IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1999 MTWCC 41

WCC No. 9807-8013

ROBERT E. WINFIELD

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

MONTANA DEPARTMENT OF FISH WILDLIFE & PARKS

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Warden Captain with Montana Department of Fish and Wildlife strained his back while capturing a moose, continued to work for almost five years despite pain, then ceased working, claiming he was PTD. Insurer presented surveillance videos depicting activities such as vacuuming a car, filling a gas can, working on a truck, and walking on a hunting trip. Jobs had been conditionally approved only and vocational evidence was equivocal. Psychological testimony indicated claimant was depressed due to his injury.

Held: Given claimant's work history, consistent pain reports, the conditional approval of jobs, and other factors, Court found him presently PTD, but noted he may be able to work in the future with therapy, proper use of pain medication, or surgery.

Topics:

> **Disability: Permanent Total.** Disability is not a wholly medical determination. In addition to claimant's age, education, work history, skills and abilities, pain is another factor the Court must consider in deciding whether claimant is permanently totally disabled. Pain may be so severe for some individuals that it renders them physically incapable of performing regular employment within section 39-71-116(16) (1991), MCA. Court credited claimant's pain reports and found him PTD, noting that inability to work on a regular, sustained basis is not the equivalent to inability to engage in any sort of activity.

Medical Conditions: Depression. Where psychologist's testimony indicated claimant's depression arose from his disability and pain following injury, the impact of the depression on his experience of pain and on his ability to work was among the factor's considered by the Court as indicating PTD. However, the Court noted that treatment of depression may change claimant's inability to engage in work on a regular, sustained basis.

Pain. Disability is not a wholly medical determination. In addition to claimant's age, education, work history, skills and abilities, pain is another factor the Court must consider in deciding whether claimant is permanently totally disabled. Pain may be so severe for some individuals that it renders them physically incapable of performing regular employment within section 39-71-116(16) (1991), MCA.

Surveillance. Insurer presented video tapes showing claimant vacuuming a car, working on a truck, squatting to fill a gas can, walking on a hunting trip, and involved in some fashion in various outdoor activities. Doctors who viewed videos agreed claimant could do more than he had portrayed in office visits, but continued their assessment of restrictions. Court credited claimant's pain reports and found him PTD, noting that inability to work on a regular, sustained basis is not the equivalent to inability to engage in any sort of activity.

¶1 The trial in this matter was held on February 22, 1999, in Helena, Montana. Petitioner, Robert E. Winfield (claimant), was present and represented by Mr. Richard J. Pyfer. Respondent, State Compensation Insurance Fund (State Fund), was represented by Mr. David A. Hawkins.

¶2 Exhibits: Exhibits 1 through 17, 19 and 20 were admitted without objection. Exhibit 18 was refused.

¶3 Witnesses and Depositions: The claimant, Linda Winfield, Joe Winfield, and Bob Harris were sworn and testified. In addition, the parties agreed the Court may consider the depositions of claimant, Robert E. Harris, Bill Visser, Herb Keating, and Dr. Allen M. Weinert.

¶4 Issues Presented:

1. Whether claimant is permanently totally disabled and, if so, the date when disability began.

2. Whether claimant is entitled to costs, attorneys fees and a penalty.

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

FINDINGS OF FACT

¶6 Claimant is 46 years old. He resides in Helena, Montana, with his wife, Linda Winfield, and their three children.

¶7 In 1975 claimant received his B.S. in Zoology from Washington State University. He has also completed approximately one year of graduate credits in Wildlife Biology.

¶8 In 1978 claimant went to work for the Montana Department of Fish Wildlife and Parks (Fish & Wildlife). His employment with Fish & Wildlife was as follows:

1978 to 1985 Game Warden

1985 to 1988 Warden Sergeant

1988 to 1994 Warden Captain

1994 to 1996 Head of Undercover for the State of Montana

(Ex. 11 at 172.)

¶9 Claimant's work history prior to Fish & Wildlife consisted of selling boats, construction labor, and ranch work.

Injury

¶10 In the early morning hours of September 21, 1991, a bull moose ran loose in the city of Great Falls. Claimant received a phone call to go forth and bring down the beast, and so he did. He tranquilized and noosed the moose, then attempted to load him into a trailer. As he loaded the behemoth, claimant strained his back.

¶11 Fish & Wildlife was insured by the State Fund at the time of claimant's injury. Claimant filed a claim with the State Fund. (Ex. 1.) The State Fund accepted the claim and has paid medical and wage-loss benefits. (Pretrial Order at 2.)

Subsequent Work and Benefits History

¶12 After his injury, claimant took four or five days off of work, then returned to his regular job.

¶13 Claimant's back continued to bother him but he continued working until June of 1996. He felt he could no longer perform his job on account of his back pain. (Winfield Dep. at 7-10.) He has not worked since then.

¶14 The State Fund's record of benefits paid claimant is found at Exhibit 20 and reflects the following:

04/28/97 to 05/02/97 Permanent Partial Benefits

12/08/97 to 02/01/98 Total Rehabilitation Benefits

02/02/98 to 06/02/98 Temporary Total Disability Benefits

06/03/98 continuing to present Permanent Partial Benefits

¶15 In this action, claimant seeks permanent total disability benefits retroactive to the date he reached maximum medical improvement.

Medical

¶16 Claimant initially sought treatment for his injury on October 28, 1991, when he was seen by Dr. Tim Weill. (Ex. 2.) Dr. Weill's office note records that claimant was "having a flare-up of some chronic lower back pain secondary to lifting a moose recently." (*Id*.) Claimant reported "some leg paresthesias but nothing persistent" and straight leg raising testing elicited "some sciatica-type pain with radiation into the right buttock at about 75-80 on the right . . . ." (*Id*.) X-rays were taken and interpreted as "reveal[ing] some degenerative changes at all disk space levels and especially a lot [sic] of narrowing at L5-S1." (*Id*.) Dr. Weill's assessment was "Degenerative disk disease, lumbar spine, with flare-up mostly at L5-S1 with right sciatic symptoms." (*Id*.) On November 5, 1991, the doctor prescribed two to four weeks of physical therapy. (*Id*.)

¶17 Dr. Weill referred claimant to Dr. Ronald M. Peterson, at the Industrial Medicine Clinic at the Montana Deaconess Medical Center in Great Falls. Dr. Peterson first saw claimant on March 24, 1992. At that time claimant had constant pain in his low back and "occasional radiation of the pain from his right lower back into his right thigh." (Ex. 7 at 98.) Straight leg raising was positive on the right side. (*Id*.) Dr. Peterson's impression was lumbar muscle strain with myofascial pain component. (*Id*.) He prescribed physical therapy and medication. (*Id*.)

¶18 On March 31, 1992, Dr. Peterson ordered an MRI. (*Id*. at 101.) The MRI disclosed a small disk herniation at L5-S1 but no evidence of nerve root impingement. It also disclosed joint space narrowing. Finally it disclosed a diffuse bulge at L4-5, along with disk dessication. (*Id*. at 103.) On April 9, 1992, Dr. Peterson referred claimant to Dr. Dale M. Schaefer for a further consultation. (*Id*. at 104.)

¶19 Dr. Schaefer, a neurosurgeon, then saw claimant. (Ex. 8 at 109.) His initial examination was on April 27, 1992. (*Id*.) At that time, claimant was complaining of low-back pain, pain and tingling in his right buttock and thigh, and intermittent aching of the right testicle. (*Id*.) Dr. Schaefer noted that claimant had not experienced leg pain prior to his encounter with the wayward moose. In reviewing an MRI of claimant's lumbar spine, Dr. Schaefer commented:

> I did review an MRI of his lumbar spine. He has narrowing of the L5/S1 disc space, but there appears to be no disc protrusion at this level. He has a broad based

> bulging of the annulus at L4/5, which is rather symmetric and does not seem to favor either side.
>
> It is conceivable, at least, that in the standing position with axial loading that this and could become a significant lesion for him.

(*Id*. at 110.) Dr. Schaefer referred claimant to Dr. Terry L. Jackson for an epidural steroid injection. (*Id*.)

¶20 Dr. Jackson, a physiatrist, first saw claimant on May 11, 1992, and continued caring for him until November 1992. (Ex. 6 at 66.) During that time, Dr. Jackson ordered numerous tests, including additional MRIs, a CT scan, a myelogram, a bone scan, a discogram, and an EMG. He also treated claimant with epidural steroid injections. The number of tests and needles which claimant permitted himself to be subjected to between May and November, while still working, is strong evidence that claimant was suffering significant pain.

¶21 After seeing little improvement in his condition, Dr. Jackson referred claimant to Dr. Michael E. Luckett to obtain a surgical opinion. (*Id*. at 97.)

¶22 Dr. Luckett is a board certified orthopedic surgeon. He first saw claimant on October 29, 1992. Claimant reported low-back and lower right extremity pain. (Ex. 3 at 3.) Dr. Luckett reviewed an MRI scan done in September of 1992, and interpreted it as showing " a L5, S1 desiccated disc with a narrowed disc space and a L4,5 desiccated disc with very mild disc space narrowing." (*Id*.) He also commented that EMG and nerve conduction studies were "consistent with a possible mild right S1 radiculopathy and possibly a mild L5 radiculopathy as well." (*Id*.; *See also* Ex. 4 at 61.)

¶23 Dr. Luckett did not consider claimant a good candidate for surgery and treated claimant conservatively, prescribing an exercise program and medications for pain (Tylenol #3 and Relafen) and sleep (Elavil, which is an antidepressant). (Ex. 3 at 4.) As of May 30, 1995, Dr. Luckett reported that claimant's symptoms "were essentially the same as they had been in the past with intermittent low back and right lower extremity pain." (*Id*. at 21.)

¶24 In a letter dated September 29, 1995, Dr. Luckett expressed his opinion that claimant had reached maximum medical improvement (MMI). (*Id*. at 22.) At that time, claimant was still working.

¶25 Claimant's next visit to Dr. Luckett was August 20, 1996. By this visit he was no longer working and reported that his symptoms had worsened over the past year. (*Id*. at 24.) Dr. Luckett reported that claimant's neurological exam remained normal and observed that "his symptoms are not dramatically changed over previously." (*Id*.) He renewed claimant's prescription for Relafen and rated claimant's impairment at 7%. (*Id*.)

¶26 In January of 1997, claimant reported to Dr. Luckett that he felt he could not return to his time-of-injury employment. Based on claimant's subjective complaints, Dr. Luckett ordered a functional capacity evaluation (FCE). (*Id.* at 26.)

¶27 The FCE was conducted in February 1997, by physical therapist Jeff Swift (Swift). (Ex. 9.) Swift opined that claimant cannot return to his time-of-injury job but concluded that claimant is capable of light work with the following restrictions: frequent position changes (every 30 to 40 minutes), no sustained walking longer than 10 minutes, and lifting no more than 20 pounds on an occasional basis. (*Id.*) Swift also noted that "[s]ymptom magnification behavior was **not** exhibited" and that claimant "was consistent in demonstrated and reported symptomatology throughout the examination." (*Id.* at 116.)

¶28 Following the FCE, Dr. Luckett concurred that claimant cannot return to his time-of-injury job (ex. 3 at 28), and that opinion is not contested by the State Fund.

¶29 In September of 1997, Dr. Luckett reported that claimant was complaining of worsening symptoms. His office note records:

> He notes his symptoms are getting worse. He has pain radiation into the S1 dermatone on the right. He does not note any frank weakness but he is limited in his ability to walk at a couple of blocks.

(*Id.* at 30.) Dr. Luckett ordered a new MRI of the lumbar spine. (*Id.*) The MRI showed degenerative disk disease of the lower three lumbar levels, and a total loss of disk space at L5, S1. (Dr. Weinert's Dep. Ex. 1 at 25.) The radiology report indicated that the findings were "compatible with degenerative changes that have advanced very slightly since the prior exam." (Ex. 3 at 31.) On September 18, 1997, Dr. Luckett reported that while claimant remained symptomatic, he was "not clearly a candidate for surgery at this point in time." (*Id.* at 33.)

¶30 Claimant's next visit with Dr. Luckett was January 6, 1998. Claimant continued to complain of the same symptoms. Dr. Luckett recommended that claimant seek a second opinion regarding surgery. (Ex. 3 at 48.)

¶31 In November 1998, claimant began treating with Dr. Allen M. Weinert, Jr., a board certified physiatrist, on a referral from Dr. Luckett.

¶32 Dr. Weinert testified at his office but with the Court present. His testimony was transcribed. (Weinert Dep.)

¶33 In his initial examination on November 5, 1998, Dr. Weinert noted that claimant had an antalgic gait (limp) on the right side and exhibited frequent postural changes. (Weinert Dep. at 8.) Dr. Luckett had earlier observed claimant limping. (September 5, 1997 examination; Ex. 3 at 30.)

¶34 Dr. Weinert testified that his examination findings were consistent with those of Dr. Luckett. (Weinert Dep. at 10.) In comparing the 1992 and 1997 MRIs, Dr. Weinert concluded that claimant's degenerative disk disease had worsened. (*Id.* at 10-11.) He also concluded that claimant was suffering from sleep dysfunction and depression secondary to his injury, and prescribed Zoloft and Amitriptyline for these conditions. (*Id.* at 15-16.) Both medications are antidepressants. (www.medscape.com.)

¶35 Dr. Weinert saw claimant on two additional occasions, December 10, 1998 and January 21, 1999. Claimant's complaints remained the same, although he reported some improvement in his mood.

¶36 Most recently, claimant has seen Dr. Max Iverson, who is an orthopedic surgeon practicing in Helena. Dr. Iverson has raised the possibility that claimant may be "a candidate for interdisc electro thermal treatment." (Weinert Dep. Ex. 3.) His report was on February 4, 1999, and the Court has no more recent information concerning follow-up to the recommendation.

Medical Releases to Return to Work

¶37 Both Drs. Luckett and Weinert opined that claimant's medical condition does not preclude him from returning to work and that he is capable, with some restrictions, of performing sedentary and light work.

¶38 On February 5, 1998, Dr. Luckett wrote the following to claimant:

> Your functional capacity examination would qualify you for light work. Qualifying for light work does not mean that you will be able to do light work with no pain. My responsibility is simply to indicate whether you are able physically to do this level of work.

(Ex. 3 at 49.) Regarding claimant's pain complaints and its impact on his personal life, Dr. Luckett further commented:

> The issue of quality of life, particularly with regard to relationships within the family, is out of my area of expertise. The only comment that I can make in this regard as a casual observer is that people choose how they wish to react to a painful stimulus. This phenomena is known as "suffering" and people clearly choose to suffer or not to suffer. These are issues which are best addressed either with a psychologist or a psychiatrist and if you feel you wish to have a referral, please let me know and I can make arrangements for this.

(*Id.*)

¶39 On December 13, 1997, Dr. Luckett approved a job analysis for insurance claims adjuster on a "trial basis." He noted that "total sitting time may be too much." (*Id.* at 47.)

Later, he conditionally approved a "communications systems operator" position. (The position is better described as a "dispatcher" for law enforcement.) (See *Id*. at 55-58.) His approval was with the following proviso: "as long as can alternately sit and stand as sx [symptoms] dictate." (*Id*. 3 at 58.)

¶40 Dr. Weinert testified that, in his opinion, claimant can work in the sedentary to light jobs but would require accommodation for "prolonged static posture, sitting or standing." (Weinert Dep. at 34.) Dr. Weinert was never requested to review any job analysis relating to the claimant. (*Id*. at 27.)

Vocational Rehabilitation

¶41 Claimant received eight weeks of vocational rehabilitation counseling from Herb Keating (Keating), who was assigned to his case in July of 1997. Keating testified by deposition.

¶42 He saw claimant six times over the course of eight weeks. Their encounters generally lasted half an hour to an hour. (Keating Dep. at 8-9.) During those visits, Keating noted that claimant had difficulty maintaining a static position. (*Id*. at 22.) He observed that claimant was continually shifting his position and on occasion had to lie on the floor during their meetings. (*Id*. at 21-22.) He testified that he had no reason to question claimant's manifestation of pain, and that claimant was cooperative throughout the rehabilitation process. (*Id*. at 23.) He felt that claimant was motivated to return to work if he could find an appropriate job. (*Id*. at 20.)

¶43 In evaluating claimant's ability to return to work, Keating relied on the opinions of Dr. Luckett and the FCE examiner, Jeff Swift. (*Id*. at 7.) He assumed that claimant was physically restricted to a sedentary position which allows for frequent postural changes. (*Id*.)

¶44 Keating contacted claimant's time-of-injury employer and learned that there was no sedentary position available for claimant. He then evaluated alternative positions. On November 20, 1996, he identified two possible jobs: (1) Meat and poultry inspector and (2) insurance claims adjuster. (Ex. 11 at 169.) Dr. Luckett approved only the insurance claims adjuster position, but as noted in Finding 39 his approval was conditional.

¶45 In April of 1998, Keating identified an additional job as appropriate for claimant. That job was as a law enforcement dispatcher (communication systems operator) for the Montana Highway Patrol. As stated in Finding 39, Dr. Luckett approved this position with the condition that claimant be able to sit/stand as his symptoms dictated. (Ex. 3. at 58.)

¶46 Claimant testified that he applied for a claims adjuster position at the State Fund and never received a response. He also went to the Highway Patrol dispatch center to inquire about the position. He was told that employees were required to work full shifts and that

there was a lot of sitting involved. Based upon the information he obtained from the employer, he did not apply for the dispatch job.

Pain and Depression

¶47 Claimant testified that following his industrial injury he was able to control his pain through medication and physical therapy, and thereby continue working. However, his condition deteriorated. He testified that he began experiencing more severe pain radiating down his right leg, pain in his right testicle, and pain in his buttocks. Since the accident he has also had significant problems sleeping. On a good night he sleeps five or six hours.

¶48 By 1994 he developed a limp. In June of 1996 he stopped working. He has not worked since.

¶49 According to claimant, his wife and his son, claimant's daily activities are restricted. He wakes around 7:00 a.m. Generally, he has pain in his lower back and right leg upon waking. He gets breakfast for his younger son and daughter. He takes his children to school. He may then do household errands or chores.

¶50 Around the house, claimant dusts and cooks, and generally helps keep things tidy. If he vacuums, he does one room at a time and then lies down. He occasionally carries groceries but estimates that he doesn't normally lift more than ten pounds.

¶51 Claimant spends much of his day and evening lying on the floor.

¶52 Claimant's condition has seriously impacted his interaction and relationship with his family. Often he is irritable and intolerant. Claimant testified that he is depressed and has thought about suicide.

¶53 Dr. J. Bailey Molineaux, a clinical psychologist, relates claimant's depression to his work injury and chronic back pain. (Ex. 5 at 63-64.)

¶54 Claimant has severely curtailed his recreational activities. While he continues to hunt and snowmobile, he does so less frequently, uses a back brace when doing them, takes extra pain medication, and suffers increased pain the day after.

Surveillance Video

¶55 The State Fund hired a private investigative agency to surveil the claimant. Investigator Robert Harris conducted the surveillance and videoed the claimant.

¶56 At trial, testimony focused on five different days of video, which the State Fund contends show claimant's physical ability exceeds what he has told his doctors and the Court. The particular days show claimant engaged in the following activities:

1. **November 14, 1997.** Claimant is seen vacuuming out the inside of his vehicle for approximately one half hour.

2. **January 16, 1998.** Claimant is observed squatting down to fuel a gas can. After he leaves the gas station, claimant is followed and video is taken of him and his son departing up river in a boat. Approximately 5½ hours later they return, and claimant is observed helping his son unload the boat.

3. **February 14, 1998.** Video is taken of claimant driving a vehicle pulling a trailer with two snowmobiles. Video shows claimant driving from Helena to the Discovery ski area.

4. **March 7, 1998.** Claimant is observed for approximately 50 minutes walking in a field with his son. Claimant's son is carrying a shotgun; the claimant does not have a gun.

5. **July 22, 1998.** Video of claimant working on his truck. Video shows claimant bending at the waist numerous times.

¶57 Both Dr. Luckett and Dr. Weinert were requested to view and comment upon the activities they saw claimant perform in the video.

¶58 Dr. Luckett felt that the video surveillance tape refuted claimant's report of his subjective complaints. (Ex. 3 at 59.) The tape did not, however, significantly change Dr. Luckett's opinion about claimant's physical restrictions. In a letter to John Gneckow, the claims adjuster, he stated his opinion:

> Based upon my observation of your tape and Bob's (claimant's) previous functional capacity examination, he clearly would qualify for light work. I think a lifting restriction of 30 pounds on an occasional basis would certainly be reasonable. *I think that he needs the opportunity to alternately sit and stand as his symptoms dictate*. He should not be required to do repetitive bend, lift and twist activities. [Emphasis added.]

(*Id.*) Thus, even after viewing the video, Dr. Luckett felt claimant was limited to light-duty work with specific restrictions.

¶59 Dr. Weinert also viewed the surveillance video. While Dr. Weinert noted that claimant demonstrated greater physical abilities on the video than he portrayed in the office, he testified that the video did not change his opinion regarding the restrictions he had placed on claimant. (Weinert Dep. at 34.) Dr. Weinert also commented that in every portion of the video the claimant was "favoring the right side, limping on his right leg." (*Id.* at 31.)

¶60 In his testimony, claimant addressed the activities shown in the surveillance video. He testified that the activities videoed are not normal, daily activities. The hunting excursions with his son were one time events for the season. He stated that he did not carry a gun on either trip and that his son had asked numerous times that he go with him. Claimant's recollection of snowmobiling was that he and his wife went two times during the year. His

snowmobile has a cushioned seat and special handlebars so he can sit upright. He travels only groomed runs. He is very sore the day after.

Resolution

¶61 This case is a difficult one. There is no question that claimant has significant back pain and cannot return to his time-of-injury job. On the other hand, the surveillance video shows claimant participating in activities that are, at minimum, somewhat incompatible with the limitations he has related to his doctors and the Court. Given claimant's advanced education, his *relative* youth, and his physicians' releases for him to return to work in sedentary to light positions (albeit with limitations), it seems extraordinary that claimant cannot work at all.

¶62 In considering the surveillance video, and Dr. Weinert's comment that the video showed claimant limping, I find that the video is not incompatible with the claimant's assertion of permanent total disability (PTD). Inability to work on a *regular*, *sustained* basis is not equivalent to inability to engage in any sort of activity. On the other hand the video shows claimant engaged in activities exceeding what claimant told his doctors he can do. I find it likely that when distracted and engaged in activities he enjoys, claimant's tolerance for his pain increases.

¶63 After considering all of the evidence, I am persuaded that claimant is, and since June 1996 has been, unable to perform regular employment of any sort due to his back pain. In reaching my decision, I have given significant weight to the fact that claimant continued to work for almost five years after his injury despite medical records reflecting that he was suffering significant pain. His complaints over the years have been consistent. His medical records do not demonstrate any deliberate exaggeration of his complaints. Claimant is also depressed as a result of his injury and his depression may affect the level of his pain and his ability to deal with it. Finally, only two potential jobs were approved by claimant's treating physicians, and those approvals were qualified. Even the State Fund's vocational counselor had doubts about claimant's employability.

¶64 In finding claimant is presently permanently totally disabled, I do not find that he will never be able to work or that his pain will be permanently totally disabling. As Dr. Luckett's note of February 5, 1998 indicates, pain is subjective and an individual's capacity to cope with pain is variable with the individual. Additional psychological evaluation and therapy may assist claimant in dealing with his pain. Moreover, Dr. Iverson's latest report suggests that surgery might improve claimant's condition. Finally, I take note that claimant is not following his prescribed schedule for taking pain medications. While there is insufficient evidence to convince me that taking his medication on the prescribed schedule will enable claimant to work, his failure to follow his doctor's advice could be adversely affecting him. His failure to follow his doctor's advice is troubling to the Court.

Reasonableness of State Fund's Denial of Benefits

¶65 The State Fund's denial of PTD benefits was not unreasonable. Claimant was released to work in sedentary and light positions. Given his education, and despite the limited vocational analysis, it is not facially unreasonable to expect that he can perform all sorts of light and sedentary jobs. Moreover, two specific jobs were approved for claimant, albeit with limitations. Claimant failed to persuade me that qualifications were so onerous that the jobs were plainly outside of his physical capabilities. The video surveillance, and Dr. Luckett's testimony after viewing the video tapes, also raise significant doubt as to whether claimant is as disabled as he claims to be.

¶66 This is also not a case where the insurer has denied all benefits. The State Fund is not attempting to "starve claimant." During the pendency of this litigation it has been paying the claimant permanent partial disability benefits. While those benefits are less than total disability benefits, they are nonetheless significant.

CONCLUSIONS OF LAW

I. Governing Law

¶67 Claimant's industrial injury occurred on September 21, 1991, thus his claim is governed by the 1991 version of the Workers' Compensation Act (WCA). *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

II. Burden of Proof

¶68 The claimant must prove by a preponderance of the evidence that he is entitled to compensation. *Ricks v. Teslow Consolidated,* 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wicken Bros. Construction Co.,* 183 Mont. 190, 598 P.2d 1099 (1979).

III. Permanent Total Disability

¶69 Claimant alleges that he is permanently totally disabled. The benefits are governed by section 39-71-702, MCA (1991), which provides in relevant part:

> **39-71-702. 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.

¶70 The Workers' Compensation Act defines 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).

¶71 In this case, uncontradicted medical evidence establishes that claimant, without consideration for his level and tolerance of pain, is physically restricted from performing his time-of-injury job and limited to performing sedentary to light work, and then with significant restrictions on the jobs. Moreover, only two jobs have been medically approved, and the approvals are with significant restrictions. Medical records and documents also establish that claimant has significant, persistent pain and suffers from post-injury depression.

¶72 Disability is not a wholly medical determination. In addition to claimant's age, education, work history, skills, and abilities, pain is another factor the Court must consider in determining whether claimant is permanently totally disabled, *Killoy v. Reliance Nat'l Indem.,* 278 Mont. 88, 923 P.2d 531 (1996). Section 39-71-116(16), MCA, as quoted above, requires claimant to prove that he has no "reasonable prospect of **physically performing regular employment**." Pain may be so severe for some individuals that it renders them physically incapable of performing regular employment.

¶73 Claimant has carried his burden of proving that at the present time he is unable to perform regular employment.

IV. Costs and Attorneys Fees

¶74 Because claimant has prevailed, he is entitled to his costs.

¶75 Attorney's fees and a penalty may be awarded only if the insurer's conduct is unreasonable. §§ 39-71-612 and -2907, MCA. The Court has found that the State Fund's position was not unreasonable, therefore, claimant is not entitled to attorney's fees or a penalty.

JUDGMENT

¶76 1. Claimant is entitled to permanent total disability benefits retroactive to June 3, 1998, the date on which his temporary total disability benefits were terminated. The State Fund is entitled to a credit for permanent partial benefits it has paid since that date.

¶77 2. Claimant is entitled to costs in an amount to be determined in accordance with the Court's rules.

¶78 3. Claimant is not entitled to attorney's fees or a penalty.

¶79 4. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.

¶80 5. 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 20th day of July, 1999.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Richard J. Pyfer
Mr. David A. Hawkins
Date Submitted: June 2, 1999