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

**WCC No. 9204-6423**

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**HENRY J. KRAMER**

**Petitioner**

**vs.**

**EBI COMPANIES/AMERICAN**

**ASPHALT, INCORPORATED**

**Defendant/Employer.**

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ORDER ADOPTING FINDINGS OF FACTAND CONCLUSIONS OF LAW
OF HEARING EXAMINER AND ENTERING JUDGMENT

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The above-entitled matter was duly heard by Court-appointed Hearing Examiner, ROBERT J. CAMPBELL who conducted the hearing, considered the evidence and prepared and submitted Findings of Fact and Conclusions of Law and Proposed Judgment for consideration by the Court.

Thereupon, the Court considered the record in the above- captioned matter, considered the Findings of Fact and Conclusions of Law and Proposed Judgment of the Hearing Examiner and does hereby make and enter the following Order and Judgment.

IT IS HEREBY ORDERED the Findings of Fact and Conclusions of Law and Proposed Judgment of the Hearing Examiner are adopted.

IT IS FURTHER ORDERED the Judgment is to be entered as follows:

JUDGMENT

1. This Court has jurisdiction over this matter pursuant to section 39-71-2905, MCA.

2. Petitioner is not temporarily or permanently disabled as a result of his October 15, 1986 industrial injury.

3. Defendant is not liable for any medical bills or expenses incurred treating claimant's ulcerative colitis.

4. The issue of whether claimant should receive 500 weeks of permanent partial disabiilty benefits now or after he reaches 65 cannot be determined on the evidence presented.

5. Petitioner is not entitled to additional compensation or medical benefits.

6. Petitioner is not entitled to attorney fees or costs.

7. Petitioner is not entitled to a penalty pursuant to section 39-71-2907, MCA.

8. The JUDGMENT herein is certified as final for purposes of appeal pursuant to ARM 24.5.348.

9. Any party to this dispute may have 20 days in which to request a rehearing from this Order Adopting Findings of Fact and Conclusions of Law and Proposed Judgment of the Hearing Examiner and Entering Judgment.

DATED in Helena, Montana, this 23rd day of July, 1993.

(SEAL)

/s/ Timothy W. Reardon
JUDGE

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Presiding Hearing Examiner: ROBERT J. CAMPBELL

Counsel of Record:

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ON BEHALF OF THE PETITIONER

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ON BEHALF OF THE DEFENDANT/EMPLOYER

* * * * * * * * * * * *

FINDINGS OF FACT AND CONCLUSIONS OF LAW
AND PROPOSED JUDGMENT

* * * * * * * * * * * *

1. Claimant filed a petition to resolve a dispute between himself and the insurer under Title 39, Chapter 71, Part 29, MCA.

2. The Clerk of Court gave notice to interested parties of (a) the time, place and nature of the trial; (b) the legal authority and jurisdiction under which the trial was to be held; (c) the particular sections of the statutes and rules involved; and (d) the matters asserted by notifying all parties who appeared of record to have an interest by mailing to them a copy of the ORDER SETTING TRIAL AND PRETRIAL CONFERENCE with a copy of the PETITION FOR HEARING attached and a copy of the Clerk's Certificate of Mailing the Order and Petition. Section 2-4-601, MCA.

3. A pretrial conference was conducted on October 20, 1992, before Clarice V. Beck, Hearing Examiner. The Pretrial Order was docketed on December 1, 1992. Pertinent parts of the Pretrial Order are as follows:

C. STATEMENT OF JURISDICTION

This Court has jurisdiction of the above-captioned matter pursuant to Section 39-71-2905, MCA.

. . . .

F. STATEMENT OF UNCONTESTED FACTS

1. On October 15, 1986, Petitioner suffered an industrial injury arising out of and in the course and scope of his employment as a heavy equipment operator with American Asphalt, Inc., in Great Falls, Cascade County, Montana.

2. At the time of the injury, the Claimant's employer was enrolled under Compensation Plan No. II and was insured by EBI Indemnity Co.

3. The Insurer accepted liability for Petitioner's industrial injury of October 15, 1986 and paid compensation and medical benefits as follows:

Medical: through 6/25/91. . . . . $1,346.78

TTD from 10/16/86 to 11/2/86. . .$768.84

4. From March 20, 1992 until September 17, 1992, Insurer paid temporary total compensation benefits at the rate of $214.07 per week under a reservation of rights. The total benefits paid during this period were $5,565.82.

5. From September 18, 1992 to present, Insurer has paid permanent partial disability benefits at the rate of $149.50 per week.

6. The parties have made an effort to resolve this dispute, but have been unable to do so, and therefore dispute exists which requires resolution by this Court.

4. The parties have proposed and the Court adopts the following issues to be decided by the Court:

1. Whether or not Petitioner's current disabilities are related to his October 15, 1986 injury.

2. Whether or not Petitioner is temporarily or permanently totally disabled from working in his normal labor market as a result of his October 15, 1986 injury.

3. Whether the 500 weeks of permanent partial disability benefits should be paid either now or after he reaches age 65.

4. Whether or not all Petitioner's medical bills and expenses incurred as a result of the October 15, 1986 injury and resulting colitis should be paid.

5. Whether or not the Employer/Defendant should be required to pay an increased award for unreasonable refusal to pay benefits pursuant to MCA Sec. 39-71-2907.

6. Whether or not Petitioner is entitled to his attorney's fees and costs incurred in pursing this matter.

7. Whether or not Petitioner is entitled to additional compensation or medical benefits.

5. Trial in this matter was held on December 1-2, 1992, in Great Falls, Montana, before Hearing Examiner Robert J. Campbell. Claimant Henry J. Kramer, his wife Mary Kramer, Mary Park, Anne Arrington and Katherine Kleinkopf were sworn and testified. The depositions of claimant, Henry J. Kramer, Robert Touchette, Donald Zuraff, Donald Lechner, Hugh Frame, Anne Arrington, Katherine Kleinkopf, Dr. Edward Quick, Dr. William Miller, Dr. Robert Seim, Dr. James Burton, Dr. Carol North and Dr. David Alpers were taken before the trial and submitted to the Court as evidence by stipulation of the parties. A second deposition of Dr. Alpers was taken after trial and submitted to the Court. Exhibit Nos. 1 through 12, 14, 17 and 22 were admitted into evidence by stipulation. Exhibit Nos. 13, 15

and 19 through 21 were withdrawn. Exhibit No. 16 was not admitted into evidence and Exhibit Nos. 18 and 22 were admitted into evidence. Upon the filing of the Proposed Findings of Fact, Conclusions of Law and post-trial motions, this matter was deemed submitted on March 5, 1993.

6. The undersigned, having reviewed the pleadings, considered the Pretrial Order and the exhibits admitted into evidence, heard the testimony and observed the demeanor of the witnesses at trial and being fully advised in the premises, now makes the following Findings of Fact and Conclusions of Law and Proposed Judgment:

## FINDINGS OF FACT

1. The uncontested facts are found as fact and adopted as fact.

### Claimant

2. At the time of trial, claimant was 60 years old, married and living in Frenchtown, Montana. (Tr. at 16; Ex. No. 18 at 3.) Claimant graduated from high school in 1950 and had no further education. (Tr. at 141; Ex. No. 18 at 3.)

3. Claimant's work history consists of a heavy equipment operator, truck driver, rancher, front-end loader operator, back hoe operator, dump truck operator, causticizer, caustic operator, lime kiln operator, laborer, faller and skidder. (Ex. No. 18 at 3-6.)

### Injury

4. On October 15, 1986, claimant was working for American Asphalt at the Great Falls refinery in Great Falls, Montana. (Tr. at 18.) At the end of the day claimant and another employee were lifting a 100 pound sump pump into a van when the claimant twisted his back and felt immediate pain. (Tr. at 20-22.) Claimant went to his apartment, where he took a hot bath because of the pain. The next morning he had difficulty getting out of bed. He informed his co-workers, who informed the supervisor, that he had injured his back and would drive his pickup to Missoula for treatment by Dr. Edward Quick. (Tr. at 23-24.)

5. Mary Sosbie, who would later become Mary Kramer, claimant's wife, worked for Dr. Edward Quick from 1985 until 1991. She testified that when the claimant drove to the office on October 16, 1986, he had to hang onto the counter and said "I'm hurt." (Tr. at 85.) His claim was accepted and benefits were paid. (Uncontested Fact Nos. 3-5.)

### Medical Evidence

#### Low-Back Pain

6. Claimant was examined the day after the injury by his treating physician, Dr. Quick. Claimant had x-rays taken of his back and Dr. Quick prescribed physical therapy and medication. (Tr. at 25.) On December 26, 1986, Dr. Quick determined claimant had reached

maximum medical improvement of his back condition. He issued a Certificate of Condition that claimant could return to work without restrictions and found no permanent impairment as a result of his industrial injury. Claimant returned to work as a heavy equipment operator and continued work for an additional four years after his industrial injury.

7. Dr. Quick examined claimant again on April 3, 1987. Claimant had signs of colitis which was diagnosed by Dr. Quick on April 6, 1987. At the April 3, 1987 examination, claimant did not complain of back pain and Dr. Quick did not tell him not to work at that time. There is no evidence in the medical records that the claimant suffered from colitis prior to April 3, 1987. (Dep. of Dr. Quick at 17.)

8. Claimant was admitted to the hospital on April 30, 1987, for ulcerative colitis and an extensive medical history was taken. Nothing in the history indicated that claimant was suffering from back pain, was nervous or anxious, or that he feared losing his employment. (Dep. of Dr. Quick at 29.)

9. In April 1991, Dr. Quick advised claimant to stop working because of a combination of his ulcerative colitis and chronic back pain. (Dep. of Dr. Quick at 27.) Dr. Quick could not relate claimant's colitis to his industrial injury of October 15, 1986. (**Id.** at 31.) Dr. Quick relied on the opinion of Dr. Seim who practices orthopedic medicine in Missoula. (**Id.** at 49.)

Dr. Seim

10. When claimant was examined by Dr. Robert J. Seim on May 13, 1992, Dr. Seim understood that the claimant had worked only a few days of being a heavy equipment operator after his industrial accident. In fact, claimant worked for four years with heavy equipment after the industrial injury. (Dep. of Dr. Seim at 6-7.)

11. Dr. Seim's medical opinion was that a direct causal relationship exists with the claimant's low-back problem and his industrial injury of October 15, 1987. (Ex. No. 9 at 3, Dep. of Dr. Seim at 43.)

12. Dr. Seim unconditionally approved positions of central supply worker, airline security, dental lab technician and custom picture framer. (Dep. of Dr. Seim at 33-39.)

13. Dr. Seim conditionally approved positions of valve assembler, leather brander, strap inspector and frame/screen assembler. (**Id.**)

Dr. Burton

14. Dr. James R. Burton is a Missoula Orthopedic surgeon who examined the claimant for a Disability Determination Bureau evaluation on July 16, 1991. (Dep. of Dr. Burton at 5.) Dr.

Burton assigned an impairment rating of 5-10% based on claimant's severe disk disease and degenerative arthritis. (**Id.** at 20.)

15. Considering the medical information available, Dr. Burton agreed with the conclusion of Dr. Seim that there is a direct causal relationship with claimant's current low-back problems and his industrial injury on October 15, 1986. (Dep. of Dr. Burton at 23.) Dr. Burton did not consider claimant's ulcerative colitis in evaluating his potential for public employment. (**Id.** at 32.)

16. Dr. Burton indicated in his medical report that the claimant was unable to do heavy equipment work activity but he could do lighter work:

> Now, if he is capable and trained and has the education and experience to do a light type of work that doesn't involve a lot of heavy lifting, bouncing around operating equipment, frequent bending, et cetera, then I -- at that point I would say, yeah, this man is able to do some type of work-related activity.

Dep. of Dr. Burton at 10.

17. Dr. Burton agreed with the work evaluations for claimant approved by Dr. Seim as a valve assembler, airline security, custom picture framer and frame and screen assembler. (Dep. of Dr. Burton at 28-32, Dep. Ex. Nos. 4, 6, 7 and 8 at 7-9.)

18. Dr. Burton approved the job of central supply worker if the claimant could alternate his position between sitting and standing. (Dep. of Dr. Burton at 27.)

Dr. David H. Alpers

19. On November 3, 1992, the parties deposed Dr. David H. Alpers, who was called as a witness for the defendant. Dr. Alpers is a professor of medicine at Washington University School of Medicine in St. Louis, Missouri. He is a specialist in gastroenterology within the specialty of internal medicine. (Dep. of Dr. Alpers, November 3, 1992, at 5.)

20. The medical records of claimant were sent to Dr. Alpers with claimant's progress notes and slides. Dr. Alpers found no evidence of colitis prior to April 3, 1987 and found no evidence of colitis as a pre-existing condition. (*Id.* at 16, 18.)

21. After reviewing the records, Dr. Alpers concluded there was no relationship between claimant's industrial injury and his ulcerative colitis. (*Id.* at 31.)

22. A second telephone deposition of Dr. David H. Alpers was taken on December 17, 1992, at which time he was presented studies from the Duffey Group which seemed to indicate an association of psychiatric illnesses with inflammatory bowel disease. Dr. Alpers was familiar with the studies and found them deficient in a number of areas. They did not change his professional opinion because they were not technically very well done, dismissing them as not scientifically sound, and he did not change his prior testimony.

Dr. William N. Miller

23. Dr. William N. Miller is board certified in internal medicine and gastroenterology. Dr. Miller is claimant's current treating physician and examined the claimant on June 5, 1992. Dr. Miller diagnosed moderately active ulcerative colitis which was reasonably well controlled on present therapy. (Ex. No. 2 at 1.)

24. When asked by claimant's counsel if it were medically probable that increased stress and his ulcerative colitis were related, Dr. Miller testified:

> I think it's possible. I don't know that I can say that it's probable. I think that the problem with ulcerative colitis is that we have utterly no idea what causes the disease. There are many theories, as many as there are researchers, because I think it lends itself to lots of theories.

Dep. of Dr. Miller at 32.

25. Dr. Miller admitted that the claimant had other areas of stress in his life such as a son with cancer and it was certainly possible that such pressure caused his ulcerative colitis rather than his industrial accident. (*Id.* at 51.) Dr. Miller could not testify with certainty as to what happened to the claimant because the cause of the ulcerative colitis is unknown. (*Id.* at 56-57.)

26. Although claimant testified at trial that stress affects his colitis condition, none of the physicians could testify with a reasonable degree of medical probability that claimant's industrial injury was more likely than not to have caused the ulcerative colitis.

Benefits Now Being Paid

27. On September 18, 1992, defendant converted claimant's benefits from temporary total at the rate of $214.07 per week to permanent partial disability benefits at the rate of $149.50 per week. No dispute was presented over the continued receipt of such benefits.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this proceeding pursuant to section 39-71-2905, MCA.

2. Petitioner is not temporarily or permanently disabled as a result of his October 15, 1986 industrial injury.

The insurer accepted liability for the petitioner's October 15, 1986 low-back work injury which occurred while lifting a sump pump.

The low-back pain resulting from the injury has been documented by Dr. Edward Quick, Dr. Robert J. Seim and Dr. James R. Burton who agree that claimant's low-back symptoms are directly related to his October 15, 1986 injury.

However, the same physicians could not state that claimant's ulcerative colitis, which developed for the first time five months after the claimant's injury, was the result of his industrial injury.

Claimant requests either temporary total or permanent total disability benefits resulting from the industrial injury but the evidence fails to meet the requirements of either benefit.

The statute defining temporary total disability benefits in effect at the time of claimant's injury states as follows:

> "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 is as far restored as the permanent character of the injuries will permit. A worker shall be paid total disability benefits during a reasonable period of retraining. Disability shall be supported by a preponderance of medical evidence.

§ 39-71-116(19), MCA (1985).

To be entitled to temporary total disability benefits, the claimant has the burden of proving that as a result of his low-back industrial injury he (1) has suffered a total loss of wages, and (2) has not reached maximum healing during that time. Claimant has failed to meet the second requirement. By December 16, 1986, claimant's treating physician, Dr. Quick, determined that maximum medical improvement of claimant's back condition had been reached and claimant could return to his work as a heavy equipment operator with no restrictions. Claimant continued to work in his former position for four more years.

Clearly claimant is not entitled to temporary total disability benefits as defined in section 39-71-116(19), MCA (1985). Nor does claimant meet the requirements of permanent total disability benefits.

Permanent total disability at the time of claimant's injury was defined in section 39-71-116(13), MCA (1985) as follows:

> (13) "Permanent total disability" means a condition resulting from injury as defined in this chapter that results in the loss of actual earnings or earning capability that exists after the injured worker is as far restored as the permanent character of the injuries will permit and which results in the worker having no reasonable prospect of finding regular employment of any kind in the normal labor market. Disability shall be supported by a preponderance of medical evidence.

To be entitled to permanent total disability benefits, a claimant has the burden of proving that after reaching maximum medical healing, he has a total loss of earnings or earning capacity as a result of the injury and no reasonable prospect of any employment of any kind in his normal labor market. *Spooner v. General Insurance Co.*, WCC No. 1309 (January 24, 1983); *Metzger v. Liberty Mutual Insurance Co.*, 212 Mont. 351, 687 P.2d 1033 (1984).

The parties agree that Dr. Quick determined that the claimant had reached maximum medical improvement on December 29, 1986, which meets the first requirement of permanent total disability.

The second requirement that claimant must meet is a showing that he has no reasonable prospect of finding regular employment of any kind in the normal labor market.

Claimant's vocational expert, Anne Arrington, is a Certified Rehabilitation Consultant from Missoula. She reviewed the medical records, depositions and submitted her report. (Exhibit No. 18.)

Considering the claimant's transferable skills and work history as a heavy equipment operator and his labor market contacts, Ms. Arrington concluded that the eight job analysis approvals were not part of claimant's normal labor market.

Ms. Arrington limited her vocational analysis to occupations that are part of claimant's normal labor market of heavy equipment operations and ranch work. Unlike Ms. Kleinkopf, Ms. Arrington found that claimant has medical limitations and a lack of any transferable or marketable skills.

Defendant retained Katherine Kleinkopf as a vocational rehabilitation counsellor who reviewed the claimant's medical records, depositions and completed a transferable skills analysis.

Ms. Kleinkopf identified claimant's transferable skills as the ability to:

- follow work orders
- coordinate eye, hands, and feet to control equipment
- estimate distances
- use basic math and shop math
- keep records
- knowledgeable of tools and equipment
- adhere to specifications and standards
- be stable, reliable, knowledgeable and efficient
- be punctual and have a good work ethic.

Ms. Kleinkopf testified that suitable jobs were available for claimant and she submitted a list of occupations approved by Dr. Seim. These occupations were: central supply worker, picture framer, airline security and dental lab technician.

Three additional jobs were identified as within claimant's vocational capacity but were rejected by the Court because they were not submitted to a physician for approval. (Tr. at 208.)

3. Defendant is not liable for any medical bills or expenses incurred treating claimant's ulcerative colitis.

There is no medical evidence that claimant suffered from ulcerative colitis prior to his industrial injury. Claimant's treating physician, Dr. Quick, testified that there was no evidence that the claimant suffered from colitis prior to April 3, 1987.

Claimant contends that this Court should rule that it was "medically possible" that claimant's ulcerative colitis was aggravated by the industrial accident.

The "possibility" standard has been applied to aggravation of a preexisting injury, however, in this case the disabling condition did not preexist the industrial injury.

Claimant must meet the burden of proving his case based on medical probability which has been defined in case law as being "more likely than not". *Dallas v. Burlington Northern, Inc.*, 212 Mont. 514, 533, 689 P.2d 273 (1984). Under this standard of proof, claimant is required to show by a preponderance of the evidence that it is more likely than not that his ulcerative colitis resulted from the industrial injury. Four doctors testified in this case on the colitis issue and none of them would state with a reasonable degree of medical probability that the industrial injury caused the claimant's ulcerative colitis. The only physician that would even state causation by a medical possibility was Dr. Miller who acknowledged that "we have utterly no idea what causes the disease" and had no other evidence to support the possibility it was caused by the industrial injury. Mere medical possibility without supporting evidence is insufficient to establish compensability. *Currey v. State Compensation Mutual Insurance Fund*, 226 Mont. 445, 736 P.2d 113, (1987).

Dr. Quick feels that the industrial injury could have contributed to the claimant's stress and could have contributed to his development of ulcerative colitis. Dr. Quick had not observed that stress causes the disease, however. He has not treated many patients with ulcerative colitis and he is not a specialist in that field. He admits that he cannot say with a reasonable degree of medical probability that the industrial injury caused the ulcerative colitis.

Dr. Miller feels that stress can exacerbate the symptoms of ulcerative colitis and he thinks that it is possible, but not probable, that increased stress and ulcerative colitis are related in the claimant. He also testified that he cannot say if stress could have brought on the initial attack or if it was something completely unrelated to the industrial injury. Finally he states that he has no opinion whether stress can cause ulcerative colitis.

The medical evidence presented in this case supports the conclusion that claimant's stress existed approximately five years prior to the injury and the first colitis symptoms did not appear until approximately five months after the injury. Other sources of stress in claimant's life were identified which could develop ulcerative colitis including a divorce, alcoholism and a son that had colon cancer. These factors distinguish the claimant's claim from other cases cited by claimant. *Hengel v. Intermountain Insurance Co.*, 224 Mont. 525, 730 P.2d 1163 (1986); *Moffett v. Bozeman Canning Co.*, 95 Mont. 347, 26 P.2d 973 (1933).

4. The issue of whether claimant should receive 500 weeks of permanent partial disabiilty benefits now or after he reaches 65 cannot be determined on the evidence presented.

The parties have stipulated that claimant is receiving permanent partial disability benefits of $149.50 per week. Permanent partial disability was not presented as an issue and without further evidence the Court has no basis for ruling on the issue.

5. Petitioner is not entitled to additional compensation or medical benefits.

Other than the benefits discussed above, petitioner has not presented evidence that would entitle him to additional compensation or medical benefits.

6. Petitioner is not entitled to attorney fees or costs.

Not having prevailed on issues presented in this dispute, petitioner is not entitled to attorney fees or costs.

7. Petitioner is not entitled to a penalty pursuant to section 39-71-2907, MCA.

No unreasonable refusal to pay benefits has been established by claimant and no penalty is payable pursuant to section 39-71-2907, MCA.

PROPOSED JUDGMENT

1. This Court has jurisdiction over this matter pursuant to section 39-71-2905, MCA.

2. Petitioner is not temporarily or permanently disabled as a result of his October 15, 1986 industrial injury.

3. Defendant is not liable for any medical bills or expenses incurred treating claimant's ulcerative colitis.

4. The issue of whether claimant should receive 500 weeks of permanent partial disabiilty benefits now or after he reaches 65 is moot.

5. Petitioner is not entitled to additional compensation or medical benefits.

6. Petitioner is not entitled to attorney fees or costs.

7. Petitioner is not entitled to a penalty pursuant to section 39-71-2907, MCA.

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

DATED in Helena, Montana, this 23rd day of July, 1993.

(SEAL)

/s/ Robert J. Campbell
Hearing Examiner

Ms. Sara R. Sexe
Ms. Susan J. Rebeck
Submitted: March 5, 1993