

**IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA**

**1999 MTWCC 52**

**WCC No. 9902-8161**

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**ERIC JOHNSON**

**Petitioner**

**vs.**

**STATE COMPENSATION INSURANCE FUND**

**Respondent/Insurer for**

**SEA TRUCKING COMPANY**

**Employer.**

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**FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT**

**Summary:** 63-year old truck driver fell and hit his head, shoulder, and lower back. Insurer accepted liability, but terminated TTD benefits when a physician released claimant to return to work. Claimant alleged permanent total disability.

**Held:** No medical testimony was presented, but medical records indicate claimant exaggerated his symptoms and failed to cooperate with medical testing and examination. His in-court testimony about his pain and limitations was not credible. While claimant unquestionably suffers from osteoarthritis, there was no objective medical evidence that he could not return to work in identified jobs. While it is possible claimant suffers genuine neck and low-back pain, his invalid responses during IME and FCE testing, his questionable responses during other medical examinations, and his behavior in Court make it impossible for the WCC to determine the true nature of his pain and disability. TTD benefits properly terminated; claimant is not PTD.

**Topics:**

**Benefits: Permanent Total Benefits.** 63-year old truck driver fell and hit his head, shoulder, and lower back. Insurer accepted liability, but terminated TTD benefits when a physician released claimant to return to work. Medical records indicate claimant exaggerated his symptoms and failed to cooperate with medical testing and examination. His in-court testimony about his pain and limitations was not credible. While claimant unquestionably suffers from osteoarthritis, there was no objective medical evidence that

he could not return to work in identified jobs. While it is possible claimant suffers genuine neck and low-back pain, his invalid responses during IME and FCE testing, his questionable responses during other medical examinations, and his behavior in Court make it impossible for the WCC to determine the true nature of his pain and disability. TTD benefits properly terminated; claimant is not PTD.

**Benefits: Termination of Benefits: Release to Return to Work.** 63-year old truck driver fell and hit his head, shoulder, and lower back. Insurer accepted liability, but terminated TTD benefits when a physician released claimant to return to work. Medical records indicate claimant exaggerated his symptoms and failed to cooperate with medical testing and examination. His in-court testimony about his pain and limitations was not credible. While claimant unquestionably suffers from osteoarthritis, there was no objective medical evidence that he could not return to work in identified jobs.

**Disability: Permanent Total.** 63-year old truck driver fell and hit his head, shoulder, and lower back. Insurer accepted liability, but terminated TTD benefits when a physician released claimant to return to work. Medical records indicate claimant exaggerated his symptoms and failed to cooperate with medical testing and examination. His in-court testimony about his pain and limitations was not credible. While claimant unquestionably suffers from osteoarthritis, there was no objective medical evidence that he could not return to work in identified jobs. While it is possible claimant suffers genuine neck and low-back pain, his invalid responses during IME and FCE testing, his questionable responses during other medical examinations, and his behavior in Court make it impossible for the WCC to determine the true nature of his pain and disability. TTD benefits properly terminated; claimant is not PTD.

**Medical Evidence: Objective Medical Findings.** 63-year old truck driver fell and hit his head, shoulder, and lower back. Insurer accepted liability, but terminated TTD benefits when a physician released claimant to return to work. Medical records indicate claimant exaggerated his symptoms and failed to cooperate with medical testing and examination. His in-court testimony about his pain and limitations was not credible. While claimant unquestionably suffers from osteoarthritis, there was no objective medical evidence that he could not return to work in identified jobs. While it is possible claimant suffers genuine neck and low-back pain, his invalid responses during IME and FCE testing, his questionable responses during other medical examinations, and his behavior in Court make it impossible for the WCC to determine the true nature of his pain and disability. TTD benefits properly terminated; claimant is not PTD.

**Pain.** 63-year old truck driver fell and hit his head, shoulder, and lower back. Insurer accepted liability, but terminated TTD benefits when a physician released claimant to return to work. Medical records indicate claimant exaggerated his symptoms and failed to cooperate with medical testing and examination. His in-court testimony about his pain and

limitations was not credible. While claimant unquestionably suffers from osteoarthritis, there was no objective medical evidence that he could not return to work in identified jobs. While it is possible claimant suffers genuine neck and low-back pain, his invalid responses during IME and FCE testing, his questionable responses during other medical examinations, and his behavior in Court make it impossible for the WCC to determine the true nature of his pain and disability. TTD benefits properly terminated; claimant is not PTD.

¶11 The trial in this matter was held on May 10, 1999, in Helena, Montana. Petitioner, Eric Johnson (claimant), was present and represented by Mr. John C. Doubek. Respondent, State Compensation Insurance Fund (State Fund), was represented by Ms. Carrie L. Garber. A transcript of the proceedings was not prepared.

¶12 At the close of trial the Court provided both parties with an opportunity to file proposed findings of fact and conclusions of law. The last filing was received May 25, 1999, at which time the case was deemed submitted.

¶13 Witnesses and Depositions: Claimant and Pat Hunt testified. No depositions were submitted.

¶14 Exhibits: Exhibits 1 through 5 and 7 through 28 were admitted without objection. Exhibit 6 was withdrawn.

¶15 Issues: The issues, as set forth in the Pretrial Order, are as follows:

1. Whether insurer improperly terminated claimant's temporary total disability benefits.
2. Whether claimant should be placed on permanent disability benefits.
3. Whether claimant is entitled to his attorney fees, costs and a penalty for the insurer's actions in this case.

¶16 Having considered the Pretrial Order, the testimony presented at trial, the demeanor and credibility of the witnesses, the exhibits, and the parties' proposed findings of fact and conclusions of law, the Court makes the following:

#### FINDINGS OF FACT

¶17 Claimant is presently 63 years old. He has an eighth grade education.

¶18 In his early working years, claimant worked odd jobs and repaired machinery. At approximately age 40 he began truck driving. He initially drove moving vans and then regular freight.

¶19 From 1976 to 1996 the claimant worked for Johnson Trucking, which is located in Washington. (Ex. 21 at 21.) In early 1996 he went to work for SEA Trucking Company (SEA) as a long-haul truck driver. (*Id. and see* Ex. 19 at 2.)

¶10 On May 4, 1996, claimant was injured while driving for SEA. He was putting water into the radiator of the truck when he fell and hit his head, shoulder, and lower back.

¶11 At the time of the accident, SEA was insured by the State Fund. A claim was submitted and the State Fund accepted liability and paid medical and temporary total disability (TTD) benefits for a time. The TTD benefits were terminated with a 14-day notice issued October 8, 1996, after Dr. Matthew J. Gambie released the claimant to return to work. (Ex. 20 at 15; Ex. 24 at 2.)

¶12 In this proceeding the claimant alleges that his TTD benefits were wrongfully terminated and should be reinstated retroactively. He also asks that the Court determine that he is now permanently totally disabled.

¶13 No medical testimony has been presented by either party and the Court is left to sift through medical records and determine medical issues based on what appears in the records. However, in light of the subjectivity of claimant's complaints, and the relative lack of objective medical evidence consistent with the claimant's complaints, the Court must also consider the credibility of claimant's reports concerning his symptoms. Throughout his medical records there are indications that he has exaggerated symptoms and failed to cooperate in medical testing and examination.

¶14 Claimant was initially seen at the emergency room of St. Patrick Hospital in Missoula, Montana, on the afternoon of May 4, 1996. He was diagnosed as suffering cervical spine strain and mild lumbar strain, discharged and told to return to work. (Ex. 18 *and* Ex. 22 at 7.)

¶15 At time of the accident, claimant was living in Husum, Washington, not Missoula, Montana. Following the ER visit at St. Patrick Hospital in Missoula, he returned home to Husum, went to the local ER and was referred to Dr. Kimberly K. Stutzman (ex. 22 at 7), who thereafter treated him (exs. 3, 8, 9, 11, 13, and 22).

¶16 Dr. Stutzman is a family practitioner. (See Exs. 9 and 11.) Other information concerning her medical credentials has not been provided to the Court.

¶17 Dr. Stutzman first examined claimant on May 9, 1996. At that time, claimant was complaining of pain in his neck and limited ability to turn his head, tingling in his upper thighs when driving, a "somewhat numb sensation in the back of his legs," lumbar back pain, and pain in both achilles tendon areas. (Ex. 22 at 7.) Upon examination, she found reduced range of motion both in the low back and neck. She diagnosed "[c]ervical strain/lumbar strain." (*Id.*)

¶18 Dr. Stutzman continued treating claimant over the next two months. Her office notes record his primary complaints as continuing neck pain, some headaches, and difficulty sleeping. Her physical examinations disclosed paracervical muscle spasm, primarily on the left. (Ex. 22 at 3-6.)

¶19 Noting claimant's minimal improvement, on June 27, 1996, Dr. Stutzman decided that claimant should be referred to a specialist and that an MRI might be appropriate. (Ex. 22 at 3.) She referred him to Dr. Matthew J. Gambee, a physiatrist (physical and rehabilitation medicine). [Listed as "Dr. Gandy" in FAX note.] (Ex. 22 at 2.) Dr. Stutzman sought the aid of the State Fund in lining up the consultation. (*Id.*)

¶20 Dr. Gambee initially saw claimant in mid-July 1996 (see exs. 10, 23 and ex. 24), but the Court has not been furnished with the records of that visit. Dr. Gambee thereafter saw claimant on August 20, 1996, on which date he reported:

Pt. comes back today with complaints of diffuse spinal pain. His ankle pain has resolved. He continues to have complaints of neck and right upper extremity radicular type symptoms. He is also having continued back pain.

(Ex. 24 at 3.) He diagnosed chronic neck and low-back pain and ordered an MRI scan of the neck. (*Id.*)

¶21 Meanwhile, in July and August the claimant was seen in office visits by Drs. Thomas Heston and Joseph Sofianek. (He was also seen in the emergency room with respect to a foot injury.) He saw Dr. Heston on July 23, 1996. (Ex. 23.) Other information about Dr. Heston and his medical association is lacking as the Court has been furnished with just his bare office note. The note is for "[b]ack pain followup" and records that claimant "has been doing about the same since his last visit," so it may be that Dr. Heston was associated with Dr. Stutzman's medical group of family practitioners even though his name does not appear on the group letterhead stationary. (See Exs. 9 and 11.) In any event Dr. Heston noted bilateral paracervical muscle spasm, along with thoracic muscle pain. (Ex. 23.)

¶22 Dr. Sofianek saw claimant on August 26, 1996. (Ex. 10.) A handwritten notation on his office note indicates that he was a medical resident working under the supervision of Dr. Raymond J. Fitzsimmons. Dr. Fitzsimmons is part of Dr. Stutzman's family practice group. (See Exs. 9 and 11.)

¶23 Dr. Sofianek recorded that claimant was complaining of vague pain in his right arm and occasional headaches in addition to his back and neck pain. He noted that cervical and lumbar x-rays disclosed osteoarthritis and that a recent lumbar MRI was essentially normal. (Ex. 10.) He found cervical muscle spasm. Also of interest, he reported:

He did have some decreased grip but there was also a component of giving-way, **raising a question of compliance of testing**. There is also a **nondermatomal** diffuse decreased sensation to light touch in his right hand and forearm. [Emphasis added.]

(*Id.*) Dr. Sofianek found no indications of cervical radiculopathy and his assessment of claimant's condition was cervical pain due to an exacerbation of his underlying osteoarthritis and mechanical low-back pain also related to osteoarthritis. (*Id.*)

¶24 On September 17, 1996, Dr. Stutzman again saw claimant. Her office note reports that claimant's cervical pain "[n]ow seems to be almost more of muscular pain" and that he was "no longer having difficulty with his lumbar back and really did not feel that this was his major problem." (Ex. 22 at 1.)

¶25 On September 26, 1996, Dr. Gambia examined claimant a final time and reviewed MRIs of the neck and lumbar spine. (Ex. 24 at 5-6.) The lumbar MRI was normal. The cervical MRI disclosed the degenerative changes (osteoarthritis) seen on plain x-rays and a moderate bulging C3-4 disk but no disk herniation or cord compression. (*Id.*) Dr. Gambia noted that claimant demonstrated significant limitation of motion in both his neck and low back but went on to say that he also exhibited "pain behavior" and had positive Waddell's tests. (*Id.*) He diagnosed cervical spondylosis and chronic neck and low-back strain. (*Id.*) He then recommended that claimant return to work:

I see no indication for further diagnostic or therapeutic intervention. He has been out of work now for about 4 months. I think it is time for him to get back to work and work I think that generally, work activity will be therapeutic for him.

(*Id.*) The return-to-work suggestion brought an angry response. Dr. Gambia noted: "He was angry and resistant to the idea of returning to work." (*Id.*)

¶26 On October 9, 1996, Crawford and Company, which the State Fund had employed to perform a vocational analysis, forwarded Dr. Gambia three job analysis for his review. (Ex. 21 at 62-63.) They were for motor vehicle dispatcher, parts clerk, and flatbed truck driver. (*Id.* at 62-81.) Dr. Gambia approved all three in October 1996. (Ex. 21 at 34-35.)

¶27 On October 28, 1996, Dr. Stutzman also released claimant to return to work in a full light-duty job. (Ex. 11 and 13.) She restricted his lifting to no more than 20 pounds, his driving to "no more than 3 hours at a time" and his sitting to "no more than four hours at a time." (*Id.*) She was skeptical that claimant could return to his "previous job of driving a logging truck" (ex. 13), but that was not the job claimant held when injured.

¶28 None of the three jobs approved by Dr. Gambia were light duty or less. The dispatcher position was classified as medium, the other two jobs as heavy. (Ex. 21 at 41, 47, 53.)

¶29 On November 25, 1996, Dr. Stutzman recommended an independent medical examination (IME). In her office note, she wrote:

I do feel that an IME for determination of the stability of his condition is warranted. I do think that he is probably at a time when his condition is fixed and stable and he will either be able to return to work or not. I did release him to light duty but he has not gone back to his employer to pursue this as of yet as he feels his high BP will make it so that he cannot complete the examination.

(Ex. 8.) She also wrote claimant's attorney, Mr. John C. Doubek, a letter, repeating her recommendation. (Ex. 9.) In apparent response to questions raised by Mr. Doubek concerning the appropriateness of a physiatrist treating claimant [Dr. Gambee is a physiatrist], she wrote:

Physiatrists are indeed specialists. They specialize in physical medicine and rehabilitation. In such, their job and their specialty is the rehabilitation of injuries and problems including the gamut of musculoskeletal and neurologic injuries. They are certainly qualified as a specialist to manage problems such as Mr. Johnson has.

*(Id.)*

¶130 The IME was set up by the State Fund and done on December 13, 1996, by Dr. Gerald R. Reimer, a neurologist, and Dr. Donald A. Peterson, an orthopedic surgeon. (Ex. 26 at 8.) At the time of the IME, claimant's chief complaints were as follows:

Complaints today are multiple and include intermittent numbing of the right forearm and hand, with tingling in the fingers; pain in the back of the neck and between the shoulder blades; pain in the lower back; and a sensation that the right leg occasionally goes "dead."

*(Id. at 2.)* The doctors performed a physical examination. In their report they noted:

Examination today is complicated by what Dr. Peterson and I feel is rather **overt functional pain behavior** manifested by giveaway weakness of both upper and lower extremities on muscle examination, a failure to perform a grip of greater than 10 pounds in the right hand and 20 pounds in the left hand, and pinch strength of only 4 pounds on the right, and 6 pounds on the left. **We also note that none of his motion as detected today with respect to the cervical or lumbar spine is valid in light of the fact that he has much greater motion of the cervical spine during distraction parts of the examination than he performs when actively attempting to measure his motion.** [Emphasis added.]

*(Id. at 5.)* With respect to cervical motion, they noted:

Cervical motion when asked to perform directly, he indicates 20 degrees of flexion, 16 degrees of extension, 18 degrees of right lateral bending, 22 degrees of left lateral bending, 14 degrees of right rotation, and 12 degrees of left rotation. **All of these motions are considerably greater while being observed and distracted.** [Emphasis added.]

*(Id. at 6.)* They further commented:

Sensory testing reveals such a patchy distribution in both the upper and lower extremity examination that **we discarded the examination as being invalid.** [Emphasis added.]

*(Id. at 5.)*

¶131 Drs. Reimer and Peterson reviewed claimant's x-rays and MRIs for both the neck and low back. (*Id.* at 6-7.) They found no evidence of disk herniation. They did find degenerative spondylosis of the neck. Spondylosis is a general term referring to "any of various degenerative diseases of the spine." (Mirriam-webster Medical Dictionary on line at [www.medscape.com](http://www.medscape.com).) That finding is consistent with the prior finding of multi-level osteoarthritis of the spine. The doctors noted that the condition was preexisting and unrelated to claimant's injury.

¶132 The doctors addressed MMI, further treatment, physical restrictions, and return to work:

Based on the above, we will attempt to respond to the questions in the cover letter of November 20, 1996, by Ms. Schendel, as follows:

1) *Date of maximum medical healing, medical stability, or maximum healing.*

In our opinion, Mr. Johnson has reached maximum medical healing/improvement. **However, we should add that his examination is so complicated by nonanatomic, nonorganic, and functional pain behavior that we would raise an issue and question whether or not malingering may be a factor involved in his current ongoing complaints.**

2) *What, if any, further treatment modalities would assist Mr. Johnson in reaching the point of maximum healing, if he has not reached this point?*

No further active treatment modalities are necessary. We are unable to find objective evidence to justify any additional medical treatment.

3) *Permanent physical restrictions expected once maximum healing is achieved?*

We are unable to comply with your request to fill out the estimated functional capacity form since the validity of his examination is questionable. We also would hesitate to attempt estimating his physical functional capacity because of his profound nonorganic pain behavior.

4) *Will the claimant be able to return to the job he performed at the time of injury, as a van truck driver, without modifications or restrictions?*

There does not appear to be any objective evidence of injury that preclude him from returning to his former occupation, without modifications or restrictions, in our opinion.

5) *Is Mr. Johnson currently capable of returning to some type of work? If yes, please provide information concerning work restrictions and tolerances. What is the projected release to work date? (Also, please review and comment as to Mr. Johnson's ability to return to work in the alternative occupations, job analysis provided.)*

I believe we have responded to this question with our response to question #4. If Mr. Johnson is unable to perform as a van truck driver, which apparently was his previous occupation, we would probably be inclined to feel that he is unable to perform any job, but this, again, is based on his subjective symptomatology and not based on objective abnormalities identified in our examination.

6) *Any additional recommendations or comments are greatly appreciated.*

It is our opinion that his claim is ready for closure, and the more prompt attention this claim receives, with closure, we feel the more likely Mr. Johnson is going to be ready to return to full employment very soon. We see no medical indications to prolong his claim, and no reason to provide additional treatments. [Bold added for emphasis.]

(Ex. 26 at 7-8.)

¶133 In January 1997, Dr. Reimer reviewed job descriptions and addressed permanent impairment. With regard to the latter he said:

[b]ased on the finding of the examination of December 13, 1996. . . I would state that in light of his nonorganic and nonanatomic findings Mr. Johnson has no objective evidence of permanent impairment as a result of his injury of May 4, 1996.

(Ex. 27.) He approved job analysis for vehicle dispatcher, parts clerk, flatbed truck driver, and van driver. (Ex. 21 at 30.) Van driver was the title of claimant's time-of-injury job. (Ex. 21 at 84-92.)

¶134 Claimant saw Dr. Stutzman again on four occasions in 1997. In January the doctor recorded that he had improved and that it was safe for him to start back to work but noted she did not have the IME results. (Ex. 3 at 1.) In February, her comment was the same except she restricted him to light duty and four hours a day. She again indicated she did not have the IME results. In March she indicated that further improvement was unlikely and suggested closure of his claim. (*Id.* at 2.) In April she noted that further therapy was unlikely to benefit him. (*Id.* at 3.)

¶135 In October 1997 the claimant sought a further consultation with Dr. J. Bruce Bell. Dr. Bell noted that he had been released to return to work

but he was unable to return to work stating that he has too much limitation of movement of his neck to be able to drive his truck. Also, the vibration of riding aggravates things and he has just not been able to do so. He is going to try for retirement because of this.

(Ex. 5 at 1.) The doctor reviewed claimant's prior MRIs and noted "extensive degenerative disk disease with significant spinal stenosis" in the neck. (*Id.* at 2) His impression was that claimant had underlying disk disease of the neck and low back that was "fairly well compensated" until his accident. (*Id.*) Concerning a return to work, he noted:

In discussing this with him it sounds like he probably cannot return to work in his previous job. I think, from what I can see, he would be at risk driving a truck at this stage of the game. Unfortunately I do not see any easy way to correct this and I think this patient will have to consider retirement or possibly finding some other job although that would probably be quite difficult at his age.

(*Id.*)

¶136 Dr. Bell did not review job descriptions, therefore, he did not comment on claimant's ability to work as a dispatcher or parts clerk.

¶137 On September 24, 1998, claimant underwent a functional capacity evaluation (FCE). (Ex. 4.) The FCE report is replete with evidence that claimant did not fully cooperate in the evaluation. Ultimately the evaluator deemed the FCE results invalid. The following information is from the report:

**RANGE OF MOTION:** For double inclinometry measurement of cervical and lumbar spine range of motion, please see attached separate form. *Flexion and extension measurements of the lumbar spine range of motion did not meet validity requirements. The cervical spine measurements are not considered valid for impairment rating purposes. Mr. Johnson was observed moving his neck in a greater range during the evaluation than at the time of measuring neck range of motion.* [Bold added for emphasis.]

(*Id.* at 1.)

**STRENGTH (on manual muscle testing, where 5 is normal strength):** Upper and lower extremities: 5/5 throughout bilaterally. **The worker demonstrated give-way weakness with multiple muscle groups**, especially in his right lower and upper extremity. With encouragement and retesting, he did demonstrate normal strength. [Emphasis added.]

(*Id.* at 2.)

**WADDELL'S TESTS:** Positive for simulated rotation, regional weakness, and over-reaction. **Overall, Waddell's was positive in three of five tests, indicating non-organic component related to his low back complaints.** [Emphasis added.]

(*Id.*) Regarding strength testing:

**COMMENTS:** Mr. Johnson used fair body mechanics. He assumed approximately a ½-depth squat, reaching with his arms retrieve a weighted crate from the floor (the handles of the crate were 9 inches from the floor). After one lift of 5 pounds, the worker **declined** to lift more weight due to reported concern about increasing pain levels which he predicted would result. Mr. Johnson **limited** lifting overhead and shoulder height due to reported neck strain. He dropped his hands to his sides abruptly after lifting 5 pounds to the overhead shelf, reporting increase in discomfort and fear of future pain. **In fact, he limited**

**all of his lift and carry weights due to reported feeling of "strain" in his low back, neck, and right forearm, as well as concern about future pain.** This was not associated with pain behaviors. With push/pull, the worker used his body weight and limited his effort due to reports of pain and reported fear of future pain without accompanying pain behaviors. **Due to effort being limited by reported pain, as well as concern about future pain, no projections could be made about strength abilities. No range of physical demand could be projected for this gentleman. . . .** [Emphasis added.]

(*Id.* at 2-3.) Regarding functional abilities testing:

**COMMENTS:** Mr. Johnson **refused** to attempt overhead reach tasks, reporting anticipation of pain in his cervical region with overhead reaching and looking. Mr. Johnson dropped his right arm to his side occasionally while working at shoulder level with outstretched arms. He reported right shoulder, arm, neck, and low back strain with forward reaching. He demonstrated **minimal** bending by moving closer to the task and keeping his low back straight as he bent at the hips minimally. Mr. Johnson **refused** to attempt a full squat position, reporting anticipated low back pain. He was observed to perform a half-depth squat slowly and carefully in order to retrieve items from the floor, appearing stiff and guarded when doing so. The worker knelt on both knees less than 2 minutes and reported need to interrupt this task due to low back strain with the kneeling posture. He supported himself on furniture with both upper extremities in order to assume and recover from the kneel position. Mr. Johnson requested to sit to rest from time to time during the evaluation, whether in the inclinometry measurement or functional portion of this evaluation. He reported increased low back pain at that time, which he reported was relieved by sitting. Mr. Johnson **refused** to perform a crawl position or vertical ladder climbing, reportedly anticipating increased pressure in his low back, shoulders, and neck with these positions. The worker completed **3 of 10** requested stair climbing circuits of 3 stairs each. He reported increased low back pain with this task. During balance testing, the worker held onto furniture for forward or backward heel-to-toe walking, reporting feeling unstable. He demonstrated 10 of 15 seconds requested for left foot single leg stance, and 5 seconds for right foot single leg stance. He reported a feeling of a "charley horse" in his right lower extremity during single leg stance. However, the worker was able to stand with his feet together and eyes closed for a 15-second Romberg Test, without opening his eyes. . . . [Emphasis added.]

(*Id.* at 3.) Concerning grip strength:

**COMMENTS:** Five-position repetitive grip strength testing revealed **4 out of 10 abnormal coefficients of variation and no Bell Curve distribution of results, indicating less-than-maximum voluntary effort with grip strength testing.** In addition, grip strength results indicate less- than-func-tional grip bilaterally. . . . [Emphasis added.]

(*Id.* at 4.) In his summary, the evaluator summarized his findings concerning the validity of the test:

During lift and carry testing, the worker limited his effort due to reports of strain in his low back, right shoulder and arm, and cervical region, as well as reported fear of future pain with further effort, not accompanied by increased pain behavior. *For this reason, no range of physical demand could be projected and the lift and carry testing was considered invalid. Three out of six tests for worker reliability were abnormal, indicating invalid test results for this evaluation.* Bell Curve effort, hand dynamometer, and three out of five Waddell's Tests were abnormal. The capacities indicated in this report appear to represent the level at which Mr. Johnson was willing to perform, rather than his maximum capacities. Right shoulder and arm complaints are not an accepted part of the current claim.

As stated above, no range of physical demand could be projected for this gentleman due to invalid lift and carry testing. Forward reaching with outstretched arm with the right upper extremity, bending, half-depth crouching, kneeling, and stair climbing are limited to an occasional basis. However, these limitations are based on an **INVALID** evaluation. He demonstrated limitations in prolonged sitting, standing, and walking.

(*Id.* at 1.)

¶138 Claimant also claims that he has high blood pressure from his accident. His claim is based on his report that he did not suffer from hypertension prior to the accident but does so now. He has provided no medical support for his assertion or to show that his hypertension is disabling.

¶139 The only vocational evidence presented in this case was developed by Crawford and Company, which identified automotive parts clerk, motor vehicle dispatcher, flatbed truck driver, and claimant's time-of-injury truck driving job as jobs for which claimant is qualified. (Ex. 21.) Claimant presented no vocational evidence to the contrary nor did he show that he has no reasonable prospect of securing employment in any of the jobs.

¶140 Claimant testified that he cannot work on account of his ailments. His complaints include:

- Loss of grip strength.
- Headaches upon sudden movement of his neck.
- Numbness in his hands and arms with associated loss of strength, which comes and goes and which is like his hands and arms falling asleep.
- Tingling in his finger tips.
- Right leg going out.

- Difficulty sitting.
- Trouble lifting.
- High blood pressure.

¶41 Claimant testified at trial that he used his best efforts during the FCE, and indeed during all medical examinations. His testimony was not credible.

¶42 During trial, claimant initially demonstrated very little movement of his head. When he turned to address the Court, he did so by rotating his entire upper torso without turning his head. However, during cross-examination he evidenced far greater movement. When counsel handed claimant documents from the side, claimant turned his head 90 degrees to address counsel, without any apparent pain or restriction.

¶43 Claimant has failed to persuade me that he cannot go back to his time-of-injury job or to one of the alternative occupations identified as within his job market. While he unquestionably suffers from osteoarthritis of the spine, there is no objective medical evidence indicating that his physical condition precludes him from returning to work as a truck driver, dispatcher, or parts clerk. His claimed disability rests on his subjective complaints. The medical records, as well as this Court's observation of him during trial, indicate that his reports are not credible. It is certainly possible, if not probable, that claimant suffers genuine neck and low-back pain and other symptoms on account of his industrial accident and underlying osteoarthritis, but based on his invalid responses during the IME and FCE testing, his questionable responses during other medical examinations, and his behavior in Court, I am unable to determine the true nature and degree of his pain and disability.

¶44 I am also unpersuaded that the claimant's TTD benefits were prematurely terminated. The State Fund based its termination on Dr. Gambee's evaluation. Dr. Stutzman, a family practitioner, referred claimant to Dr. Gambee because he specializes in "rehabilitation of injuries and problems including the gamut of musculoskeletal and neurologic injuries." (Ex. 9.) Her referral indicates that she believed Dr. Gambee to be better qualified to evaluate and treat claimant's condition. Dr. Gambee found that claimant would not benefit from further evaluation and treatment. That finding satisfies the definition of MMI, which is:

(17) "Medical stability", "maximum healing", or "maximum medical healing" means a point in the healing process when further material improvement would not be reasonably expected from primary medical treatment.

§ 39-71-116(17), MCA (1995). Dr. Gambee approved claimant's return to work in three jobs identified by a vocational consultant.

¶45 The State Fund did not act unreasonably in terminating claimant's TTD benefits or in refusing claimant's request for permanent total disability benefits.

## CONCLUSIONS OF LAW

¶46 Claimant's entitlement to benefits is governed by the 1995 Workers' Compensation Act, which was the law in effect at the time of his industrial accident. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶47 Claimant bears the burden of persuading me, by a preponderance of the evidence, that he is entitled to benefits. See *Ricks v. Teslow Consolidated*, 162 Mont. 469, 483-84, 512 P.2d 1304 (1973); *Dumont v. Aetna Fire Underwriters*, 183 Mont. 190, 201, 598 P.2d 1099 (1979). He has failed to carry his burden.

¶48 His PTD claim is governed by section 39-71-702, MCA (1995), which provides in relevant part:

(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.

Section 39-71-116(23), MCA (1995), defines permanent total disability:

(23) "Permanent total disability" means a physical condition resulting from injury as defined in this chapter, after a worker reaches maximum medical healing, in which a worker does not have a 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.

Claimant bears the burden of persuading me that he meets the above definition. He has not carried his burden. His case for disability is ultimately based on his subjective reports of pain and other symptoms. I have found those reports not credible.

¶49 Claimant has similarly failed to carry his burden with respect to his claim for additional TTD benefits. Eligibility for TTD benefits is governed by section 39-71-701, MCA (1995), which provides in relevant part:

**39-71-701. Compensation for temporary total disability -- exception.** (1) Subject to the limitation in 39-71-736 and subsection (4) of this section, a worker is eligible for temporary total disability benefits:

(a) when the worker suffers a total loss of wages as a result of an injury and until the worker reaches maximum healing; or

(b) until the worker has been released to return to the employment in which the worker was engaged at the time of the injury or to employment with similar physical requirements.

I have found as a matter of fact that claimant reached maximum healing on September 26, 1996, which is prior to the termination of his benefits.

¶150 Claimant is not entitled to attorney fees or a penalty. Both require proof that the insurer has unreasonably delayed or refused benefits. §§ 39-71-611, -612, 2907, MCA (1993). The insurer's conduct was reasonable.

¶151 Since he has not prevailed, claimant is not entitled to costs.

#### JUDGMENT

¶152 1. Claimant is not entitled to PTD benefits or to additional TTD benefits. His petition is dismissed **with prejudice**.

¶153 2. Claimant is not entitled to attorney fees, a penalty, nor costs.

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

¶155 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 20<sup>th</sup> day of August, 1999.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. John C. Doubek

Ms. Carrie L. Garber

Date Submitted: May 25, 1999