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

**1995 MTWCC 70**

**WCC No. 9505-7312**

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**VICTORIA KLOEPFER**

**Petitioner**

**vs.**

**LUMBERMENS MUTUAL CASUALTY COMPANY**

**Respondent/Insurer for**

**BECHTEL CONSTRUCTION COMPANY**

**Employer.**

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FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

**Summary:** 45-year-old laborer, with ninth grade education and history of working as house cleaner, cashier, photo finishing worker, nurses aide, and receptionist-trainee, sought permanent total disability benefits following occupational disease consisting of tendinitis or fibromyalgia. Physician who performed back surgery on claimant and followed her recovery opined she could return only to part-time employment. IME physicians found no neurological or physical deficits other than decreased range of motion and believed claimant was capable of working. Indeed, she opined that chronic pain patients often benefit by returning to work because work increases their self esteem and can take their mind off their pain. She opined that patients with more severe pain than claimant return to work. Chronic pain expert testified that claimant's pain is amplified by psychological factors and that claimant lacked the motivation to return to work. Vocational expert identified jobs that exist in Montana within claimant's qualifications.

**Held:** Noting that surgeon's medical opinion was based on claimant's pain reports rather than any objective physical limitations, WCC was not persuaded that claimant's pain precludes her from returning to work. Rather, the Court was persuaded that claimant's ability to return to work was purely a function of her motivation.

**Topics:**

> **Benefits: Permanent Total Benefits: Pain as Disabling.** While pain must be considered in determining the ability of an injured worker to return to work, WCC

was persuaded this claimant's ability to return to work was purely a function of her motivation. Although surgeon opined she could work part-time only, his opinion was based on claimant's pain reports, not objective physical limitations. More persuasive opinions came from IME conducted by occupational health and chronic pain experts who found no neurological or physical deficits, pain amplified by psychological factors, and lack of motivation to work. The Supreme Court affirmed in *Kloepfer v. Lumbermen's Mutual Casualty Co.*, 276 Mont. 495, 916 P.2d 1310 (1996), finding substantial evidence to support the WCC's finding.

**Disability: Permanent Total.** While pain must be considered in determining the ability of an injured worker to return to work, WCC was persuaded this claimant's ability to return to work was purely a function of her motivation. Although surgeon opined she could work part-time only, his opinion was based on claimant's pain reports, not objective physical limitations. More persuasive opinions came from IME conducted by occupational health and chronic pain experts who found no neurological or physical deficits, pain amplified by psychological factors, and lack of motivation to work. The Supreme Court affirmed in *Kloepfer v. Lumbermen's Mutual Casualty Co.*, 276 Mont. 495, 916 P.2d 1310 (1996), finding substantial evidence to support the WCC's finding.

**Pain.** While pain must be considered in determining the ability of an injured worker to return to work, WCC was persuaded this claimant's ability to return to work was purely a function of her motivation. Although surgeon opined she could work part-time only, his opinion was based on claimant's pain reports, not objective physical limitations. More persuasive opinions came from IME conducted by occupational health and chronic pain experts who found no neurological or physical deficits, pain amplified by psychological factors, and lack of motivation to work. The Supreme Court affirmed in *Kloepfer v. Lumbermen's Mutual Casualty Co.*, 276 Mont. 495, 916 P.2d 1310 (1996), finding substantial evidence to support the WCC's finding.

The trial in this matter was held on August 16 and 17, 1995, in Billings, Montana. Petitioner, Victoria Kloepfer (claimant), was present and represented by Mr. James G. Edmiston, III. Respondent, Lumbermens Mutual Casualty Co. (Lumbermens), was represented by Mr. Steven S. Carey.

Witnesses and Depositions: The claimant, Juanita Hooper, Dana Headapohl, M.D., Martin Cheatle, Ph.D., and Peter V. Teal, M.D. testified at trial. Dr. Teal's testimony was taken at his office. The depositions of claimant, Dana Headapohl, M.D., Michael Lahey, M.D., Ethan Russo, M.D. and Martin Cheatle, Ph.D. were also submitted to the Court for its consideration.

No transcript of the trial has been prepared and therefore is not cited in this decision.

Exhibits: With the exception of pages 249 through 288 of Exhibit 1, Exhibits 1 through 4 were admitted by agreement of the parties. Claimant objected to pages 249 through 288 on relevancy grounds. Having reviewed those pages, I found nothing in them which will assist me in reaching my decision in this case. The objection is therefore **sustained**.

Issues Presented: Petitioner seeks an adjudication that she is permanently totally disabled as a result of her back injury of April 14, 1992, and that she is therefore entitled to permanent total disability benefits. She also seeks attorney fees and costs.

Prior Proceedings: In a previous proceeding this Court determined that back surgery performed on claimant on June 2, 1993, was reasonable treatment for her April 14, 1992 injury. I ordered Lumbermens to pay for the surgery and to pay temporary total disability benefits during claimant's period of recuperation. *Victoria Kloepfer v. Lumbermens Mutual Casualty Co.,*WCC No. No. 9305-6796, Findings of Fact, Conclusions of Law and Judgment (January 18, 1994) (referred to hereinafter as *Kloepfer I*). At trial the parties agreed that the depositions, testimony and exhibits admitted in the prior proceedings may be considered by the Court in reaching its decision in the present case.

* * * * *

Having considered the Pre-trial 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

1. Claimant is 45 years old. She is a divorced mother of three. One of her three children, a fourteen year old daughter, is still living at home.

2. Claimant has a ninth grade education. Her work history includes jobs as a house cleaner, cashier/checker, photo finishing worker, nurses aide, and receptionist-trainee. (Ex. 2, pg. 14.) However, her employment has been sporadic and short-term. Between 1974 and 1986 she held no significant employment. (*Kloepfer I* at 1.) Between 1987 and 1991 she worked sporadically as a construction laborer. (*Id.*) She has never been employed in any one position for an extended period of time.

3. From April 1991 until September 24, 1991, the claimant worked as a general laborer for Bechtel Construction Company at its Conoco Refinery in Billings, Montana. Claimant filed an occupational disease claim for tendinitis or fibromyalgia arising while she was employed by Bechtel. At the time of the claim, Bechtel was insured by Lumbermens, which accepted the claim and paid medical and temporary total disability benefits. (*Id.* at 2.)

4. As part of a rehabilitation program for her occupational disease, claimant was enrolled in a work-hardening program at the Billings Clinical Physical Rehabilitation Center. (*Id.*) On April 14, 1992, while participating in that program, she injured her lower back when attempting to empty a wheelbarrow. (*Id.*) Lumbermens deemed the additional injury as

compensable under claimant's occupational disease claim and thereafter paid medical and temporary total benefits on account of the injury. (*Id.* at 3.)

5. On June 2, 1993, Dr. Peter Teal, a board certified orthopedic surgeon, performed low-back surgery on claimant. He carried out a disk excision at the L5-S1 level and fused the L5-S1 vertebrae (with instrumentation). (Ex. 1 at 308.) The fusion is solid. However, the claimant experienced little pain relief.

6. Claimant has reached maximum healing but contends that her pain renders her incapable of gainful employment and that she is therefore permanently totally disabled.

7. Due to her continuing pain, on October 27, 1993, claimant was treated with an epidural steroid injection. The treatment was unsuccessful. Claimant reported increased pain and muscle spasm. (Ex. 1 at 310.)

8. In January 1994 the claimant underwent a lumbar myelogram and a post-myelogram CT scan. These diagnostic studies revealed no evidence of significant stenosis or impingement on the nerve roots. (Ex. 1 at 238.)

9. At the request of Dr. Teal, Dr. Donald H. See performed electrodiagnostic studies on claimant in May of 1995. The studies were normal, providing no evidence for lumbar radiculopathy. (Ex. 1 at. 291.)

10. Dr. Teal, who has continued to follow claimant, testified that claimant's continuing pain is due to degeneration of the L5-S1 disk and scarring around the L5 nerve roots. He testified that she has been at maximum medical improvement since November of 1994 and that her pain complaints have been basically the same, although claimant has reported them as getting worse.

11. Dr. Teal has advised claimant, and testified, that the instrumentation attached to claimant's vertebrae during surgery sometimes causes irritation and pain. The instrumentation can be surgically removed. However, Dr. Teal cautioned that such removal has only a 10% success rate. Removal of the instrumentation is not under active consideration.

12. In Dr. Teal's medical opinion, claimant is capable of returning to part-time employment. He does not believe she can work full-time.

13. Dr. Teal's opinion concerning claimant's ability to return to work is based on claimant's pain reports rather than any objective physical limitations. Based on her pain reports, Dr. Teal believes that claimant will have good and bad pain days, and that on her bad days she will not be able to work. It is also his opinion that claimant will need to change positions frequently and should avoid bending and lifting. With those limitations, he approved claimant for part-time work as a bank teller, desk clerk, telephone solicitor, food demonstrator and telemarketer.

14. Dr. Teal acknowledged that many patients who have undergone back fusions thereafter return to work and that many patients are gainfully employed despite their pain. He noted that pain tolerance varies by individual and can be a factor in the individual's return to work. He also acknowledged that motivation is a big factor in an individual's return to work. He could not say whether motivation was a factor in Ms. Kloepfer's case. He acknowledged that, as an orthopedic surgeon, he presently does not have much to offer claimant treatment-wise and that treatment by a pain specialist is more medically appropriate.

15. Dr. Teal does not believe that claimant is "consciously" exaggerating her pain but acknowledged that she sometimes has a more exaggerated pain response than normal. He performed Waddel's tests on her during his examinations. Based on the testimony of numerous physicians in previous cases (*See e.g. Edwin Taylor v. State Fund Compensation Insurance Fund,* WCC No. 9406-7066 (August 21, 1995)), as well as Dr. Lahey's deposition testimony in this case (Lahey Dep. at 8-11), the Court is familiar with Waddel's tests. The tests involve physical maneuvers which should not produce pain based on spinal conditions. Results are characterized as positive if the patient reports pain. Several positives to the five tests may indicate magnification of pain or pain without any physical basis. According to Dr. Teal, claimant tested positive to some of the tests. He did not record any specific information concerning the tests but acknowledged that the tests assist in determining whether a patient is exaggerating pain. Claimant tested positive to four of the five Waddel's tests administered by Dr. Lahey, an orthopedic surgeon who conducted an independent physical examination of claimant. (Lahey Dep. at 11.) Dr. Teal testified that he had no basis to question Dr. Lahey's results. On the other hand, he characterized claimant's pain threshold as "low" and did not believe that the tests showed conscious magnification of claimant's pain.

16. At the request of Lumbermens, an independent medical examination was conducted by a panel of physicians in Missoula, Montana. The panel members were Dr. Dana Headapohl, who is board certified in occupational and environmental medicine; Dr. Michael Lahey, who is a board certified orthopedic surgeon; Dr. Ethan Russo, who is a board certified neurologist; and Dr. Martin Cheatle, who is a Ph.D. psychologist specializing in pain evaluation and management. Dr. Teal acknowledged that medical panels can sometimes provide a more objective analysis than a treating physician. The panel in this case specifically considered claimant's ability to work.

17. In her examination, Dr. Headapohl could find no neurological or physical deficits other than a decreased range of motion. Dr. Headapohl has extensive experience with chronic pain patients and testified that patients are often able to return to work. Back fusion patients in particular often return to work. She does not believe claimant's back fusion prevents her from returning to work and she considers claimant physically capable of working in sedentary to light jobs. She testified persuasively that patients with chronic pain often benefit by returning to work because work increases their self-esteem and also takes

their minds off of their pain. She pointed out that medical studies show that pain improves with work. Dr. Headapohl also noted that motivation is an important factor in an injured worker's return to work and that claimant's motivation is an issue in this particular case. She approved claimant's return to work on a full-time basis and pointed out that patients with more severe complaints, including patients with true radicular pain, return to work.

18. Dr. Russo also found no evidence of neurological deficit or impairment of strength, sensation, coordination, or reflexes. (Russo Dep. at 6-7.) He indicated that he would place no work restrictions on claimant based on neurological findings but felt that lifting restrictions may be appropriate due to claimant's back surgery. (*Id.* at 9.) He agreed that claimant can perform sedentary and light work, and that the only impediment to her working is her subjective pain. (*Id.* at 10.) Even given her reported high level of pain, he did not believe she is unable to perform light or sedentary work. (*Id.* at 21.)

19. When Dr. Lahey examined claimant he found her motion was severely limited, which he attributed principally to apprehension and pain behavior; his exam revealed no neurological deficits. (Lahey Dep. at 6. ) He felt claimant had chronic pain syndrome. Noting in his report claimant's positive response to four of the five Wadell's tests, he commented that she might benefit from a pain management program. (Ex. 1 at 235.) Dr. Lahey determined that, from a structural or neurological standpoint, claimant can perform sedentary to light work. (Lahey Dep. at 16.)

20. Dr. Martin Cheatle, who specializes in pain management, determined that claimant suffers from chronic pain. He distinguished chronic pain from chronic pain **syndrome**. Chronic pain **syndrome** is characterized by chronic pain which lasts for six or more months and a variety of conditions secondary to the pain which interfere with the quality of life. In examining claimant he found a remarkable lack of secondary conditions. Specifically, claimant is not depressed; she has no significant family or social disturbances in her life; and she is not socially withdrawn. Significantly, in her interview with Dr. Cheatle, claimant did not appear distressed over her chronic back pain or the lack of vocational opportunities.

21. Dr. Cheatle does not dispute claimant's reports of pain. However, his examination adduced that the pain has not significantly interfered with her life.

22. Dr. Cheatle diagnosed claimant as suffering from somatoform disorder, which means her pain is amplified on account of psychological factors. The amplification is not deliberate and Dr. Cheatle does not doubt that claimant suffers pain. In his testimony, Dr. Cheatle focused on claimant's motivation to return to work. He noted that motivation is a *key* component in return to work. He opined that claimant will not likely return to work unless she becomes motivated to do so. According to Dr. Cheatle, claimant at present is not motivated to do so. When he questioned her about her life goals, claimant responded

she had no vocational goals and only wished to raise her daughter. But in Dr. Cheatle's opinion, the claimant is able to return to work but lacks the motivation to do so.

23. Claimant testified that she suffers pain from the small of her back through her buttocks, down her right leg to her foot, in her left leg and on her hip joint (where Dr. Teal removed a bone graft used in her surgery). She takes Darvocet occasionally for her pain and Ibuprofen daily. She testified that she is unable to work due to her pain and her inability to concentrate because of her pain.

24. Juanita Hooper, a certified rehabilitation consultant, has been involved in claimant's case since October 1991. She was originally contacted by the insurer to obtain a job history and do a job analysis of claimant's time-of-injury position. (Ex. 2 at 1.) She assembled a series of 13 job analyses and submitted them to Dr. Teal and the medical panel. As already noted, Dr. Teal approved five positions subject to claimant being able to change positions frequently and no bending or lifting. The medical panel approved two positions outright and six other positions with modifications. The medical panel approved the following positions for claimant: cafeteria cashier, bank teller, hotel/motel clerk, telephone receptionist, telemarketer, food demonstrator, cosmetic counter clerk, and convenience store cashier. The positions of telemarketer and cosmetic counter clerk were approved without restriction. The other positions were approved with either lifting restrictions or limits on the amount of sitting, stooping, standing or bending required. (Ex. 2 at 19, 22, 25, 31, 34, 40, 43.)

25. Most of the positions identified by Hooper are entry-level positions which claimant is qualified to perform. The fact that claimant has not worked at the positions does not affect her employability in the positions. Hooper opined that many employers in Montana are willing to accommodate claimant's limitations. She testified that the approved job positions are available in Montana in significant numbers. Hooper's testimony and opinions were credible and I adopt them in reaching my decision in this case.

26. According to claimant, on an average day she sorts laundry, dusts, does dishes and cooks. She said that she cannot scrub floors, vacuum or do yard work, and that her mother helps her out. She reads but said that reading gives her headaches and in response to further questions by the Court she indicated that she reads the newspaper once in a while and reads only a book a month. She testified that she goes to bed at 10:00 pm and awakens between 3:00 a.m. and 4:00 a.m. She said that she has to lie down one to two hours a day.

27. After sifting all of the evidence in this case, I find that claimant can return to work on a full-time basis if she is motivated to do so. I further find that her injury and her pain do not prevent her from doing so. In reaching these findings, I am especially influenced by the following:

a. Claimant's treating physician, Dr. Teal, is of the opinion that claimant can return to part-time work despite her pain. Dr. Teal was sympathetic to claimant and accepted her pain complaints as true. But he also acknowledged that the medical panel which examined the claimant may be more objective than he, as a treating physician, is.

b. Claimant's **physical** condition does not preclude her from working.

c. Claimant's pain is subjective.

d. Drs. Teal, Headapohl and Cheatle all agreed that motivation plays a significant role in pain and in a worker's ability to return to work. Their testimony was consistent with my own observation and experience.

e. Based on the evidence presented in this case -- particularly the claimant's work record, my evaluation of her trial testimony, her interview with Dr. Cheatle, and her testimony concerning her average day -- I find that claimant is not motivated to return to work and that her lack of motivation is fueling her pain.

f. I also find that claimant's pain is **not** as severe as she reports it to be. Her testimony fails to show that pain has significantly interfered with her activities. She is not depressed; her social and family life does not appear to be affected; and she has not become socially withdrawn. Her testimony concerning her daily activities does not add up. She does not spend significant time reading or watching television. Her family unit consists of herself and her daughter, and she says that she has help with her housework. She testified that she lies down one to two hours a day, but her day extends from approximately 4:00 a.m. to 10:00 p.m. at night. While she testified that she spends time talking to her daughter, it is difficult to believe that her interaction with her daughter takes up several hours of her day. Frankly, I do not believe claimant's testimony concerning the way she spends her time. Finally, her positive responses to the Wadell's tests indicate that she is exaggerating her pain, even if not deliberately.

g. Having personally listened to the testimony of Drs. Headapohl and Cheatle, I found their testimony especially persuasive.

h. I also found credible, and am persuaded by, Juanita Hooper's testimony concerning jobs which claimant is capable of performing and which are available to her if she should wish to return to work.

## CONCLUSIONS OF LAW

1. Claimant has the burden of proving that she is entitled to benefits. *Ricks v. Teslow Consolidated,* 162 Mont. 469, 512 P.2d 1304 (1973). She must prove her entitlement by a

preponderance of the probative credible evidence. *Dumont v. Wicken Bros. Construction Co.,* 183 Mont. 190, 598 P.2d 1099 (1979).

2. Although claimant's present condition is the result of an injury she suffered while attending a work-hardening program, she is seeking benefits based upon the occupational disease that led to her participation in the work-hardening program.

3. Claimant seeks total disability benefits. Permanent total disability is defined by section 39-72-102(4), MCA(1991)[(1)] :

> "Disablement" means the event of becoming physically incapacitated by reason of an occupational disease from performing work in the worker's job pool. Silicosis, when complicated by active pulmonary tuberculosis, is presumed to be total disablement. "Disability", "total disability", and "totally disabled" are synonymous with "disablement", but they have no reference to "permanent partial disability".

Claimant has presented no evidence that her physical condition is permanently disabling. Her claim for disability is based on her assertion that she cannot work because of pain. While pain must be considered in determining the ability of an injured worker to return to work, *Metzger v. Chemtron Corporation*, 212 Mont. 351, 687 P.2d 1033 (1984), I am not persuaded that claimant's pain precludes her from returning to work. Rather, I am persuaded that claimant's ability to return to work is purely a function of her motivation.

4. Since claimant has not prevailed in this case, she is not entitled to costs or attorney fees.

JUDGMENT

1. Claimant is not permanently totally disabled and is not entitled to permanent total disability benefits.

2. Claimant is not entitled to attorney fees or costs.

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

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

DATED in Helena, Montana, this 18th day of September, 1995.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. James G. Edmiston
Mr. Steven S. Carey
Submitted Date: August 17, 1995

1. The law in effect at the time of the occupational disease governs claimant's entitlement to benefits. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 730 P.2d 380 (1986).