

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1996 MTWCC 34

WCC No. 9508-7361

RICHARD WARE

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

HAGEMAN CONSTRUCTION

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: During November 1992, 41 year old carpenter suffered surgery injury, for which insurer accepted liability. Claimant continued working in a modified capacity, then moved to Missoula to be closer to his children. During 1995, he received shoulder surgery. He now seeks TTD back to the time of the original injury.

Held: Claimant is not entitled to TTD benefits from December 15, 1992 through April 1993 because his loss of wages during that time was not the result of his injury. His own testimony established he could have continued working; he lost wages because he decided to move, not because his injury caused him to cease work. He is also not entitled to TTD from April 1993 through early January 1995 where he failed to establish that periods of unemployment were due to flare-ups of his condition or anything other than lack of immediate jobs within his labor market. Claimant is, however, entitled to TTD benefits after he ceased working due to an acute recurrence of his shoulder problems. TTD should have continued during the period after surgery was recommended, but the insurer refused to cover surgery until claimant had gone through a period of more conservative treatment.

Topics:

Benefits: Temporary Total Benefits. Under 1991 Act, claimant not entitled to TTD during period he lost wages not as the result of his injury, but because he chose to move to be nearer his children. He was also not entitled to TTD during period for which he failed to establish he was unemployed as the result of flare-ups of his

condition and not merely lack of immediate jobs in his labor market. He was entitled to back TTD, however, for period after which his shoulder condition deteriorated such that surgery was recommended, including period during which insurer insisted on further conservative treatment prior to paying for surgery.

Benefits: Temporary Total Benefits. An injured worker capable of continuing to perform work within his or her labor market is ineligible for TTD benefits whether or not the worker continues to work as a true employee or undertakes self-employment. *Weaver v. Buttrey Food and Drug*, 255 Mont. 90, 96, 841 P.2d 476, 480 (1992).

Wages: Wage Loss. Under 1991 Act, claimant not entitled to TTD during period he lost wages not as the result of his injury, but because he chose to move to be nearer his children. He was also not entitled to TTD during period for which he failed to establish he was unemployed as the result of flare-ups of his condition and not merely lack of immediate jobs in his labor market. He was entitled to back TTD, however, for period after which his shoulder condition deteriorated such that surgery was recommended, including period during which insurer insisted on further conservative treatment prior to paying for surgery.

The trial in this matter came on March 1, 1996. Petitioner, Richard Ware (claimant), was present and represented by Mr. Rex Palmer. The Respondent, State Compensation Insurance Fund (State Fund), was represented by Mr. Charles G. Adams.

Exhibits and Depositions admitted at trial: Exhibits 1 through 32 and 37 through 41 were admitted by stipulation. Exhibits 33 through 36 were admitted over the objection of Mr. Adams. Exhibits 42 through 45A were admitted without objection. The deposition of the claimant was submitted for the Court's consideration. The Court also received a deposition of Dennis Small, a claims adjuster for the State Fund. However, the parties did not request the Court to consider Mr. Small's deposition.

Issue presented: In November 1992, the claimant injured his right shoulder in a work-related accident. Thereafter, he worked off and on until September 1995, when he underwent shoulder surgery and was placed, for the first time, on temporary total disability benefits. Through his petition in this case he is seeking payment of additional temporary total disability benefits retroactive to December 1992.

* * * * *

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

FINDINGS OF FACT

1. Claimant is a 41 year old carpenter. He is married but separated from his wife. He has four children who reside in Missouri.
2. Claimant is a high school graduate and attended college for two and one-half years.
3. His prior work experience includes jobs as a meat cutter, clerk/typist and draftsman. He began working as a carpenter in 1980. Since then he has performed virtually all aspects of carpentry and related work. He has done concrete work, wiring, framing, roofing, and finish work.
4. For a short period of time in 1992 he was co-owner of a construction company, Alpine Construction, in Bozeman. That business folded after a short time.

Gannon Job

5. In July 1992, claimant went to work for Hageman Construction, which is owned by Doug Hageman. Hageman was building a large home near Bozeman. The project was referred to as the *Gannon job*.
6. At the time he went to work for Hageman, claimant informed Hageman that he would work only until mid-December since he intended to move at that time to Missouri to be closer to his children.
7. While working on the Gannon project the claimant performed a full range of carpentry duties. He used hand and power tools and read blueprints. He carried building materials and equipment which sometimes weighed over 100 pounds. He framed doors, walls, windows, floors, and roofs. (Ex. 24 at 8.)

Industrial Accident and Claim

8. On a day in early November 1992, claimant and another carpenter were moving a large beam which had been previously set on the top plate of a framed wall. The beam was composed of four 20 foot, 2 by 12s joined together. As they were attempting to move it, the beam slipped. Claimant caught it with cupped hands, receiving a weight of approximately 180 to 200 pounds. Claimant immediately felt like hot water had been poured on his back and shoulders. He thereafter experienced pain. (Ware Dep. at 31-32; trial testimony.)
9. Claimant filed a written Claim for Compensation on February 3, 1993. (Ex. 1.) The State Fund, which insured Hageman, accepted liability for the claim.

Initial Medical Treatment

10. Following the injury claimant "took it pretty easy the rest of the day." (Ware Dep. at 32.) He continued working.
11. Claimant first sought medical care on November 13, 1992, when he went to see Dr. Stephen Forte, a chiropractor. Dr. Forte examined claimant and diagnosed lumbo-sacral,

thoracic, and cervical back strain, along with spondylosis. He recommended treatment "three times a week for three weeks with spinal manipulative therapy, moist heat, ice, electrical therapy [sic] to normalize and reduce swelling, inflammation and joint function. Then twice a week for three weeks with the above followed by a re-exam." (Ex. 19 at 2.) Dr. Forte noted that claimant planned on moving out-of-state before his treatment would be completed. (*Id.*)

Continued Work and Move to Missouri

12. Claimant continued working on the Gannon project but in a lighter, modified capacity. On the advice of Dr. Forte, claimant avoided lifting heavy objects and limited his work to below shoulder height. (Ware Dep. at 33.)

13. In mid-December claimant moved to Missouri as previously planned.

14. At the time of his move the Gannon project was unfinished. Claimant estimated that the house was not completed until March or April 1993.

15. Claimant was hired by Hageman as a "lead carpenter." Following his injury, he was able to modify his specific duties and avoid the heavier jobs. He continued working. There was no evidence indicating that, had he chosen to do so, he could not have continued working on the Gannon project until its completion.

16. Shortly after moving to Missouri, claimant worked approximately 24 hours painting and doing minor electrical work for his Uncle Clyde. He was paid approximately \$6.00 per hour. The work arrangement was an informal one. His Uncle Clyde paid him without any specific accounting for his hours of work.

17. Claimant then applied for and received unemployment benefits from January to July 1993. (Ware Dep. at 35-36.) During that time claimant looked for work but was unable to find employment. He indicated that he was capable of performing employment during that time.

18. Following termination of his unemployment benefits, claimant adopted the business name "RW Construction" and did several jobs. He bid some of his work on a bid form used by his prior business, Alpine Construction, using a "RW Construction" sticker pasted over the old business name. He considered himself an independent contractor.

19. Claimant limited his work to light-duty carpentry jobs and some odd jobs.

20. Claimant worked as follows:

a. June 26, 1993 through week of November 27, 1993: During these weeks claimant built an addition on a residence owned by Mr. and Mrs. Woody McCollum. A chart of his work⁽¹⁾, submitted by his attorney on March 15, 1996, shows that he began work during the week of June 26, 1993, and completed work the week of November 27,

1993. He performed work each week during that period of time. His weekly hours of work varied from a low of 10 hours to a high of 35.5. He averaged 23 hours of work a week.

b. December 1993 to February 1994: Between December 1993 and February 1994, claimant did electrical work for Brian Riley. His chart shows that he began work during the week of December 11, 1993 and finished during the week of February 5, 1994. He worked a total of 56 hours. Of the nine weeks during that period, he worked during five weeks and did no work during four of those weeks.

c. March 26, 1994 to April 29, 1994: During this five week period, claimant built a garage for Charlie Slater, a high school friend. He submitted a bid to Slater and entered into a written, signed contract with him. (Ex. 43.) Claimant used his own tools on the job. He worked between 20 and 30 hours a week, averaging 24 hours a week over the five-week period.

d. Week of May 14, 1994: During this week claimant did electrical wiring in a garage owned by Diane Palmer. He bid the job for a fixed amount and made out a written agreement governing the job; however, the agreement was never signed. (Ex. 42.) Palmer did not supervise the work. Ultimately, claimant finished the job in less time than he had anticipated and unilaterally reduced the amount due from Palmer.

e. Week of June 4, 1994 through week of December 31, 1994: During this period of time the claimant performed odd jobs for Mr. Maffrey, who was claimant's landlord. Claimant's jobs included patching fences, mulching, caulking, building a gate, and some form of sales/marketing. He was not supervised and provided his own tools with the exception of a fence post pounder purchased by Maffrey. During two weeks claimant performed no work for Maffrey. During the other weeks claimant worked as few as 2 hours and as many as 13.5 hours. He was paid by the hour and received approximately \$1608 for his work.

During this same period of time, claimant also performed work for others, as follows:

(i) During the week of July 23, 1994, claimant cleared brush for five hours for his brother Richie Ware. He used his own chain saw. He could not recall how much he was paid but remembered that repairs to his chain saw exceeded his pay.

(ii) During the week of July 30, 1994, claimant did concrete finishing work for Mr. Louzaway. He worked for approximately five hours. He received no monetary compensation, rather he did the work in return for some pipe which Louzaway had previously given him.

(iii) During the weeks of August 13, 1994 through September 17, 1994, claimant worked on a porch for Mr. Frankie. He bid the job and was paid on a flat fee basis of \$600 but was paid by the hour for extra work on a handrail.

(iv) During the week of December 31, 1994, claimant widened a door and did electrical work for Mr. Henry. He worked for approximately five hours and was paid by the hour. He used his own tools and worked without supervision.

f. July 1995: Sometime in July of 1995, claimant moved into a trailer home owned by Mr. Powell. In exchange for fixing up and cleaning the trailer he was allowed to live in the trailer without paying rent for the months of July and August. Thereafter, he paid rent of \$125 per month.

21. On the McCollum job, claimant was required to hire other workers. However, the McCollums had to approve the individuals he hired. The McCollums also paid the additional workers. Claimant presented their hours, along with his own, to the McCollums, who then paid claimant for both his own and the workers' hours. Claimant then passed the wages for the workers on to them.

22. Claimant's services for the McCollums were terminated before completion of the job. Upon termination, claimant charged the McCollums for the time he spent cleaning his tools and removing them from the job site. Later, he unsuccessfully bid for the work remaining at the McCollums.

23. Claimant testified to three methods of billing commonly used in the construction industry. Those methods are (1) a fixed price (or straight bid) for the entire job; (2) cost plus, which is a firm price for the majority of the work with an understanding that additional sums will be charged for added work; and (3) an hourly rate. Claimant used both a fixed price and a hourly rate for the jobs he did in Missouri.

24. In his 1993 and 1994 federal tax returns, claimant listed himself as an independent contractor. (Ex. 37 at 25-34.) He has a federal employer I.D. number and listed no wages as income for those years. On the other hand, he carried no workers' compensation or liability insurance, had no accounts at lumber yards or other construction connected businesses, did not advertise, and did not have a separate bank account for RW Construction.

Medical Treatment in Missouri

25. Following his move to Missouri, claimant continued to experience shoulder symptoms, primarily pain. In Missouri he sought treatment from Joe Elliot, D.C., who treated him with limited success through March 1993. Dr. Elliot then referred claimant to Dr. Joel Jeffries, an orthopedist.

26. Dr. Jeffries initially examined claimant on July 20, 1993. At that time claimant reported "neck, mid scapular pain and bilateral shoulder pain . . . low back pain with burning pain

into his right posterior thigh. . . . numbness in both arms, some tingling in his right leg and some weakness in both arms." He rated his pain to be 9 out of 10 at worst, and 8 out of 10 at the time of the examination. (Ex. 23 at 8.) On physical examination, Dr. Jeffries reported:

[s]houlder abduction on the right causes slightly increased pain. Shoulder impingement is negative. There is no tenderness over the biceps tendon. On the left shoulder abduction is negative. Shoulder apprehension is slightly positive. Shoulder impingement is negative. There is no tenderness over the biceps tendon.

(*Id.* at 9.) X-rays were negative. Dr. Jeffries' impression was "[c]ervical and lumbar strain versus ankylosing spondylitis." He recommended a course of physical therapy. (*Id.*)

27. Claimant returned to Dr. Jeffries on August 24, 1993. His condition was unchanged and he had not yet begun physical therapy. Dr. Jeffries again urged that he start physical therapy. (*Id.* at 7.)

28. Claimant thereafter began physical therapy.

29. In a follow-up exam on October 5, 1993, Dr. Jeffries reported:

Richard . . . started in rehabilitation with Kathy Abernathie [sic]. He has been switched over to a home exercise program. He has noted some increase in his flexibility but still has a discomfort in his shoulder, especially, and he also notes that **this is worse when he does things like carrying sheet rock or when he abducts his shoulder completely. He has remained at work. On examination today his right shoulder shows a trace positive impingement sign.** He has full abduction and forward flexion. He has a negative drop arm and he has strong supraspinatus strength. **We will x-ray his shoulder today.**

Two views of the shoulder show a moderate amount of degenerative change at the AC joint with an osteophyte off the acromion. The interval between the humeral head and the acromion is well-maintained. On the axillary lateral there is no evidence of Hill-Sach's lesion.

(Ex. 23 at 6 emphasis added.) Dr. Jeffries recommended another month of physical therapy. (*Id.*)

30. In a letter to Dr. Jeffries dated November 3, 1993, physical therapist Kathy Abernathy reported claimant had increased flexibility and less pain following a month of therapy. However, claimant reported continued "soreness whenever over-doing it at work." (Ex. 7.) During the month prior to the report, claimant worked on the McCollum job. For the weeks of October 2, 1993 through October 30, 1993, he averaged 27 hours of work a week, working as much as 35.5 and as little as 14.5 hours per week.

31. Dr. Jeffries saw claimant on November 5, 1993. He recommended that claimant continue with a home exercise program and return on an "as needed basis." (Ex. 23 at 5.)

32. Claimant did not thereafter return to Dr. Jeffries until August 30, 1994. On that date, claimant reported having experienced improvement in his symptoms the first months following his last examination. During many weeks of the interval, however, claimant was not working. During many of the other weeks, he only worked 13 hours or less. Dr. Jeffries reported, "Since I saw him last year, he has not worked 40 hour weeks straight through. He is doing mostly light duty, part-time jobs." (*Id.* at 17.)

33. On August 30, 1994, claimant also reported that during the previous two months he had increasing pain in his right shoulder, along with numbness and tingling down both arms. Dr. Jeffries recommended renewed physical therapy. (*Id.*)

34. Claimant thereafter participated in additional physical therapy. In a letter to Dr. Jeffries dated September 14, 1994, physical therapist Kathy Abernathy reported that claimant had increased range of motion and strength and a decrease of pain in his neck. However, he continued to have pain in his right shoulder which increased with activity. (Ex. 8.)

35. On September 22, 1994, Dr. Jeffries injected claimant's right shoulder with "3 cc. of 2% Lidocaine, 3 cc. of ½ % Marcaine and 60 mg. of DepoMedrol [sic]." (Ex. 23 at 16.) On October 13, 1994, claimant reported an initial decrease in pain following the injection. Dr. Jeffries recommended he continue with his exercise program and return on an as needed basis. He noted that if the claimant's pain continued he would be "willing to inject his shoulder once more but then after that we would probably need to scan his shoulder and consider doing a decompression." (Ex. 23 at 10.)

36. Dr. Jeffries next saw claimant on December 27, 1994. Claimant's condition remained unchanged and the doctor ordered an MRI of the shoulder. (Ex. 23 at 3.)

37. An MRI was performed in January 1995. The findings were consistent with tendinitis and a questionable tiny intersubstance tear as well as degenerative changes of the AC joint. (Ex. 23 at 13.) Dr. Jeffries asked Dr. Mark Adams, who practices in the same orthopedic group, to examine claimant.

38. Dr. Adams examined claimant on January 25, 1995. He noted that conservative measures had failed to bring relief and that claimant reported difficulty with overhead use of his arms. After reviewing the MRI, Dr. Adams opined that "[b]asically, I think he has reached the point where surgery is eminent." (Ex. 20 at 18.)

39. At the request of the insurer, an IME of claimant was done by Dr. Herbert H. Haupt on April 6, 1995. Dr. Haupt felt that the MRI findings did not conclusively demonstrate the necessity of surgery and that further physical therapy should be attempted:

Routine plain films of the shoulder are obtained. These fail to demonstrate any significant degenerative changes about the AC joint. There is no obvious spur on the plain films. The subacromial space is well maintained. The Bigliani views demonstrate a relatively flat anterior acromion.

This patient's presentation is most consistent with a chronic myofascial complaint about the trapezius and paracervical musculature with some secondary disuse atrophy of the rotator cuff and resultant mild impingement syndrome. **I do feel the impingement syndrome is present but it is considered quite mild and is secondary to the injuries sustained at work originally.**

Based upon his presentation I do not feel this patient is currently a surgical candidate. His presentation is quite mild despite the findings on the MRI scan. My recommendation for treatment would be to place the patient on anti-inflammatory medication and begin an aggressive physical therapy program. Initially I would start off with at least 4 weeks of therapy. If the patient is making progress but still having shoulder soreness, then he may be a candidate for a repeat injection to the shoulder. Previously an injection caused at least 4 week[s] of improvement in his discomfort. Following the injection at least 4 more weeks of therapy would be recommended. If he is not able to return to full functional duties at that point in time he would be a candidate for a work hardening program. [Emphasis added.]

(Ex. 22 at 2.)

40. Dr. Jeffries saw claimant on April 27, 1995. He was made aware of Dr. Haupt's opinions but felt that additional conservative treatment was unwarranted. However, he agreed to prescribe an additional injection and additional physical therapy. (Ex. 23 at 20.)

41. Claimant again underwent physical therapy but continued to report intermittent soreness in his neck and right shoulder. (Ex. 20 at 25.) Following the therapy he was urged to continue his home exercise program. (*Id.*)

42. On May 25, 1995, claimant returned to Dr. Jeffries. The doctor noted that physical therapy had not improved claimant's pain level and that he had right shoulder impingement. Dr. Jeffries injected claimant's subacromial bursa with Marcaine, Lidocaine and Depo-Medrol. He advised claimant to continue his home exercise program with the proviso "[i]f he continues to be symptomatic, it would be my opinion that he is a conservative care failure and will require a decompression of his shoulder." (Ex. 23 at 14.)

43. Neck and shoulder pain propelled claimant to the Columbia Regional Hospital Emergency Room on July 6, 1995. He was given a shot of Toradol, a prescription for Relafen, and advised to follow-up with Dr. Jeffries. (Ex. 21 at 3, Ex. 23 at 15.)

44. Claimant saw Dr. Jeffries on July 13, 1995. The doctor prescribed pain medication and recommended that claimant see Dr. Adams "as soon as possible for evaluation of his shoulder decompression." (Ex. 23 at 15.)

45. Claimant was reevaluated by Dr. Adams on August 28, 1995. Dr. Adams renewed his recommendation for surgery. (Ex. 20 at 16-17.)

46. The State Fund then authorized surgery. On September 19, 1995, Dr. Adams performed a right shoulder subacromial decompression with distal clavicle removal. The operative report provides the following information concerning shoulder defects:

[T]here was a quite large spur present off the anterior acromial edge. The coracoacromial ligament was also divided and removed. Inspection of the subacromial area revealed an extremely thickened and large bursa. . . . The acromioclavicular joint was then approached and there was a large spur present off the distal portion of the clavicle area."

(Ex. 21 at 1-2)

47. Although the Court has not been provided with records of Dr. Adams' follow-up care, a December 13, 1995 letter from Debra K. Edwards, a medical services consultant, to Dennis Small, claims adjuster for the State Fund, indicates that post-surgical care was provided. (Ex. 24 at 17-18.) Dr. Adams indicated that claimant should reach maximum healing in late January or early February 1996, and could then return to work but with restrictions precluding repetitive overhead work with his arms.

48. Claimant returned to Dr. Jeffries on December 26, 1995, after undergoing a functional capacities evaluation (FCE). Dr. Jeffries found claimant to be at maximum medical improvement. He noted that claimant was suffering some neck pain but felt that surgery was unwarranted. He also noted that claimant had physical restrictions as set forth in the functional capacities evaluation and that he should not perform frequent overhead work with his right arm. (Ex. 20 at 1.) The FCE capacities assessment limited claimant to medium physical work with a 45-pound lifting restriction overall. (Ex. 20 at 2.)

49. Claimant testified that his surgery, while not completely resolving his pain, increased his range of motion and reduced his pain.

50. Claimant was a credible witness.

CONCLUSIONS OF LAW

1. At issue is claimant's entitlement to temporary total disability benefits between December 15, 1992, which is the date he quit his job with Hageman, and September 26, 1995, the date on which the State Fund commenced paying him temporary total disability benefits. The State Fund has accepted liability for this claim and conceded that claimant

had not reached maximum medical improvement prior to his surgery on September 19, 1995. Claimant contends he is entitled to temporary total disability benefits during the entire time prior to his surgery.

2. Claimant must prove his entitlement to benefits by a preponderance of the evidence. *Ricks v. Teslow Consolidated*, 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Aetna Fire Underwriters*, 183 Mont. 190, 598 P.2d 1099 (1979).

3. The law in effect at the time of the injury controls the claimant's entitlement to benefits. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 730 P.2d 380 (1986). Thus, the 1991 version of the Workers' Compensation Act governs this case.

4. The 1991 Workers' Compensation Act defines temporary total disability at section 39-71-116(23), MCA:

"Temporary total disability" means a condition resulting from an injury as defined in this chapter that **results in total loss of wages** and exists until the injured worker reaches maximum healing. [Emphasis added.]

The loss of wages criteria for payment of temporary total disability benefits is repeated in section 39-71-701, MCA (1991), which provides in pertinent part:

(1) Subject to the limitation in 39-71-736 and subsection (4) of this section, a worker is eligible for temporary total disability benefits when the worker **suffers a total loss of wages as a result of an injury** and until the worker reaches maximum healing. [Emphasis added.]

The State Fund contends that "[c]laimant did not suffer a **total** loss of wages as a **result** of his injury." (Respondent's Proposed Findings of Fact, Conclusions of Law and Judgment at 2.)

Citing *David v. State Compensation Ins. Fund*, 267 Mont. 435, 884 P.2d 778 (1994), the claimant contends that the Court must ignore his 1993 and 1994 earnings because he was working as an independent contractor. He further contends that he sustained a total loss of wages during a number of weeks over the two-year period.

David holds that an independent contractor is not an employee, citing, in turn, *St. John's Lutheran v. State Compensation Ins. Fund*, 252 Mont. 516, 523, 830 P.2d 1271, 1276 (1992). *David*, however, concerned concurrent earnings. Concurrent earnings from work as an independent contractor were excluded by the statute if the claimant had failed to secure workers' compensation coverage for his concurrent work. *St. John's*, which was cited in *David*, concerned the exemption of independent contractors from the mandatory coverage provisions of the Act.

The definition of "employee" within the general provision defining wages as remuneration for "services rendered by an employee" § 39-71-123(1), MCA (1991), may be a different matter. Under the WCA a sole proprietor operating as an independent contractor may elect coverage under the Act. The Act provides that partners and sole proprietors "shall elect to be bound personally and individually" by the Act unless they apply for and obtain an exemption certifying their status as an independent contractor. § 39-71-401(3)(a), MCA (1991). If the term "employee", as used in section 39-71-123(1), MCA, is construed as excluding independent contractors, then independent contractors electing coverage under the Act will have no wages; and lacking wages there is no basis for temporary total benefits.

In this case, the Court need not address the above dilemma. Irrespective of whether claimant's 1993 and 1994 earnings constituted wages within the meaning of the WCA, he still fails to satisfy the definition of temporary total disability between December 15, 1992 and January 1995.

Initially, claimant is not entitled to temporary total disability benefits from December 15, 1992 through April 1993 because his loss of wages during that time was not the *result* of his injury. His own testimony established his ability to continue working on the Gannon job. The job was expected to continue through April. There was no evidence that his employer would have refused him continued employment. Rather, he quit work because he decided to move back to Missouri. His move, not his injury, caused him to cease work.

He is also not entitled to benefits from April 1993 until early January 1995. The Supreme Court in *Weaver v. Buttrey Food and Drug*, 255 Mont. 90, 96, 841 P.2d 476, 480 (1992), has adopted the following standard for determining a total loss of wages:

To demonstrate "total loss of wages," a claimant must establish what jobs constitute her normal labor market and prove complete inability to perform the duties associated with those jobs.

In *Weaver* the Court held that the claimant did not meet this test where she demonstrated her ability to work as a bookkeeper and bartender subsequent to her injury. At the time of her injury she had been working as a grocery store checker. After her injury she began working as a bookkeeper and bartender at a bar she and her husband owned as partners. Technically, she was self-employed. However, the Supreme Court held that she was ineligible for temporary total disability benefits even though part of the time for which she sought benefits she was only working part-time. It rejected her argument that she was not "employed" after the injury.

Weaver teaches that an injured worker capable of continuing to perform work within his or her normal labor market is ineligible for temporary total disability benefits whether or not the worker continues to work as a true employee or undertakes self-employment. *Weaver*

also shows that a worker's normal labor market may include jobs he or she in fact performs subsequent to injury.

The petitioner in this case was working as an all-around carpenter at the time of his injury. Subsequently, he did light carpentry work. Light carpentry is a subset of general carpentry and is therefore a part of claimant's normal labor market. His work in Missouri established his ability to perform light carpentry, at least until January 1995. The evidence presented by claimant fails to establish that his periods of unemployment were due to flare-ups of his condition or to anything other than a lack of immediate jobs. He is therefore not entitled to benefits during 1993 or 1994.

A different result is required with respect to the weeks after December 31, 1994. Claimant last worked during the week of December 31, 1994. His testimony and the medical records establish that at about that time his shoulder problem became more acute. On January 25, 1995, Dr. Jeffries recommended that he consider surgery and commented, "I think he has reached the point where surgery is eminent." (Ex. 20 at. 18.) Surgery did not immediately follow because the State Fund refused to approve it and demanded that he undergo additional conservative care which ultimately proved unsuccessful. Thus, by January 1995, it is clear that his shoulder had become totally disabling and required more aggressive therapy. He is therefore entitled to benefits from that time onward.

The work claimant performed in July 1995 on the trailer house he rented did not constitute employment. There was no contract for hire. See § 39-71-118(1)(a), MCA (1991). Claimant merely made his rental quarters liveable in return for a rent reduction.

Although the Court cannot precisely identify a day on which claimant's condition became totally disabling, I am persuaded that total disability arose at least by the time he altogether ceased working, i.e., the week commencing January 6, 1995. Allowing for the six day wait period prescribed by section 39-71-736(1), MCA (1991), claimant is entitled to temporary total disability benefits commencing January 13, 1995.

5. Claimant is entitled to his costs.

JUDGMENT

1. The State Compensation Insurance Fund shall retroactively pay claimant temporary total disability benefits for the time period of January 13, 1995 through September 25, 1995.
2. Claimant is entitled to costs in an amount to be determined by the Court. He shall have 10 days in which to submit his memorandum of costs. The State Fund shall then have 10 days in which to file its objections, if any.
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 15th day of May, 1996.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Rex Palmer

Mr. Charles G. Adams

Submitted: March 23, 1996

1. Respondent was provided an opportunity to dispute the chart but has not done so. The Court has therefore relied upon it in making its findings.