercise/stretching, with the remainder of the day spent doing simulated work activities such as sweeping, vacuuming, walking stairs, and shoveling sand. (Ross Dep. at 16-17.) While performing the tasks participants were able to take breaks and rest. (*Id.* at 17.) Claimant was permitted to apply ice to his back to relieve pain. (*Id.* at 15.) Claimant testified that he had to take a break after just about every exercise, sometimes for as long as a half hour. (*Id.* at 18.)

Dr. Weinert followed the claimant throughout the FRP. He performed a final follow-up examination on October 28, 1993. In his notes of that date the doctor states:

His functional capabilities as demonstrated through the functional restoration program and functional capacity evaluations were in the light physical demand level and I feel that this is an objective accurate determination of his abilities.

(Ex. 3 at 1.)

Vocational rehabilitation information in this case was documentary, consisting of the records of R. Wade Martin, a certified rehabilitation manager. Martin identified four jobs as potentially suitable for claimant. Analyses for the jobs were presented to both Dr. Weinert and Dr. Murphy.

Dr. Weinert approved two of the positions -- Motel/Hotel Desk Clerk and Cashier/Clerk - outright. He also approved the position of Motor Vehicle Dispatcher with the proviso that the claimant stand and stretch and move about every thirty minutes. (Ex. 11 at 12, 18, 21.) On February 10, 1994, Dr. Weinert notified the vocational rehabilitation provider that claimant had reached maximum medical improvement and could actively pursue retraining or employment. (Ex. 11 at 22.) He restricted the claimant to "light physical demand[ing]" work, lifting of less than 20 pounds, and no lifting from the floor. (*Id.*)

Dr. Murphy, on the other hand, disapproved all of the job descriptions presented to him by the vocational provider.

Dr. Murphy was deposed in connection with this case. Dr. Weinert was not. Therefore, other than his notes and correspondence, we have no information concerning his opinions and the basis for those opinions.

In his deposition Dr. Murphy reaffirmed his disapproval of both the motel/hotel desk clerk and the cashier positions. He explained that the position of motel/hotel desk clerk was disapproved because it required vacuuming, mopping and washing windows, activities which are inappropriate for the claimant. (Murphy Dep. at 18.) He disapproved the cashier job because claimant is unable to stock shelves. (*Id.* at 18-20.) After the attorney for the State Fund provided him with further information concerning the dispatcher position, Dr. Murphy indicated it might be "possible" for the claimant to perform that position. He emphasized that claimant had a five pound maximum lifting

restriction and could not bend or stoop. (*Id.* at 18-21.) It was Dr. Murphy's ultimate opinion that it was a "possibility" that claimant could work at a sedentary job such as the dispatcher position. Put another way, he stated the claimant "is in between nonemployable to sedentary." (*Id.* at 27.)

Mr. Martin researched the existence and wage range for the positions of cashier, desk clerk and vehicle dispatcher. (Ex. 11 at 4.) He determined that cashier and desk clerk positions are available in the Butte area and statewide, and that vehicle dispatcher jobs are not available in Butte but are available statewide. (*Id.*)

At the time of his deposition on January 24, 1995, the claimant described his pain as extending through his hips, buttocks, and down both legs. (Ross Dep. at 7.) He characterized his pain as continuous but said it worsens with physical activity. (*Id.* at 8, 18-19.) He can sit for only short periods of time, up to an hour, then must get up and move about. (*Id.* at 30.) When his pain intensifies, he lies down and applies heat. (*Id.* at 18.) Claimant has continued to do the stretching exercises he learned at the FRP. (*Id.* at 28.) He tried but had to discontinue riding an exercise bike. (*Id.*) Claimant states he is able to do many things but for only ten minutes at a time. (*Id.* at 29.)

#### Rehabilitation Panel Statutes

This case involves an application of statutes providing for a rehabilitation panel. Under those statutes, enacted in 1987 and repealed in 1991, a rehabilitation panel designated by the Department must recommend the first appropriate rehabilitation option for an injured worker. § 39-71-1012, MCA (1989). The options are:

- (2) The first appropriate option among the following must be chosen for the worker:
  - (a) return to the same position;
  - (b) return to a modified position;
  - (c) return to a related occupation suited to the claimant's education and marketable skills;
  - (d) on-the-job training;
  - (e) short-term retraining program (less than 24 months);
  - (f) long-term retraining program (48 months maximum); or
  - (g) self-employment.

Following the recommendation, the Department must issue an order determining the first appropriate option. § 39-71-1018, MCA (1989). Typically, the order adopts the panel recommendation, however, the statute does not restrict the Department to the recommendation, although it does require the Department to specify its reasons for any departure. *Id.* Following the issuance of the order, either party may request a hearing. §

39-71-1018(2), MCA (1989). Following the issuance of a final determination, either party may appeal that decision to this Court. § 39-71-1018(4), MCA (1989).

### Procedural History

As required, this matter was presented to a rehabilitation panel designated by the Department. On June 1, 1994, the panel issued its written recommendation. (Ex. 8.) It recommended "option (c), return to a related occupation suited to the claimant's education and marketable skills, as the first appropriate return to work option." (*Id.* at 2.) That recommendation was based on Dr. Weinert's approval of the three positions identified by Dr. Murphy. However, the panel report only confirmed two of the positions as available in claimant's local and/or statewide job pool. Those two were the cashier and the desk clerk positions.

The Panel Member from the Department of Labor and Industry with expertise in labor market information and research verified 2 of the positions as typically available within the claimant's local and/or statewide job pool. The average entry level wage for the position of **Hotel/Motel Desk Clerk** is \$5.00 to \$7.00 per hour and **Cashier Clerk** has no wage data.

(Ex. 8 at 1; emphasis added.) Of importance to the resolution in this case, the panel was unable to confirm the availability of the dispatcher position either locally or statewide.

On June 8, 1994, the Department adopted the recommendation in its Initial Order of Determination. (Ex. 9.) The claimant then requested a hearing. The State Fund did not submit any cross-request.

The parties then agreed to submit the case on exhibits, depositions and briefs. Ultimately, a Department hearing officer issued his Findings of Fact, Conclusions of Law, and Order on May 23, 1995. This appeal by claimant followed.

### Standard of Review

Section 39-71-1018, MCA (1987), provides for an appeal to the Workers' Compensation Court from the Department's final order. Review of that order is governed by section 2-4-704 (2), MCA, which provides:

(2) The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because:

(a) the administrative findings, inferences, conclusions, or decisions are:

(i) in violation of constitutional or statutory provisions;

(ii) in excess of the statutory authority of the agency;

- (iii) made upon unlawful procedure;
- (iv) affected by other error of law;
- (v) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;
- (vi) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or (b) findings of fact, upon issues essential to the decision, were not made although requested.

As a general rule, when reviewing a decision under the clearly erroneous standard of subparagraph (e), the hearing examiner's findings of fact may be overturned on judicial review only where they are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." *State Compensation Mutual Insurance Fund v. Lee Rost Logging*, 252 Mont. 97, 827 P.2d 85, (1992). The Court will not reweigh the evidence and the findings and conclusions of the fact-finder will be upheld if they are supported by substantial credible evidence in the record. *Nelson v. Semitool, Inc.*, 252 Mont. 286, 289, 829 P.2d 1, 3 (1992). However, in this case no hearing was ever held. Rather, the parties agreed to submit the case on exhibits, depositions and briefs. The standard of review is therefore broader. "Where crucial testimony is taken by deposition, the court will examine findings more closely, as it is in as good a position as the lower court to assess such evidence." *Stangler v. Anderson Meyers Drilling Co.*, 229 Mont. 251, 255, 746 P.2d 99, 102 (1987).

Conclusions of law must be examined to determine if they are correct. *Steer, Inc. v. Department of Revenue*, 245 Mont. 470, 803 P.2d 601 (1990).

### Discussion

On appeal the claimant contends that the Department lacked jurisdiction in this matter because the rehabilitation panel statutes have been repealed. He further argues that even if the Department had jurisdiction, the hearing officer's decision was clearly erroneous. The briefs filed on appeal advise the Court that following the Department's decision, the claimant underwent an additional laminectomy at the L3-4 level on May 18, 1995, and that total disability benefits were reinstated as of that date. However, claimant's benefit entitlement for the period June 8, 1994, the date of the Department's initial order, to May 18, 1995, is still at issue. Thus, the appeal is not moot.

#### 1. Applicability of Rehabilitation Panel Statutes.

The Court must initially consider the timeliness of claimant's appeal regarding this issue. Prior to the final resolution below, the claimant moved for summary judgment, arguing that the rehabilitation panel statutes did not apply to him since they had been repealed. The hearing officer denied the motion. Ruling on Motion for Summary Judgment (September 6, 1994). In his ruling the hearing officer included a notice stating that any appeal of the order to the Workers' Compensation Court had to be taken within 30 days after the mailing of the order. Claimant did not appeal within that time, although he

timely appealed the final decision. The State Fund argues that claimant's present appeal regarding that issue is untimely.

The State Fund's contention is without merit. The denial of a motion for summary judgement is an interlocutory order which is not appealable. *Brown v. Midland National Bank*, 150 Mont. 422, 428-29, 435 P.2d 878 (1968). The denial of the motion is reviewable on the appeal from the final order. *Id.*

The Court must therefore consider the applicability of the rehabilitation statutes. In fact, it has done so in a prior decision. In *Wood v. MSGIA*, WCC No. 9401-6986, Order Granting Partial Summary Judgment, decided August 12, 1994, the petitioner pointed out that the rehabilitation panel procedures were repealed effective July 1, 1991. He argued that the rule requiring application of "the law in effect at the time of the injury" is inapplicable since the rehabilitation statutes are purely procedural, thus the procedure in effect at the time of adjudication should prevail. We rejected those arguments, pointing out that some of the provisions were substantive and that those substantive provisions were inextricably interwoven with the procedural ones. Referring to those substantive provisions governing rehabilitation panels, I said:

One of the obvious purposes of the provision for twenty-six weeks of total rehabilitation benefits, § 39-71-1023, MCA (1989), is to provide the disabled worker with compensation during the rehabilitation panel process. Indeed the benefits are triggered by the Department's designation of a rehabilitation provider . . . . § 39-71-1023(2), MCA (1989). In turn, the designation of the rehabilitation provider sets in motion the remaining procedures for determining the first appropriate rehabilitation option. If some of those procedures are abandoned then the wheels come off of the entire statutory scheme. As did Judge Reardon, I hold that the rehabilitation panel procedures enacted in 1987, and codified at section 39-71-1012 et seq., MCA (1987), are applicable to injuries occurring between the effective date of the procedures and the date of their repeal. . . .

*Wood* at 8-9. Therefore, claimant is subject to the rehabilitation panel process and the Department had original jurisdiction to determine the first appropriate rehabilitation option.

## 2. The Hearing Officer's Decision.

The hearing officer's ultimate findings of fact concerning claimant's ability to work and the availability of jobs are actually set forth in his conclusions of law, perhaps because they reflect his application of legal principles. The findings of fact themselves contain a narrative of the evidence, ending in a finding concerning claimant's pain complaints, as follows:

21. Constant pain persists through the hips, the buttocks and into both legs, right greater than left. Any physical activity or prolonged sitting (more than 30 to 45 minutes) aggravates the pain. His only recourse then is to lie down for about 15 to 60 minutes and apply heat. (*Depo. of Claimant* pp. 5 @ 8 8@ 20 and 18 @ 13 25.)

The hearing officer read a prior decision of this Court, *Sather v. State Compensation Insurance Fund*, WCC No. 9306-6821 (March 4, 1994), as holding that a "claimant's self-professed limitations and pain behavior do not overrule the medical opinions as to ability to engage in productive work activity in the position identified." Conclusion of Law 4 at 11. He went on to give greater weight to Dr. Weinert's opinions while noting that Dr. Murphy's opinion regarding the dispatch position amounted to his "tacit approval" for that job. Conclusion of Law 5 at 11-13. Finally, he concluded:

It is therefore concluded that, given Dr. Weinert's explicit approval for return to work in an occupation of "light" duty and Dr. Murphy's tacit approval of return to work in a "sedentary" position, of which Motor Vehicle Dispatcher meets the latter criteria, **the position identified** is medically approved. In addition, given there is no assertion **the position** is not suited to the claimant's education and marketable skills, the panel's determination must be concluded to be correct. [Emphasis added.]

(Conclusion of Law 5 at 13.)

As stated in the section concerning the standard of review, since this case was decided on exhibits, depositions and briefs the usual deference due Department decisions does not apply. The Court is in as good a position to review the evidence as was the hearing officer, thus his findings of fact are subject to greater scrutiny.

Claimant contends that the hearing officer erred by discounting the claimant's complaints of pain and relied instead on clinical records which reported that claimant "exhibited inappropriate illness behaviors and symptom exaggeration." (Finding of Fact 12 at 5.) He further contends that the hearing officer erred in finding that the jobs approved by the Rehabilitation Panel were "medically approved." While those specific contentions are wide of the mark, I nonetheless conclude that the exhibits and depositions do not provide substantial support for the hearing officer's findings of fact.

Initially, I note that in his final conclusion of law quoted above, the hearing officer refers to "the position" in the singular. While it is not totally clear whether he meant the dispatch position only, or whether he intended to refer to all three positions, the references to "the position identified" and to "the position" are in the singular. Moreover, reference to "the position identified" immediately follows a specific reference to the Motor Vehicle Dispatcher position. I therefore read his decision as based only upon the dispatcher position.

That holding is clearly erroneous. Putting aside the medical opinions for the moment, the finding is contrary to the rehabilitation panel's determination that only the cashier and desk clerk jobs could be confirmed as available in claimant's local and/or statewide job markets. Not only must the claimant be able to physically perform the job identified in any return to work option, the job must be available either locally or statewide. Section 39-71-1012(3), MCA (1989), provides:

(3) Whenever possible, employment in a worker's local job pool must be considered and selected prior to consideration of employment in a worker's statewide job pool.

Section 39-71-1017(3)(a), MCA (1989), requires the rehabilitation panel to make specific findings that "identify jobs in the local or statewide job pool and the worker's anticipated wages from each job." Section 39-71-1011(7)(a), MCA (1989), defines "worker's job pool" as "those jobs **typically** available for which a worker is qualified . . . ." In this case, the dispatcher position was not identified as within either the statewide or local job pool.

While the report of Martin states that the dispatcher position is available on a statewide basis, that report was made prior to the time the rehabilitation panel met and was available to the panel. The panel, which included a labor market expert from the Department of Labor, did not concur with Martin's conclusion. Martin did not testify and did not provide any later report. Thus, the hearing officer did not have substantial evidence to disregard the panel finding.

Even had the hearing officer intended to find that claimant was capable of performing all three of the jobs approved by Dr. Weinert, that finding would have been erroneous. Dr. Weinert did not testify and was not subjected to cross examination concerning his conclusions. Dr. Murphy on the other hand did testify and expressed firm opinions, based on his treatment of claimant over a period of several years, that claimant could not perform either the cashier or desk clerk jobs. He did **not** opine that claimant can perform the job of dispatcher, only that it is "possible" that he can. He gave specific reasons for his opinions.

Dr. Murphy was questioned as to whether he had observed any exaggeration of claimant's pain:

Q. Did you ever notice any symptom exaggeration in your treatment of Mr. Ross?

A. I can't think of any specific thing right now.

Q. And as far as you recall, your records don't indicate one way or the other?

A. I would have to look through the whole bunch of them here. But I don't know.

(Murphy Dep. at 14.) Dr. Murphy's records, which are attached to his deposition and also set forth in Exhibit 5, do not reveal any note which would indicate the doctor had reason to doubt the claimant's veracity or that his symptoms of pain were not genuine. The notes describe "radicular pain into the lower extremities" and "pain with sitting, pain with standing, pain with any **prolonged activities of any type.**" (Ex. 5 at 2-3; emphasis added.) Dr. Murphy testified that he has not considered the claimant to be employable since December 22, 1992. (Murphy Dep. at 6-7.)

Q. Have you since that time [December 22, 1992] considered him to be employable?

A. No. I can honestly say no. We've tried everything, I think. We've tried epidural blocks, we've tried psychiatric help, pain clinic, the whole bit, and he just still has pain.

(Murphy Dep. at 7.)

The hearing officer's reliance on Dr. Weinert's written opinions and the records of the FRP are misplaced. Again, the individuals making the written entries did not testify. Moreover, claimant's testimony points out the limitations of the FRP. His testimony, which is uncontradicted, shows that the program did not even roughly approximate ordinary, every day work conditions. Claimant was never expected to put in a full day, could take breaks as needed and could tend to his back as needed. While he made progress in the program that progress does not provide substantial evidence that he could hold down regular employment. In light of the limitations of the FCE and the FRP, and Dr. Weinert's apparent reliance on them, Dr. Weinert's opinions do not carry as great a weight as do Dr. Murphy's.

The hearing officer's reliance on *Sather v. State Fund*, WCC No. 9306-6821, (March 4, 1994) is also misplaced. That case does not establish the proposition that claimant must be deemed, as a matter of law, employable if he or she is released by her/his physician to perform the job in question. In *Sather* not only did claimant's physician release her to return to work, the claimant "conceded that she could physically perform the duties of a motel clerk." In this case there were conflicting medical opinions. Moreover, there was affirmative evidence based on claimant's participation in the FRP that claimant would have difficulty maintaining regular employment. The evidence that claimant can perform tasks for only short periods was uncontradicted.

Reviewing the evidence as a whole, I find that in light of the reliable, probative, and substantial evidence, the decision of the hearing officer was clearly erroneous.

Claimant argues that this Court should find him permanently totally disabled. It cannot do so. Under the statutes in effect at the time of the claimant's injury, the Department must determine the first appropriate option. Since it considered only option (c), this matter must be remanded for consideration of the other options below (c). If the Department then finds that none of those options are appropriate, then the claimant will be deemed permanently totally disabled.

### ORDER

IT IS HEREBY ORDERED that:

1. The decision of the Department hearing officer is **reversed**. This case is **remanded** for consideration of the options below (c).
2. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.
3. Any party to this dispute may have 20 days in which to request an amendment or reconsideration of this decision.

Dated in Helena, Montana, this 28th day of February, 1996.

(SEAL)

/s/ Mike McCarter  
JUDGE

c: Mr. R. Lewis Brown  
Mr. Daniel J. Whyte  
Ms. Christine L. Noland  
Mr. Brian McCullough - Zip Mail  
Submitted: December 13, 1995