

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1996 MTWCC 8

WCC No. 9502-7230

CATHERINE E. SATTERLEE

Petitioner

vs.

LUMBERMEN'S MUTUAL CASUALTY COMPANY

Respondent/Insurer for

BUTTREY FOOD & DRUG

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: 61-year old grocery store checker strained her left trapezius and shoulder at work. She recovered and was able to resume checking duties, but suffered disabling pain associated with degenerative disc disease and arthritis exacerbated by the injury and by post-traumatic stress disorder and depression, associated with several tragedies in claimant's personal life.

Held: Claimant is permanently totally disabled, but her disability results from psychological trauma occurring subsequent to her injury. Her claim is not compensable. **Note:** this decision was reversed in [*Satterlee v. Lumbermen's Mutual Casualty Co.*, 280 Mont. 85, 929 P.2d 212 \(1996\)](#), which held that substantial evidence did not support the conclusion that the psychological condition arose only post-injury.

The trial in this matter was held on August 30, 1995, in Butte, Montana. Petitioner, Catherine E. Satterlee (claimant), was present and represented by Mr. Bernard J. Everett. Respondent, Lumbermen's Mutual Casualty Company, was represented by Mr. Thomas A. Marra. The claimant and Elaine Seibel were sworn and testified. Exhibits 1 through 7 and 9 were admitted by stipulation. Exhibit 8 was admitted over the objection of Mr. Everett. The depositions of the claimant, Robert Buhl, Dana Headapohl, M.D. and Patricia Schendel were submitted for the Court's consideration.

Issues presented: Claimant asks the Court to determine that she is permanently totally disabled as a result of a July 25, 1992 industrial injury. She also seeks a penalty, attorney fees and costs.

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

FINDINGS OF FACT

1. Claimant is presently 61 years old. At the time of her industrial accident she was 57. She has lived for many years in the community of Anaconda.
2. Claimant did not graduate from high school but does have a GED.
3. Claimant has worked as a waitress, a clerk and in a smelter. During the 15 years prior to her industrial injury, she worked as a checker for Buttrey Food & Drug.
4. On July 25, 1992, while working for Buttrey, claimant attempted to turn over a 40-45 pound bag of dog food on the bottom of a shopping cart. In doing so, she strained her left trapezius and shoulder area.
5. Claimant returned to work the following day, but within three or four hours pain "set in the shoulder." (Ex. 6 at 25.) When she went to work the next day, the same thing happened. On both days she continued working. On the third day, however, she was only able to work for an hour or two. She has not worked since July 28, 1992.
6. At the time of the injury, Buttrey was insured by Lumbermen's. Lumbermen's accepted liability for the claim and thereafter paid temporary total disability benefits until February 23, 1993, at which time those benefits were terminated. It has also paid medical expenses.
7. Claimant was a credible witness.
8. The claimant was able to perform all of her job duties as a checker for Buttrey during the 15 years prior to her industrial injury. She testified that she never suffered neck or left shoulder pain prior to July 25, 1992. Medical examinations following her industrial accident show that she suffers from preexisting cervical disk disease. However, that disease was asymptomatic prior to her injury.

Medical

9. Following her industrial accident, claimant was initially seen on July 29, 1992, by Dr. Zachory Deiss. He diagnosed her injury as a left trapezius strain and prescribed Flexeril and Lodine⁽¹⁾. (Ex. 6 at 29.)
10. Claimant was then treated by Dr. Ira E. Fender, who first saw claimant on August 3, 1992, with respect to her injury. (Ex. 4 at 5.) During his first examination, the doctor noted

"muscle strain with spasm" in the upper back. (*Id.*) In addition to continuing the medications previously prescribed, Dr. Fender prescribed physical therapy. (*Id.*) Physical therapy began the same day and continued until October 10, 1992. (Ex. 6 at 47-54.)

11. On August 24, 1992, claimant was again examined by Dr. Fender. She reported that her back was better, "[b]ut I will not go back to work in pain." (Ex. 4 at 6.) Despite improvement, she still had pain in the area of the rhomboid trapezius muscle and Dr. Fender noted that she still had muscle spasm. (*Id.*) Dr. Fender's office note further reflects that claimant was "under [increasing] stress." Dr. Fender prescribed Xanax for the stress.⁽²⁾ (*Id.*) He later noted on August 24th that claimant's stress was "not work related but due to other factors." (*Id.* at 10.)

12. The claimant returned to Dr. Fender on September 24, 1992. (*Id.* at 8.) At that time she reported that her back was okay unless she used it, but that she experienced pain if she used her left hand repeatedly or lifted. (*Id.*) She specifically noted pain in her trapezius, shoulder and chest due to muscle spasm. (*Id.*) On examination Dr. Fender noted the presence of "mild trapezius spasm." (*Id.*)

13. Dr. Fender ordered an MRI of claimant's cervical spine. The imaging was done on September 28, 1992, and revealed:

Spondylosis Is Producing Spondylotic [Sic] Spurs Centrally and to the Left at the [C]5-6 and [c]6-7 levels causing borderline spinal stenosis and partial obliteration of the nerve root canals.

(*Id.* at 9.)

14. Dr. Fender saw the claimant again on October 13, 1992. (*Id.* at 11.) He noted that she still had neck discomfort and that physical therapy the previous day had aggravated the pain. He referred the claimant to Dr. Richard C. Dewey for a neurological consultation. Dr. Fender did not see the claimant again until January 1995, when she fell and broke her arm. (*Id.* at 11-12.)

15. Dr. Dewey examined claimant on October 15, 1992. He reported the following:

[S]ignificant spasm of all of the trapezius on the left side in and around the left scapula. On the right side this is not so.

There is marked tenderness to the interscapular, suprascapular, and trapezius and poor ROM of the cervical spine.

....

The MRI scan shows significant degenerative disc disease at C3-4, 4-5, 5-6, and 6-7 with significant posterior spur formation. There is no spinal stenosis. Neuroforamina on the left side can not be adequately evaluated.

There is a significant muscular component to the patient's symptoms and unfortunately her exercise program has been defeating any attempts at providing muscle relaxation

[T]here may be some underlying radiculopathy but it is impossible for me to determine this at this time because **muscle spasm is so severe**. I will see her again at any time. I do not feel that this is a surgical problem but one of muscle spasm. . . . [Emphasis added.]

(Ex. 1 at 1-2.)

16. Following Dr. Dewey's exam, claimant traveled to Sequim, Washington to be with her daughter, who was awaiting a heart-lung transplant. (Claimant's daughter suffered from cystic fibrosis.)

17. While in Washington claimant was seen by Dr. Alvin Harris, an orthopedic surgeon, on December 23, 1992. Claimant reported: "The left shoulder constantly burns. I get spasms above the shoulder and behind it and under the arm. The pain does not awaken me." (Ex. 2 at 5.) In a letter to Intermountain Claims of Montana, which adjusted the claim for Lumbermen's, Dr. Harris commented:

The patient's symptoms strongly suggest a cervical neuropathy involving the left upper extremity. She relates this to a work incident having occurred on July 25, 1992 with symptoms centered upon the left shoulder.

To my knowledge, the patient had no prior awareness that the problems may have had their origin in the neck. A single x-ray observed in this office, together with the MRI indicates **advanced degenerative changes in the neck with spinal stenosis at the C-5, C-6 level, and the C-6, C-7 levels**. [Emphasis added.]

(Ex. 2 at 8.)

18. Dr. Harris referred the claimant to Dr. Donna Frankel for a neuromuscular electrodiagnosis consultation which occurred on January 12, 1993. (Ex. 3 at 4-5.) After reviewing Dr. Frankel's report, Dr. Harris commented that Dr. Frankel "believes that the neck symptoms may be the result of **local impingement from arthritis** rather than a significant radiculopathy. " (Ex. 2 at 3, emphasis added.)

19. On February 1, 1993, Dr. Harris responded to questions posed by Intermountain concerning claimant's condition:

To answer your specific questions regarding the patient's symptoms being a direct result from the reported injury of July 25, 1992, I would be inclined to say that the degenerative changes within the neck preceded that by a number of years, despite the fact that the patient denies having prior symptoms. **It is possible that the**

employment incident aggravated the existing pathology so that symptoms arose. If the patient's symptoms resulted from a strain in the neck when she lifted the 40 pound bag of dog food, then healing of the soft tissue certainly should have occurred within a six week period. **It is difficult to rationalize a permanent partial impairment related to that one incident.** [Emphasis added.]

(Ex. 2 at 3.)

20. Based on Dr. Harris' report the insurer terminated claimant's temporary total disability benefits on February 23, 1993.

21. Claimant's daughter passed away and claimant returned to Montana in the Spring of 1993. She sought medical care from Dr. Michael J. Sadaj, who specializes in internal medicine and pulmonary disease. Dr. Sadaj had previously treated and cared for claimant's daughter.

22. Claimant initially saw Dr. Sadaj on May 10, 1993, for depression and insomnia. (Ex. 9 at 1.) Dr. Sadaj's office record for that date noted claimant's recent loss of her daughter. It also notes that the recent loss was the latest in a series of personal losses suffered by claimant in recent years. Specifically, he noted, "She has had quite a bit of trauma in the last few years with [the] loss of 2 grandchildren, loss of her daughter, loss of 2 husbands, and loss of a son." The Court notes that the claimant's son was killed in an automobile accident approximately two years prior to her industrial injury and that the claimant was treated by Dr. Fender for depression and insomnia at that time. (Ex. 4 at 1.) In addition, various records indicate that in 1993 the claimant's sister was dying of a brain tumor. (Ex. 7 at 63; Ex. 9 at 6-7.)

23. Dr. Sadaj saw claimant again on May 20, 1993. She was still depressed and related that a niece and three of her niece's children had perished in a fire the previous week. (Ex. 9 at 2.)

24. During the months that followed, Dr. Sadaj continued to treat claimant for her depression and insomnia. He referred her to a counselor (Sue Bennett) and then a psychiatrist (Dr. Kenneth Olson) for further psychological treatment. He also treated her for acute medical conditions, including phlebitis, nausea, vomiting, tremors and chest pain. (*Id.*) The last treatment note by Dr. Sadaj and his medical associates is for May 22, 1995. (*Id.* at 13.)

25. Dr. Sadaj's office notes for his two years of treatment of claimant do not reflect complaints by claimant of shoulder, upper back and/or neck pain or claimant's July 1992 industrial injury. The medical history taken by Dr. Olson on August 27, 1993, also does not mention neck, upper back or shoulder pain or muscle spasm but does mention arthritis and other prior medical problems, including ulcer disease, phlebitis and hypertension. (Ex. 7 at 78-81.)

26. Dr. James R. Burton, an orthopedic surgeon practicing in Missoula, performed a disability examination of claimant on November 16, 1993. (Ex. 5.) He performed a physical examination which encompassed the cervical spine, upper extremities and upper back. His notes do not record any complaints of pain or of muscle spasm in those areas, nor do they reflect any report of claimant's July 1992 industrial injury. After reviewing spinal x-rays, Dr. Burton reached the following conclusions:

IMPRESSION: Degenerative disc disease and degenerative arthritis of the cervical spine.

Significant generalized osteoporosis. Minimal upper thoracic scoliosis related to compression, degenerative disc disease and osteoporosis. Acute and subacute stress reaction.

It is my opinion, this lady is unable to do any significant work related activity for which she has training or experience.

(*Id.* at 3.) Dr. Burton's statement that claimant could not work in occupations in which she had training or experience was made in the context of a work history as "a waitress, cook and cashier." (*Id.* at 1.)

27. After January 1993, the first mention in any medical record of shoulder-neck-back complaints was on July 26, 1994, when claimant returned to Dr. Dewey. At that time she reported that "[s]he continues to have pain in the trapezii [sic] on the left side, numbness in the distal digits of each finger that comes and goes, heat helps." (Ex. 1 at 4.) Dr. Dewey further recorded, "**Her symptoms wax and wane.**" (*Id.*, emphasis added.) His examination of claimant showed "marked spasm of the trapezii [sic] on the left side which is the major culprit." (*Id.*) After examining claimant, he wrote:

The patient does have some cervical spondylosis, but her symptoms are still **muscular**. She has **not** been doing the exercise program which I showed her two years ago . . . There is so much muscle spasm it is difficult to see beyond that to determine whether neurologic problems exist or don't. By examination, there are no neurologic problems and her symptoms are primarily muscular. Unless she is willing to be compliant in an exercise program for her low back, as well as her neck, I doubt that she will get much improvement. [Emphasis added.]

(*Id.*)

28. In the meantime, in August 1993, the claimant applied for social security disability benefits. In her initial interview on August 25, 1993, claimant listed "Post Traumatic Stress Syndrome Trauma from Dth [death] of children/back strain" as disabling conditions. (Ex. 7 at 50.) In her disability application she listed her "disabling condition" as "Back Pain Constant - Totally Traumatized over deaths of [her] children." (*Id.* at 138.) In her responses

to a pain questionnaire, claimant described her physical pain as follows: "L [low] back, neck, arm - aching c [with] sharp pain occasionally, chest heart." (*Id.* at 115.) She described diminished activities, primarily sitting, watching television (10 hours a day), and reading, with minimal household chores. (*Id.* at 116, 118.) She said she suffered from constant "physical and emotional" pain (*Id.* at 115) and added that she was "unable to function in a daily capacity due to extreme grief." (*Id.* at 120.)

29. On December 14, 1993, the Social Security Administration concluded that claimant was totally disabled. (*Id.* at 53.) Social Security disability benefits thereafter commenced.

30. The rationale for the disability determination was as follows:

This 59 year old female alleges disability as of July, 1992 because of back pain, severe emotional trauma.

Review of the medical evidence shows that the claimant has been grieving due to the recent deaths of her children. She has had a chaotic past. She has major depression and post traumatic stress disorder, and panic disorder. She also has degenerative disc disease, arthritis of the spine and osteoporosis. Her condition does affect her ability to work. She should avoid frequent climbing, stooping, exposure to vibration and working around hazardous machinery and the general public. Taking into consideration her work, age and education, this claimant should be considered a medical vocational allowance.

(*Id.* at 53.) The Disability Determination and Transmittal document signed December 27, 1993, shows that the primary diagnosis for the claimant's disability was "Affective Disorders" with a secondary diagnosis of "Osteoarthritis/Allied Ds." Claimant's July 1992 injury was not mentioned. (*Id.* at 9.)

31. At the time of the social security determination, claimant was plainly totally disabled on account of her depression and grief. Dr. Olson, her treating psychiatrist, wrote on October 19, 1993, "I would consider her at this time 100% disabled as far as any work-related activities." (*Id.* at 72.) While the Court has no more current psychiatric opinion, claimant's testimony indicates that she continues to suffer depression.

32. The more difficult question, which must be answered in this proceeding, is whether claimant was, and continues to be, permanently totally disabled on account of her industrial injury.

33. Claimant testified that she has had pain in her left shoulder, neck and arm ever since the 1992 injury. I find her testimony credible. The lack of mention of her pain in the records of Drs. Sadaj, Burton and Olson does not persuade me that her shoulder/neck pain and spasm had remitted. On the other hand, the lack of any mention of shoulder and neck complaints, together with the mention of other physical complaints, persuades me that

claimant's shoulder and neck pain were not her predominate problems and that she was coping with them without medical assistance. In 1993 and 1994 the claimant was preoccupied with family losses and severely depressed. She thought about suicide although she did not act on her thoughts. The physical ailments for which she sought care were acute ones of recent onset.

34. Claimant clearly suffers from preexisting degenerative disk disease of the cervical spine. Dr. Dewey concurred with Dr. Harris that the degenerative problem in the claimant's neck had preceded by years the onset of her symptoms. Dr. Dana Headapohl, a specialist in occupational medicine, participated in a medical panel which conducted an independent medical examination and she similarly concluded that claimant suffers from preexisting cervical disk disease. (Ex. 6 at 1.)

35. When Intermountain asked Dr. Dewey for his opinions concerning claimant's current complaints, he responded by letter on September 12, 1994, writing in relevant part:

[H]er problem is primarily muscular and not neurologic

I would agree with Dr. Harris that the degenerative problem in her neck preceded by years the onset of her symptoms. I felt that the symptoms represented muscular spasm which can occur abruptly with or without degenerative disease of the neck and treatment for this was suggested and shown the patient in October of 1992, and by July of 1994 the patient has shown no evidence of compliance with that exercise program. I would defer to Dr. Harris completely in this matter, as he is more closely identified as her treating physician.

(Ex. 1 at 3.)

36. Claimant was evaluated by the St. Patrick Hospital Medical Panel on April 18, 1995. The panel was composed of Dr. Dana Headapohl, a specialist in occupational medicine and panel chair, Dr. Timothy Browne, an orthopedic surgeon, Dr. Ethan Russo, a neurologist, and Dr. Martin Cheadle, a psychologist. (Ex. 6 at 1.)

37. At the time of the panel examination claimant was experiencing muscle spasm and pain. Dr. Browne noted "severe muscle spasm in the cervical, thoracic, and lumbar area with severe tight muscles in all areas." (Ex. 6 at 12.) Dr. Russo noted "some guarding around the L [left] shoulder girdle." (*Id.* at 21.) Dr. Russo also reported that claimant rated her neck and trapezius pain as a 10 on a scale of 1 to 10, with 10 being the most severe pain. (*Id.* at 20.)

38. The panel concluded that claimant has reached maximum medical improvement with regard to her 1992 injury. (*Id.* at 1.) Dr. Russo observed that he "would consider her at MMI even a short few weeks after the original injury." (*Id.* at 21.)

39. In its final report the panel responded to specific questions posed by counsel for Lumbermen's. It concluded that the claimant's current medical status was depression and cervical disk disease. (*Id.* at 1.) While agreeing that claimant's prognosis for the future was "[g]uarded for pre-existing disc disease," the panel concluded that her physical limitations place her in the light to sedentary range. (*Id.*) Finally, it offered the following comment in response to a question asking whether claimant had "residual effects as a result of the 7/25/92 injury that would preclude her from returning to work?"

No. However, she would benefit from aggressive treatment of her non work related pre-existing post traumatic stress disorder and depression. She also may benefit from learning a home exercise program.

(*Id.* at 2.)

40. Dr. Headapohl testified by deposition. She said she concurred in the finding of Dr. Harris that the claimant's restrictions were due to preexisting problems and that the claimant had **no impairment** resulting from the strain injury. (Headapohl Dep. at 17-18, emphasis added.) She further agreed with Dr. Dewey's assessment that the claimant's "problem is primarily muscular and not neurologic." (*Id.* at 19.) Her agreement with Drs. Harris and Dewey that the injury was muscular in nature was based upon the fact that there was no significant finding on radiographs; also, the nature of claimant's pain was entirely consistent with a soft tissue injury and there was no evidence of neurologic compromise. (*Id.* at 22.)

41. In his report, Dr. Cheatle concurred "with the opinions of Drs. Dewey and Harris that the patient has pain based on myofascial type pain syndrome which is well past the point of functional improvement." (Ex. 6 at 19.)

42. Dr. Headapohl was asked whether claimant's 1992 injury aggravated her preexisting condition. She responded:

A: All right. The injury temporarily aggravated a pre-existing problem, but caused **no permanent residuals**. So in that sense, it was related. It did not cause further damage, nor did it cause the pre-existing cervical disease. [Emphasis added.]

(*Id.* at 20.) She opined that it was more probable than not that the claimant's physical restrictions and limitations are the result of the preexisting degenerative cervical disk disease and **not from the injury**. (*Id.*)

43. However, in response to questions put to her on cross-examination, Dr. Headapohl conceded that in her opinion claimant's 1992 injury made her previously asymptomatic disk disease symptomatic:

Q: Dr. Harris, correct. Okay. In the second paragraph, apparently just the second sentence, the first sentence appears to be rather long, he states, "It is possible that

the employment incident aggravated the existing pathology so that symptoms arose"; is that correct?

A: That's what that says.

Q: Do you agree with that opinion of the doctor?

A: Yes, I think it is possible, yes.

(Headapohl Dep. at 30.)

Q: And muscle spasm is an objective finding of the presence of pain, isn't it?

A: It can be of pain or irritation, yes.

Q: And it is present when an individual sustains a muscular injury, is it not?

A: It can also be present when one has arthritic changes.

Q: Now, I take it it is your opinion that Catherine Satterlee suffered from a pre-existing degenerative disc disease of her cervical spine that pre-existed her injury of July 25, 1992?

A: That's correct.

Q: And that according to the information that's been provided to you, even though she had this pre-existing condition, it was not symptomatic for pain; is that correct?

A: By my history, it was not symptomatic for pain.

Q: And she was also able to do the work as a checker and perform her duties before the injury of July 25, 1992?

A: Correct. That's what she stated to me.

Q: And it is true, is it not, that trauma superimposed upon a pre-existing cervical disc disease condition can cause the condition to be aggravated and become symptomatic for pain?

A: Yes, it is.

(Id. at 34-35.)

Q: Now, you -- well, Doctor, let's ask the straightaway question. Based upon the history, the medical records that were provided to you, your examination of the claimant, the examinations of the other physicians on your panel, do you have an opinion, to a reasonable degree of medical certainty, as to whether it is more likely than not that the injury of July 25, 1992 sustained by Catherine Satterlee aggravated

her pre-existing cervical spine condition so as to cause it to become symptomatic for pain?

A: Yes.

Q: What is your opinion?

A: That it did aggravate her pre-existing underlying problem.

Q: And that her problem with that underlying condition and the reason she has difficulty working is because of her pain; is that correct?

A: Could you repeat the first part of that?

(Whereupon, the Court Reporter read back the previous question.)

A: It is correct that her difficulty working is as a result of the pain. However, our restrictions or recommended restriction on her regarding the type of work she can do has to do with the pre-existing arthritic condition.

(*Id.* at 37-39.)

Q: And her pain is, in your opinion, caused by an industrial injury?

A: No.

Q: Her pain is caused by the pre-existing condition?

A: Yes.

Q: And the pre-existing condition was aggravated by the injury that caused it to become painful?

A: True.

(*Id.* at 46-47.)

Dr. Browne's report of his examination reflects his opinion that "[t]he accident caused progression of the preexisting [condition]." (Ex. 6 at 13.)

44. The opinions of Drs. Headapohl, Browne and Harris persuade me that claimant's 1992 industrial accident aggravated her preexisting cervical disease in the sense that it made her condition symptomatic, triggering pain and associated muscle spasm.

45. Dr. Headapohl precluded claimant from returning to her time-of-injury job on account of her underlying cervical disk disease, noting the danger that claimant could suffer further injury. (Headapohl Dep. at 50-51.) However, in her opinion Dr. Headapohl does not believe that either claimant's preexisting condition or her pain precludes her from working altogether. Dr. Headapohl approved job analyses for keno caller and auto self-service

cashier. (*Id.* at 15-16.) She testified that claimant could perform either of those jobs safely and without physical risk. (*Id.* at 52.)

46. Dr. Headapohl acknowledged that the claimant suffers from shoulder and neck pain and made two points which are central to a decision in this case. First, she noted her opinion that claimant's psychological condition is amplifying claimant's pain. (*Id.* at 37, 54.) In discussing the role of psychological stressors, she said:

Q: And would, in your opinion, her pain in her neck and left shoulder should be considered permanent as of this time?

A: I can't say that because I believe that much of her pain and her response to pain has to do with the significant emotional stressors in her life. It is quite possible that given resolution of some of these issues, which may take psychotherapy on her part for post-traumatic stress, that her pain would be greatly reduced, if not absent.

However, given her radiographs, it's more likely than not that she'll have continued pain based upon the arthritic changes.

(*Id.* at 37.)

Second, she noted that the ability to work despite pain is primarily a function of the individual's motivation. In discussing ability to work with pain, she said: "The determining factor would be motivation. . . . The pain, in and of itself, it not the primary limiting factor. It is one's ability to, and willingness to and motivation to work through that." (*Id.* at 42-43.) She pointed out that claimant in fact engaged in a number of activities and did so despite pain, attributing her ability to do the activities to her motivation to do so. (*Id.* at 44.) (In this regard, the Court notes that shortly before trial the claimant suffered a broken leg while bicycle riding.) Dr. Headapohl further commented that work can be therapeutic in the sense that it can provide a "distraction from some very, very significant psychosocial stressors [that] would help her." (*Id.* at 47-48.) I find her testimony persuasive, and indeed it is not contradicted by any other medical testimony.

47. Patricia Schendel, a certified rehabilitation consultant with Crawford Rehabilitation Services, testified, and I find, that claimant has transferable skills which qualify her to work as a keno caller and auto self-service cashier jobs. (Schendel Dep. at 9-10.) She further testified that those jobs are available in significant numbers in the Butte and Anaconda area. (*Id.* at 12-15.) Finally, she discussed, from a vocational point of view, pain as a limiting factor in return to work.

Q. In your experience as a vocational consultant, do you know whether any of the people that you've worked with from a vocational rehabilitation standpoint actually worked with pain?

A. Yes, a lot of times if a person has identified a job that they want to return to work in and they are motivated to return to that type of work, a lot of times they will work with the pain. But if they can get into a job that they do enjoy, oftentimes the work setting can provide them with some outlet that will help reduce that pain.

(*Id.* at 26.)

48. The claimant described her typical day as sitting in a recliner for eight to ten hours. She states she is in constant pain and has headaches. Ironing, sweeping, dusting, mopping and the motion of reaching, all aggravate her pain. She no longer vacuums. Turning her head aggravates her pain and when she turns her head she also must turn her shoulders. She states there is no activity other than lying down that does not aggravate her pain. Her outside activities include crocheting, bingo and caring for some elderly friends. Until she broke her leg shortly before trial, claimant also rode a bicycle on a regular basis, albeit for exercise. Claimant does not believe she can perform the duties of auto self-service cashier or keno caller because of her pain.

49. I find that if motivated the claimant could tolerate her pain and work on a regular basis in either of the two positions identified. However, in fact, claimant is severely depressed and unmotivated. In her present state I can only conclude that she would be unable to cope with her pain while working on a regular basis.

50. However, I am unpersuaded that absent the personal losses suffered by claimant subsequent to her industrial accident she would be unable to cope with her pain and work. When the claimant's son died in 1990 she was treated for depression for only a short time. Dr. Fender last prescribed medication on account of her grief over her son's death on October 10, 1990,⁽³⁾ almost two years prior to claimant's industrial accident, and claimant continued to work at Buttrey during that two year period. (Ex. 4 at 5.)

CONCLUSIONS OF LAW

1. The law in effect at the time of the injury governs the claimant's entitlement to benefits. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 730 P.2d 380 (1986). Claimant's accident occurred on July 25, 1992, consequently the 1991 version of the Workers' Compensation Act applies.

2. Claimant has the burden of proving by a preponderance of the evidence that she is entitled to compensation. *Ricks v. Teslow Consolidated*, 162 Mont. 469, 478, 512 P.2d 1304, 1309 (1973); *Dumont v. Wicken Bros. Construction Co.*, 183 Mont. 190, 201, 598 P.2d 1099, 1105 (1979).

3. The fact of injury is uncontested. The insurer accepted liability for the July 25, 1992 industrial accident.

4. At the time of the claimant's industrial accident, "disability" was not separately defined by the Workers' Compensation Act. The definition set forth in section 39-71-121, MCA, prior to 1987 was repealed in 1987 and not replaced at that time. In 1993 the legislature adopted a new definition of "disability," § 39-71-116(9), MCA(1993), but that definition was then repealed by the 1995 legislature except for purposes of section 39-71-116(29), MCA (1995). Therefore, what is said in this decision concerning the essential elements of permanent total disability may not apply to cases arising after June 30, 1993.

5. At the time of claimant's injury, the Act defined "permanent total disability" as follows:

(16) "Permanent total disability" means a condition resulting from injury as defined in this chapter, after a worker reaches maximum healing, in which a worker has no reasonable prospect of physically performing regular employment. Regular employment means work on a recurring basis performed for remuneration in a trade, business, profession, or other occupation in this state. Lack of immediate job openings is not a factor to be considered in determining if a worker is permanently totally disabled.

§ 39-71-116(16), MCA (1991). Thus, to prevail on her claim for permanent total disability benefits, the claimant must prove she is physically unable to work as the result of a condition caused by her 1992 industrial accident.

6. Claimant is presently totally disabled on account of her emotional and psychological condition. She has suffered more personal tragedies than any person should have to bear.

7. Even though claimant is totally disabled on account of an unrelated condition, she is entitled to permanent total disability benefits **if** her industrial accident is also permanently and totally disabling. *Larson v. Cigna Ins. Co.*, 271 Mont. 98, 894 P.2d 327 (1995) (even though a preexisting heart condition is in itself totally disabling, a claimant is entitled to permanent total disability benefits if he can prove that a work-related hernia is also permanently totally disabling).

8. The employer and insurer take the claimant as they find her, subject to both the claimant's physical **and** emotional condition at that time. *Houts v. Kare-Mor*, 257 Mont. 65, 68, 847 P.2d 701, 703 (1992). The employee is entitled to compensation if the condition was aggravated or accelerated by an industrial injury. *Hash v. Montana Silversmith*, 248 Mont. 155, 158, 810 P.2d 1174, 1175 (1991).

9. Drs. Headapohl, Browne and Harris all gave opinions which satisfy the legal criteria for the aggravation of claimant's preexisting disk disease. Dr. Harris couched his opinion in terms of "possible" causation. Dr. Headapohl did not qualify her opinion. She testified affirmatively that, in her opinion, the 1992 incident made claimant's underlying condition symptomatic. Prior decisions of the Montana Supreme Court hold that a traumatic work-related incident which makes a preexisting, previously asymptomatic condition

symptomatic, is an aggravation which is compensable under the Workers' Compensation Act. *Conway v. Blackfeet Indian Developers, Inc.*, 205 Mont. 459, 669 P.2d 225 (1983). Lumbermen's is therefore liable for the disabling consequences of the 1992 industrial accident.

10. In this case the claimant has failed to show that any physical restrictions have been placed on her as the result of her industrial accident. The restrictions adopted by the panel are due to her underlying cervical disk disease, which increases her risk of additional injury, and not due to the effects of the 1992 injury.

11. We have previously determined that pain so severe as to preclude an individual from engaging in regular employment may be "physically" disabling. *Killooy v. Reliance National Indemnity*, WCC No. 9508-7362 (November 7, 1995). On the other hand, pain is only one factor in determining disability. *Metzger v. Chemetron Corp.*, 212 Mont. 351, 354, 687 P.2d 1033, 1035 (1984). In determining whether pain without any specific medical restriction is disabling, the Court is not bound by claimant's assertion that she is unable to work on account of her pain. *Killooy* at 9.

12. The Court is not persuaded that absent subsequent psychological trauma associated with the death of claimant's daughter and other close relatives that her pain would in fact preclude her from physically performing either of the two jobs which were medically approved by Dr. Headapohl. While the Court agrees that claimant cannot presently cope with her pain and therefore return to work, Dr. Headapohl testified persuasively that claimant's pain is amplified by her underlying psychological condition and that, if sufficiently motivated, claimant can return to work in either of two jobs. Unlike the situation in *Kloepfer v. Bechtel Construction Co.*, 52 St.Rep. 663 (Mont. 1995), this is not a simple lack of ambition on claimant's part which keeps her from more aggressively attempting to overcome her pain or from returning to work. Claimant in this case has valid medical/psychological reasons for her inability to cope with her pain. But those reasons are attributable to subsequent unrelated events, not to her industrial accident.

13. In 1987 the legislature amended section 39-71-703, MCA, to add a requirement that a "determination of permanent total disability must be supported by a preponderance of medical evidence." § 39-71-703(2), MCA (1987), enacted by 1987 Montana Laws, ch. 464, § 22. Medical evidence relating claimant's condition to her industrial accident does not satisfy the requirement. Under subsection (2), which is plain on its face, the Court is precluded from finding permanent total disability unless a preponderance of medical evidence supports a finding that the claimant "has no reasonable prospect of physically performing regular employment," § 39-71-116(16), MCA (1991). The medical evidence in this case fell short of supporting such finding. Indeed, the medical evidence presented to the Court supports the opposite conclusion.

14. Lumbermen's denial of permanent total disability benefits was not unreasonable and claimant is not entitled to attorney fees or a penalty. §§ 39-71-611, -612, -2907, MCA (1991).

JUDGMENT

1. Claimant is not permanently totally disabled as a result of her July 25, 1992 industrial injury.
2. Claimant is not entitled to attorney fees, a penalty or costs.
3. This Judgment is certified as final for purposes of appeal pursuant to ARM 24.5.348.
4. Any party to this dispute may have 20 days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

Dated in Helena, Montana, this 25th day of January, 1996.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Bernard J. Everet

Mr. Thomas A. Marra

Submitted: November 7, 1995

1. Flexeril relieves local muscle spasm. Lodine is a nonsteroidal anti-inflammatory. Physicians' Desk Reference at 1455, 2551 (48th Ed. 1994).
2. Xanax is a central nervous system agent used for the management of anxiety disorder. (Physicians' Desk Reference at 2456 (48th Ed. 1994).
3. On October 10, 1990, Dr. Fender prescribed 30 tablets of Desyrel. (Ex. 2 at 5.) Desyrel is an antidepressant. Physicians' Desk Reference at 514 (48th Ed. 1994).