IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2000 MTWCC 28

WCC No. 9809-8047

GLENN SHEPARD

Petitioner

vs.

BORDEN, INCORPORATED

Respondent/Insurer/Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

¶1 The trial in this matter was held on March 16, 2000, in Kalispell, Montana, Petitioner, Glenn Shepard (claimant), was present and represented by Mr. Kenneth S. Thomas. Respondent was represented by Mr. G. Andrew Adamek. A trial transcript has not been prepared.

¶2 Exhibits: Exhibits 1 through 4 and 6 through 10 were admitted. Exhibit 5 was withdrawn.

¶3 Witnesses and Depositions: Claimant, Juanita Shepard, Donald D. Agan, and Wayne Hegdahl were sworn and testified. The parties submitted two depositions of Glenn Shepard taken on November 12, 1998 (Shepard Dep. I) and March 6, 2000 (Shepard Dep. II), two depositions of Dr. John V. Stephens taken on November 12, 1998 (Stephens Dep. I) and February 4, 2000 (Stephens Dep. II), and the depositions of Donald D. Agan and Susan Brakefield.

¶4 Issues Presented: The issues as set forth in the Pretrial Order are:

1. Whether Petitioner is permanently and totally disabled and entitled to permanent total disability benefits pursuant to §39-71-702, MCA.

2. Whether Petitioner is entitled to an increase in award for unreasonable delay or refusal to pay proper workers' compensation benefits pursuant to §39-71-2907, MCA.

3. Whether Petitioner is entitled to costs and attorneys' fees, pursuant to §39-71-612, MCA.

¶5 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

¶6 Claimant is 50 years of age. He is a high school graduate and was in the military for two years. (Shepard Dep. I at 13.) He has had some training in aircraft maintenance and briefly attended Flathead Community College in 1989. (Ex. 1 at 5-6; Shepard Dep. I at 10-11.)

¶7 Claimant's work history has primarily involved manual labor. He has worked at a plywood plant, as a groundskeeper, in a lumber mill, in the oil fields for fifteen years, for a short time as an aircraft mechanic, and for a cleaning business. (Shepard Dep. I at 17- 23.) In April 1993, claimant went to work for Meadow Gold Dairy as a dock worker. (*Id.* at 25.) Meadow Gold is now owned by Borden and will hereinafter be referred to as Borden.

¶8 When he went to work for Borden, claimant had a history of back and neck problems. He reported back pain as early as 1983. (Stephens Dep. I, Ex. 1 at 31.) In 1986 he injured his leg and back in a logging accident. (*Id.*) In 1988, Dr. Henry Gary, a neurosurgeon, diagnosed him as suffering from "chronic thoracic strain." (*Id.* at 28.)

¶9 In January 1992, claimant experienced increased cervical pain. He was seen by Dr. Hilleboe, who ordered a cervical MRI. Claimant was then referred to Dr. James Mahnke, who is a neurosurgeon. (Stephens Dep. I, Ex. 1 at 23.) On April 22, 1992, Dr. Mahnke performed the first surgery on claimant's neck, doing "[a]nterior cervical disk excisions and interbody fusions, C4-5 and C5-6; arthrodesis C4-5 and C5-6; . . . Synthes plate stabilization, C4-5-6 (46 mm plate)" on the claimant. (Ex. 6 at 49.) In essence, in addition to removing cervical disks, he fused claimant's neck from C4 through C6.

¶10 This surgery resulted in a decrease of the claimant's symptoms to such an extent that he was able to go to work for Borden as a dock worker.

¶11 The parties agree that on June 14, 1993, claimant suffered a work-related injury to his neck. At the time of his injury, Borden was self-insured. It accepted liability for the claim and has been paying temporary total disability benefits. At the time of trial, claimant was still on temporary total disability benefits. However, Borden contends claimant is able to return to employment, leading to claimant's present petition asking that he be declared permanently totally disabled.

¶12 The injury and claimant's subsequent treatment are not in dispute and will be set out only briefly.

¶13 Claimant was initially seen by Dr. Mahnke on June 18, 1993. The doctor's office note records in part:

> [Claimant] underwent a two level cervical fusion with plating April '92 and has generally done quite well. But over the past week, performing repetitive carton lifting activities at the Darigold Milk plant in Kalispell, has developed significant R shoulder arm pain.

(Ex. 6 at 1.)

¶14 Six months later, claimant's symptoms included "neck pain, headaches, knife-like interscapular pain, right shoulder pain, and numbness in the right C7 dermatome." (Ex. 6 at 58.) On December 15, 1993, Dr. Mahnke performed a second neck surgery, excising the disk at the C6-7 level and fusing the vertebrae at C6-7. (Id. at 60.) The initial fusion failed and on May 23, 1994, claimant had repeat fusion at the C6-7, re-grafting bone from claimant's hip and installing new plates to immobilize the vertebrae. (*Id.* at 74.) That fusion failed to take and a third fusion/plating operation at C6-7 was performed on November 16, 1994. (*Id.* at 84.) This third operation at C6-7 (fourth operation overall) succeeded. However, on December 4, 1996, claimant underwent yet a fifth neck surgery for a new disk protrusion at "at C3-4 which occupies the ventral epidural space and is in contact with the cord." (*Id.* at 101.) Not only was the disk excised, the C3-4 vertebrae were fused. (*Id*. at 104.) Thus, claimant's neck is fused at four levels, C3 through C7.

¶15 On June 25, 1997, the claimant was examined by Dr. Stephens, who specializes in physical and rehabilitation medicine, for an Independent Medical Examination (IME). (Stephens Dep. I, Ex. 1 at 16-19.) At that time, claimant's symptoms were as follows:

> He continues to experience a constant discomfort at the base of his neck, up the left side somewhat, discomfort over the dorsum of the right shoulder and right lateral arm. He notes that he experiences a headache coming from posterior to anterior on the left. His pain is made worse by sitting, lifting, moving his head. He is able to drive though he uses his mirrors. His sleep is intermittently disrupted by discomfort. . . .

(*Id*. at 17.) Dr. Stephens found the claimant was at maximum medical improvement (MMI), and limited him "to sedentary work on a permanent basis with avoidance of static positioning of his head." (*Id.* at 19.)

¶16 On July 23, 1997, Dr. Stephens rated claimant's impairment at 29% of the whole person. (*Id.* at 15.)

¶17 Although Dr. Stephens initially saw claimant in an IME, he thereafter treated claimant. In October 1997, Dr. Stephens noted that while claimant was doing reasonably well, he was experiencing "increasing numbness in his hands" and "also having pain in the right shoulder." (*Id.* at 13.) An EMG was done on December 10, 1997, which didn't reveal "any evidence of anything real definite" but did show "some abnormality . . . suggestive of some

right C6 or C7 irritation" which the doctor thought "was accounting for his numbness symptoms." (Stephens Dep. I at 9.)

¶18 On February 24 and 25, 1998, a Functional Capacities Evaluation (FCE) was done by Richard L. Smith, a physical therapist. (Ex. 6 at 113-119.) Mr. Smith reported the claimant was "willing to work to his maximum abilities throughout the FCE." (*Id.* at 113.) He found claimant physically capable of performing sedentary work activities. (Ex. 1 at 3; Ex. 6 at 116.)

¶19 On March 2, 1998, claimant was seen by Dr. Lawrence Iwersen, an orthopedic surgeon, complaining of right shoulder pain. (Ex. 6 at 4.) Dr. Iwersen determined that claimant had "[p]robable muscle imbalance, possible impingement process." (*Id.* at 5.) He injected claimant's shoulder and told him to return in one month. Claimant returned on March 31st, reporting some relief but that the symptoms returned within a week or so. A second injection was given. (*Id.*)

¶20 In May and June of 1998, the claimant returned to Dr. Iwersen for repeat injections, which gave him no relief. He was then sent to physical therapy for a short course of stretching and strengthening, but this did not relieve his pain. (Ex. 6 at 5.)

¶21 Claimant returned to Dr. Stephens on July 1, 1998. In his office note Dr. Stephens recorded that claimant was continuing to have "discomfort in his neck, into his right shoulder and hand," and that his sleep was disrupted. (Stephens Dep. I, Ex. 1 at 6.) Dr. Stephens ordered a cervical x-ray, which showed his fusions were solid. (Stephens Dep. 1; Ex. 1 at 6, 8.) He also ordered a second EMG, which was done on July 29, 1998. The EMG was compared to the December 10, 1997 test and was essentially normal. (*Id.* at 5.) Dr. Stephens stated that he believed "we need to just continue to treat this gentleman symptomatically." (*Id.* at 3.) There were no changes in the claimant's condition or treatment noted on a follow-up, September 9, 1998 exam. (*Id.* at 1.)

¶22 In March 1998, the claims adjuster assigned to claimant's case[(1)] referred the case to Crawford for a vocational services. Don Agan (Agan), a certified rehabilitation counselor for Crawford, was assigned the case and has provided vocational consulting and services since then.

¶23 Agan obtained an employment history for clamant and tested him. (Ex. 1 at 4-12.) He identified six possible jobs as appropriate for claimant in light of his prior employment, transferable skills and test results. He forwarded job analyses for those jobs to Dr. Stephens. On July 9, 1998, Dr. Stephens disapproved every one of the jobs as incompatible with claimant's medical restrictions. (Ex. 3 at 1.)

¶24 In his November 1998 deposition, Dr. Stephens explained his reasons for disapproving the jobs:

> They were disapproved for the reason that some of them required frequent neck motion that I felt exceeded sedentary restrictions.
>
> . . . .
>
> So the concerns are most of these jobs had to do with twisting, turning of the head or, in some situations, static positioning of the head.
>
> The rationale being is this gentleman had essentially, I think as I mentioned when I rex-rayed [sic] him, a fusion from C3 to C7, which markedly limits flexion and extension ability and limits the motion of the spine. So that was the reasons for those restrictions, in and above the usual weight restrictions, of course, for sedentary.

(Stephens Dep. I at 14-15.) Dr. Stephens went on to testify that claimant's complaints regarding headaches and the severity of those headaches, his neck pain, and problems with his fingers and upper extremities were consistent with claimant's medical condition. (*Id*.) He also opined:

> I think, in regards to his overall pain level, he may gradually get a little teeny bit worse. The reason for that is the marked limitation in motion in his neck. From the surgical procedures, he's going to -- would be expected to have an acceleration of the normal degenerative changes that everybody experiences in their neck. So he's likely to start having a little more trouble above the fusion site, which basically gets way up high in his upper neck area, in fact, in the area where you get primarily rotation. And he's probably going to have a little bit more trouble down lower. I think all of those various in sundry irritative points are just going to cause him to have more spasm which is, of course, why he's having more headaches and all that stuff. He's likely to get a little bit worse, I think. I certainly would not expect him to get better.

(*Id*. at 15-16.) Finally, when asked about claimant's employability the doctor stated:

> I think it would be difficult for him to be competitively employed, based upon my knowledge of the situation here in the Flathead Valley.

(*Id*. at 25.)

¶25 Crawford requested a medical panel examination of claimant. The panel consisted of Dr. Dana Headapohl, a specialist in occupational and environmental medicine, Dr. Ethan Russo, a neurologist, Dr. Catharine Capps, an orthopedic surgeon and Robert Vellin, Ph.D., a neuropsychologist. They examined claimant on November 18 and 19, 1998.

¶26 Dr. Headapohl reviewed claimant's medical records and examined him, as did the other panel members. In addition, she served as panel chair and wrote the final panel report. (Exhibit 9.) In that report, she summarized his conditions and symptoms as follows:

- Chronic neck pain SP multiple surgical procedures . . .
- Chronic headaches.
- Right shoulder pain: full range of motion.
- SP right ankle fracture . . .
- Possible left CTS.

(*Id*. at 14.) She then provided the following comment:

The subjective complaints are consistent with the objective findings. Symptom magnification behavior was not evident.

(*Id.*; emphasis added.) In further response to a question concerning possible "Malingering, Secondary Gain, Factitious Disorder or Somatoform Pain Disorder," (Ex. 9 at 18; capitalization in the original), Dr. Headapohl wrote: "There is no evidence of any of the above disorders." (*Id*.)

¶27 The panel was provided with job analyses for eight possible jobs identified as vocationally appropriate for claimant. The panel disapproved six and approved the other two with restrictions. (Ex. 8.) Customer service clerk was approved with the comment:

> If work station is ergonomic match for his specific problems and telephone head set could be used and he could change positions for comfort.

(Ex. 8 at 2.) Receptionist was also approved but with the same reservations/modifications that were set out for the customer service clerk. (*Id*. at 3.) With regard to claimant's employability, Dr. Headapohl also commented:

> Placement will need to take into account his **deconditioned state and less than adequate pain control at the present time**. However, with those issues addressed, he is capable of employment within capacity and restrictions described below. . . .

(Ex. 9 at 17, emphasis added.)

¶28 The panel determined that claimant's physical capacity was "within the sedentary range" (*id*.) and listed his physical restrictions as,

> He should have an ergonomic work station specific to his medical condition. He should avoid static or awkward neck positions or overhead work. He should be able to change position for comfort.

(Ex. 9 at 17-18.) The panel report also comments that claimant's "chronic pain, fatigue and deconditioned condition would keep him from full time employment at this time [November, 1998]." (*Id*. at 18.)

¶29 While deferring to the panel report, Dr. Capps wrote a further comment regarding claimant's ability to return to work, as follows:

> Although the FCE documents the patient can probably return to sedentary work, they also noted he has increased pain complaints when lifting 10 pounds. He can probably return to work in some capacity once he gets a better handle on his pain complaints. **It will be a challenge finding something he can do with his extreme limitation of neck motion as well as claimed pain**.

(Ex. 9 at 28; emphasis added.)

¶30 Lacking a medical release for claimant to return to some sort of employment, on September 29, 1998, Agan wrote that further vocational efforts were inappropriate. (Ex. 1 at 15.) He was, however, asked to continue his efforts. He then requested the assistance of Susan Brakefield (Brakefield), a physical therapist and specialist in ergonomics. (Brakefield Dep. at 9.)

¶31 Brakefield has specialized in the treatment of spinal problems since 1973. In 1986 she was trained to do functional capacity evaluations. In 1988 she began doing ergonomic consultations.

¶32 Borden indicated it was willing to develop a **sedentary** job for claimant within his physical limitations. Thereafter, through the coordinated efforts of Agan, Brakefield, and and Mr. Wayne Hegdahl, who works for Borden, a position for a shipping and receiving clerk was developed. (Ex. 2 at 1-5.) Both Agan and Brakefield visited the job site at Borden to analyze the various tasks of the job.

¶33 Job analyses/descriptions for (1) shipping and receiving clerk, (2) telemarketer, and (3) ward/customer clerk were thereafter submitted to Dr. Stephens for his consideration. The doctor approved shipping and receiving clerk "as modified" and suggested that claimant start part time and gradually increase his hours up to full time work. (Ex. 3 at 3.) He also approved telemarketer and ward/customer clerk on March 5, 1999. (Ex. 3 at 4.) In approving the telemarketer position, Dr. Stephens testified that the job description

> allows for frequent changes of position. It meets requirements for sedentary. There are statements that ergonomics would be considered kind of in regards to what Mrs. Brakefield suggested. This is why I did approve that job.

(Stephens Dep. II at 25.) He said he would continue to approve the position if it was "[a] job that actually meets that description I would approve." (*Id.*) Dr. Stephens also continued to approve the ward/customer clerk position, but at the time of his deposition expressed

concern about the "push/pull" weight requirement. (*Id*. at 27.) The job of the shipping/receiving clerk was also approved, but Dr. Stephens express skepticism about the job actually existing as described. (*Id.* at 26.) He further expressed his skepticism, asking, "Is a job as described to me actually the job in the community?" (*Id.* at 31.)

¶34 In his notes of March 15, 1999, the doctor emphasized the need to make sure that the job description described a "real job" and his recommendation that claimant start any job on a part-time basis:

> Mr. Shepard, perhaps his representative, and the employer and Mr. Don Agan go over these jobs together **so there is no misunderstanding as the [sic] what the job actually entails and the determination of whether, in fact, the job is "real." . . . I note that recommendations have been made before of starting any job on a part-time basis and gradually working it up.** [Emphasis added.]

(Stephens Dep. II, Ex. 1 at 5.) He reaffirmed his recommendation in his second deposition. (*Id*. at 31.)

¶35 Brakefield personally evaluated claimant in March 1999. At the time of her first evaluation on March 22, 1999, she reported his pain as follows:

> He reports continuing to have pain through the head, with headaches three to four times per week, pain bilaterally in the neck, into the shoulders and down into nearly mid scapular area. He also has some numbness and tingling into the right more than left hand. Glenn stated that when his headaches were bad they would occasionally put him to bed with an inability to work. He also reports when he is heavily medicated he feels he has some difficulty driving.

(Brakefield Dep. Ex. 1 at 10.)

¶36 On April 22, 1999, Brakefield provided physical therapy, which she described as:

> Some very, very gentle, what I called myofascial release, which is just trying to stretch some of the tissues and get them moving again, because I felt like he would need that in order to get back to work and be able to, like, move things around the way that he would have to.

(Brakefield Dep. at 17.) Three days later the claimant reported that following this session he had a headache for three days. She noted that he had been to a massage therapist who hadn't been able to help him either. (*Id.* at 19.) She concluded he was not ready to return to work and she recommended a work-conditioning program. (*Id.*; Ex. 1.) [(2)]

¶37 In June, Brakefield set up a work conditioning program which included "lower extremity strengthening and flexibility, truncal stabilization, appropriate work site modifications, as well as aerobic conditioning." (*Id.* at 8.) She worked through some exercises with claimant

on June 28, I999, to establish some baselines for the program. (Brakefield Dep. at 20-21, Ex. 1 at 2.) On June 30th he returned for his scheduled appointment but reported he was sore and that he had had a headache. Brakefield had him perform a number of gentle exercises and walk on a treadmill. She observed that he was pretty sore and when he left, noted that he was rubbing his arm. She testified, "I could tell that it had hurt his right arm." (*Id*. at 24.)

¶38 Mrs. Shepard called before his next appointment and explained that the claimant had been suffering a headache and vomiting for the last two days. (Brakefield Dep. at 24.) At this point Brakefield decided she needed to discuss the case with Agan. She testified as to her thinking at the time:

> We really need to decide what we want to do with this guy, because I don't want to put him through all of this. And, I mean, I can order all this equipment, but there are very few things that are on the job analysis [shipping and receiving clerk at Borden] that I feel that he could safely do.

(Brakefield Dep. at 25.)

¶39 Regarding the shipping and receiving clerk position, it was her opinion that "several of the job functions are not and may never be safe for Glenn to perform." (*Id*. at 28.) She mentioned "increased discomfort when reaching forward more than 12 inches from his body,"(*id*.) and "vision limitations simply because of his loss of neck range of motion." (*Id*. at 28-29). She also pointed out that "the temperature varies from down to minus 20 degrees - from 35 degrees to minus 20 degrees, farenheit [sic] . . . [which will] put him into a - - what we call a hunter's reaction. When you get chilled, your muscles start to quiver." (*Id*. at 52.) Additionally, Brakefield did some testing of the claimant's ability to bring his arm out away for his body and straighten his elbow, referred to as "neural tension signs." (*Id*. at 33.) He was only able to bring his arm out to 30 degrees and extend his wrist to 30 degrees, which she explained "is not very much. It's just a little bit past neutral, and he was getting neck signs." (*Id*. at 33-34.) Ultimately, Brakefield testified that she would "probably disapprove" the job. (*Id*. at 34.)

¶40 While not being asked by Agan to consider the other job descriptions, Brakefield commented that while claimant could answer the telephone, he would have a "really difficult time writing down the messages." (Brakefield Dep. at 36.) She reemphasized that he would have problems with any task which required him to reach out away from his body. (*Id*.)

¶41 Regarding the telemarketer position she agreed that, "he could just sit and punch a button." (*Id*. at 38.) If that was what the job entailed and if the ergonomic considerations were taken into account, she would approve that position. However, she went on to express

concern regarding the claimant's frequent headaches which can be brought on by stress. (*Id*. at 39.)

¶42 At the time Dr. Stevens approved the telemarketing, ward/customer clerk and shipping clerk, he was unaware of the claimant's failed attempt in Brakefield's work-conditioning program. When asked whether this additional information affected his approvals, he replied:

> I guess that my answer to that would be, I would still approve those positions, although perhaps some modification to the work-hardening approach to those might be taken.

(Stephens Dep. II at 37.) Dr. Stephens also thinks that the claimant's medication needs must be investigated (*id*. at 41-42) and that the medications may in fact alter his behavior and make it difficult for him to perform tasks. (*Id*. at 49.) He continues to be of the opinion that it will be difficult for the claimant to be competitively employed in the Flathead Valley. (*Id*. at 44, 48.) He also made it clear that his approval of the various positions was based only on claimant's medical restrictions.

Resolution

¶43 Claimant has had five cervical surgeries; he is fused from the C3 through C7 (Ex. 6 at 98,109-110.) The fusions significantly reduce his cervical spinal range of motion (ROM). At the time of an FCE on February 24 and 25, 1998, his cervical ROM was measured as follows:

> approximately 15 degrees flexion, 15 degrees extension, 5 degrees lateral flexion right, 10 degrees lateral flexion left, 20 degrees rotation right, 10 degrees rotation left.

(Ex. 6 at 114.) As a result of his injuries and his fusions, claimant suffers frequent debilitating headaches. His headaches can be brought on by physical activities, cold, and stress. I found his testimony in this regard credible and there is not a single medical provider who disputes that he suffers the pain which he reports. In fact, throughout the medical reports, the physical therapy reports and the vocational reports, I found notes made by various providers stating that claimant's pain behavior is appropriate to his condition and that he tries to do all that is asked of him.

¶44 I personally observed claimant at trial. His limited range of motion of his neck was obvious. It was also obvious to me that as the trial progressed he had a worsening headache. My impression was based on careful observation of claimant, not on any exaggerated behavior on his part.

¶45 I am persuaded that claimant is not currently able to work on either a part-time or full-time basis due to a combination of his physical limitations and his headaches. If his

headaches are controlled there is a realistic possibility of employment in a controlled environment with ergonomic and other accommodations. Whether he can compete in the open labor market is doubtful.

¶46 Borden has not acted unreasonably. It has continued to pay claimant temporary total disability benefits and has not threatened to cut them off. It has diligently explored trying to get claimant back to productive employment and continues to be willing to make additional efforts to do so. Dr. Capps noted that he "can probably return to work in some capacity once he gets a better handle on his pain complaints." (Ex. 9 at 28.) Dr. Stephens commented that claimant's medications should be investigated. It remains in the realm of possibility that further medical attention to claimant's headaches, perhaps some alteration of his medications, may provide better pain control and enable him to increase his activity level to the point that employment may be reconsidered. For now, however, I find him permanently totally disabled.

CONCLUSIONS OF LAW

¶47 Claimant's injury is governed by the 1991 version of the Workers' Compensation Act. *Buckman v. Montana Deaconess Hosp.,* 224 Mont. 319, 321, 730 P.2d 380, 382 (1996).

¶48 Entitlement to permanent total disability benefits is governed by sections 39- 71-116(16), MCA (1991) and 39-71-702, MCA (1991). Section 39-71-702, MCA, provides:

> **Compensation for permanent total disability.** (1) If a worker is no longer temporarily totally disabled and is permanently totally disabled, as defined in 39-71-116, the worker is eligible for permanent total disability benefits. Permanent total disability benefits must be paid for the duration of the worker's permanent total disability, subject to 39-71-710.
>
> (2) The determination of permanent total disability must be supported by a preponderance of medical evidence.

Section 39-71-116(16), MCA, provides:

> "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.

¶49 Although section 39-71-702(2), MCA, requires that disability be *supported* by a preponderance of medical evidence, disability is not solely a medical question. *Coles v.*

Seven Eleven Stores, 217 Mont. 343, 347, 704 P.2d 1048, 1051 (1985). Disability involves the effect of a medical condition upon a claimant's ability to work.

¶50 Further, as in the case of *Killoy v. Reliance National Indemnity*, 278 Mont. 88, 923 P.2d 531 (1996), even though a doctor approves job descriptions for various positions, the entirety of the doctor's testimony must be considered. In this case Dr. Stephens and the doctors on the medical panel all found that the claimant was credible, that his pain behaviors were appropriate for his condition, that he tried hard when asked to perform various tests, and, most importantly, that his pain was experienced and real. All of these opinions were supported by the additional testimony of Susan Brakefield, PT, who attempted to provide work conditioning to the claimant.

¶51 In the case of permanent total disability, the claimant must demonstrate (1) that he has reached MMI and (2) that, as a consequence of his injury, he has no reasonable prospect of physically performing regular employment. The first prong is satisfied. There is no dispute that claimant reached MMI as found by Dr. Stephens at least by June 25, 1997. Indeed, MMI is not raised as an issue in this case. The only issue is whether claimant has a "reasonable prospect of physically performing regular employment."

¶52 The evidence in this case persuades me that claimant is currently unable to perform regular employment. Borden is therefore liable for permanent total disability benefits retroactive to the date the claimant reached MMI and continuing until such time as the claimant is no longer permanently totally disabled. Since the rate for permanent total disability is the same as the rate for temporary total disability, §§ 39-71-701, -703, MCA (1991), Borden owes claimant no additional benefits with respect to past benefits.

¶53 The Court has noted the significant attempts Borden has made to create a meaningful job for the claimant and that it has continued to pay claimant temporary total disability benefits. Its conduct was not unreasonable, therefore claimant is not entitled to either a penalty or attorney fees. §§ 39-71-612, -2907, MCA (1991).

JUDGMENT

¶54 1. Claimant is presently permanently totally disabled.

¶55 2. The insurer is liable for permanent total disability benefits retroactive to the date claimant reached MMI but owes no additional amounts with regard to past benefits since it has been paying him the same amount in benefits to which he is entitled.

¶56 3. Petitioner is not entitled to attorney fees nor a penalty.

¶57 4. Petitioner is entitled to costs pursuant to ARM 24.5.342.

¶58 5. Pursuant to ARM 24.5.348, this JUDGMENT is certified as final for purposes of appeal.

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

DATED in Helena, Montana, this 23rd day of May, 2000

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Kenneth S. Thomas
Mr. G. Andrew Adamek
Date Submitted: March 16, 2000

1. CIGNA adjusted the claim for Borden. Chip McKenna, an adjuster for CIGNA, was adjusting the case in early 1998.

2. Brakefield explained the difference between work hardening and work conditioning as: "Work hardening is having someone perform the job tasks for short tiny bits of periods and gradually increase their tolerance to doing that activity. . . . he needed work conditioning . . . an exercise program in order to be able to get himself to the point where he could really do the job." (Brakefield Dep. at 20.)