

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1996 MTWCC 48

WCC No. 9505-7309

JOE YARBOROUGH

Petitioner

vs.

MONTANA MUNICIPAL INSURANCE AUTHORITY

Respondent/Insurer for

CITY OF BILLINGS

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: 40 year old firefighter sustained injuries at work during August and October 1987. The August injury involved a lightning strike near him, which knocked him unconscious, but did not cause permanent physical injury. The October incident involved a fireball emerging from a burning residence knocking claimant over, giving him singes and relatively minor burns, leading to no permanent restrictions. Claimant, however, testified he "lost his nerve" to do firefighting work after the October incident, though he had no physical problems. Diagnosed with post-traumatic stress disorder, a mental condition, claimant seeks medical and permanent partial wage loss benefits.

Held: While finding claimant entirely credible, the Court held as a matter of law that claimant's psychological condition is not a compensable injury within the Workers' Compensation Act as amended in 1987. Unlike earlier cases (O'Neil v. Industrial Accident Board, 107 Mont. 176, 81 P.2d 688 (1938) and Schumacher v. Empire Steel Manufacturing, 175 Mont. 411, 574 P.2d 987 (1977)), there is no evidence here that claimant's mental condition (PTSD) was caused by physical injuries he suffered on the job. The injuries were resolved in a short time and were inconsequential. Where the evidence demonstrates that it was mental shock or mental fright that gave rise to claimant's disability, his allegedly disabling condition is one "arising from....emotional or mental stress" and is excluded from the definition of compensable injury within section 39-71-119(3), MCA (1987). (Note: this decision was affirmed in Yarborough v. Montana Municipal Insurance Authority, 282 Mont. 475, 938 P.2d 679 (1997).)

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-119(3), MCA (1987). Where the evidence demonstrates that it was mental shock or mental fright that gave rise to firefighter claimant's post traumatic stress disorder, his allegedly disabling condition is one "arising from....emotional or mental stress" and is excluded from the definition of compensable injury within section 39-71-119(3), MCA (1987). (**Note:** this decision was affirmed in [*Yarborough v. Montana Municipal Insurance Authority*](#), 282 Mont. 475, 938 P.2d 679 (1997).)

Injury and Accident: Mental or Psychological Stress. Where the evidence demonstrates that it was mental shock or mental fright that gave rise to firefighter claimant's post traumatic stress disorder, his allegedly disabling condition is one "arising from....emotional or mental stress" and is excluded from the definition of compensable injury within section 39-71-119(3), MCA (1987). (**Note:** this decision was affirmed in [*Yarborough v. Montana Municipal Insurance Authority*](#), 282 Mont. 475, 938 P.2d 679 (1997).)

Trial in this matter was held on May 7, 1996, in Billings, Montana. Petitioner, Joe Yarborough (claimant), was present and represented by Mr. Patrick R. Sheehy. Respondent, Montana Municipal Insurance Authority (MMIA), was represented by Mr. Oliver H. Goe. Exhibits 1 through 8, 10 and 11 were admitted without objection. Exhibits 9 and 13 were admitted over Mr. Goe's objection. Exhibit 12 was admitted over Mr. Sheehy's objection. Exhibit 14 was refused. Additionally, the depositions of claimant, Dr. Thomas Van Dyke, and Dr. Fred Olson were submitted for the Court's consideration. Claimant, Thomas Van Dyke, and Joseph McElhinny testified at trial.

Issues presented: Claimant contends he suffers from post traumatic stress disorder (PTSD) as the result of two industrial injuries he suffered while working as a firefighter for the City of Billings. He seeks medical benefits and permanent partial wage loss benefits. He also contends the respondent has been unreasonable in handling his claim and therefore asks for attorney fees, costs, and a penalty.

* * * * *

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

FINDINGS OF FACT

1. Claimant is 40 years old. He is a high school graduate and needs 9-12 credits to complete an associate degree in Fire Science. (An associate degree is based on

completion of a two-year program.) He is divorced and has two children. He presently lives in Basin, Wyoming.

2. From 1977 to 1981 claimant served in the Air Force. While stationed in England, he was trained in both crash and structural fire fighting techniques. After finishing his tour in England, claimant returned to the United States and was stationed in Missouri where he received further training in automobile extrication.

3. The Court found claimant's testimony fully credible. In the findings that follow, his testimony is adopted as true.

4. Claimant was honorably discharged from the Air Force in 1981. Over the next two years he worked assembling circuit boards, making pizzas, as a rough-neck on an oil rig, and as a ranch hand.

5. In June 1983 claimant was hired as a firefighter for the city of Billings. In addition to fighting fires, his job duties included business and structure inspections, first aid calls, and public education.

6. Claimant's work schedule as a firefighter was 24 hours on followed by 48 hours off. From 1985 to 1987 he was rotated between stations, filling in for other firefighters. He was permanently assigned to Station 5 in the summer of 1987. (Yarborough Dep. at 33-34.)

7. Claimant enjoyed his work as a firefighter. He liked the excitement of fighting the fires, his public education duties, and the work schedule. His schedule allowed him to spend time with his children and work a second job delivering pizzas.

8. However other aspects of the jobs were distasteful. He disliked first aid calls involving serious car accidents and performing CPR on persons who could not be resuscitated. He said that the job was also boring at times.

9. On August 14, 1987, claimant was at work and saw an approaching thunderstorm. He ran outside to close his car window and apparently was either hit by or very near a lightning strike. Claimant testified that he saw a flash, heard a clap of thunder, and the next thing he knew he was being worked on by some of the other firefighters. He was taken to the hospital and kept overnight for observation. He was released the following day and advised he could return to work on August 17, 1987. (Ex. 5 at 3-5.) After the lightning incident, claimant took a previously planned vacation, visiting his family in Florida. (Yarborough Dep. at 40.) He returned to work after his vacation. He presented no evidence of any permanent physical injury caused by the lightning incident.

10. On October 22, 1987, claimant responded to a fire at a residential home in Billings. He dragged a hose to the back of the house and began fighting the fire. He first sprayed a wooden fence to the rear. Another firefighter, Don Regnier, came to assist him and the two of them prepared to spray the house. Standing about 10 to 15 feet away, claimant adjusted

the hose to a fog pattern to protect himself and Regnier from the heat as they approached the house. A stream of water hit a soffit, knocking it down. He heard a "whoosh" and was hit with what he described as a "fireball." He was knocked backwards into the fence losing both the hose and his helmet. He crawled over to Don Regnier and they then retreated to the front of the house. (Yarborough Dep. at 45-48; Trial Test.)

11. Claimant was taken to Saint Vincent Hospital where he was examined by Dr. Evan Buchan:

[T]he hair on the head is singed. There are a 1st and a few 2nd degree burns throughout the face. Very small amount of singing [sic] of the nasal hair. There is no soot in the nose, mouth, or throat. Eye exam is benign. Neck is supple. Lungs are clear throughout. No burns noted at all on the trunk or on the right hand. He does have some 1st and 2nd degree burns on the left hand. These mainly involve the thenar area and the last 3 digits. There are no areas of circumferential burn and he has normal sensation, circulation, and function throughout the hand. Chest x-ray was taken, was unremarkable. He continued to be comfortable throughout this time in the Dept. He was observed for a little over 2 hours and developed no respiratory difficulty or cough at all. His burns were cleansed and dressed with Silvadene to the hand and Neosporin to the face.

(Ex. 5 at 9.)

12. Claimant returned to the hospital the next day and his wounds were again cleaned and dressed. Claimant testified in his deposition that he returned to the hospital daily for a week to have his wounds cleaned and dressed. (Yarborough Dep. at 56.) The hospital notes for one such visit are contained in the record. (Ex. 5 at 11.) He thereafter required no more treatment for his burns.

13. Claimant suffered no permanent physical restrictions. He was off work approximately two and a half weeks. He then returned to work without restriction. (Yarborough Dep. at 56.)

14. Claimant testified that he was able to perform all physical aspects of the firefighting job following the October 22 injury, however, he had "lost his nerve" to do the job. In his deposition he described the problems he had following the injury:

Q. [By respondent's counsel.] What type of problems, if any, did you have after that . . .?

A. As far as physical, I don't think I had any physical problems. At home, I couldn't get rid of that fireball in my eyes. Every time I closed my eyes, even during the day, if I just blinked, It's [sic] like it was burned onto my retina. I couldn't -- if I closed my eyes to go to sleep, it would take three or three [sic] hours. I couldn't get rid of that orange and dark black coming at me.

And I had nightmares. I woke up a few times beating on my wife putting her out because I thought she was on fire. I slammed her against the wall one time, rolled her and pushed her into the wall trying to put her out.

Crying when I had to go to work in the morning; hugging my kids good-bye like I wasn't going to see them again.

Q. But physically you didn't have any problems --

A. Uh-uh.

Q. -- but emotionally you were?

A. Yeah -- yes.

Q. Any other emotional symptoms outside of what you just talked about at all?

A. Just fear that something was going to go wrong every time I got near a fire.

My first call back was a big propane tank leaking in a garage. And it had not caught on fire; it was just leaking .

I mean, this lady knocked it over and sheared the top off of it. So it was just venting 200 pounds of propane or something like that.

And we had to go down there and shut that down and put a dowel in it to plug it.

Q. Mm - hmm.

A. And I didn't go in, but I stood next to the garage fanning and putting a straight stream -- or fog, a pattern into the window where the vent was coming out to dissipate so it didn't find a source, a spark, and [sic] ignition source.

And it was the most miserable 20 minutes of my life. I thought for sure that garage was in -- I'd seen propane tanks go before, and they don't leave anything but matches.

(Yarborough Dep. at 59-61.)

A. I can't remember any other calls that we had during that period. There were a bunch, but I just can't come up with them.

Q. You performed your job as you were supposed to during all those calls?

A. Yeah.

I was scared

(*Id.* at 64-65.) Claimant testified at trial that he felt "shaking scared, sick scared" during the propane leak call. He had never felt that way prior to the October 22 explosion.

15. Claimant spoke with the Billings Fire Chief about being reassigned to a fire prevention position that would not involve fighting fires but was told that no position was available. (*Id.* at 67.)

16. Claimant also spoke with Carlene Dubeau, personnel director for the City of Billings about working in a temporary position outside the fire department. (*Id.* at 67-68.)

17. Claimant read an article in the fire station about PTSD in emergency personnel and began to suspect he was suffering from it. (*Id.* at 70.) He suffered from many of the symptoms described in the article, including nightmares, diarrhea, feelings of doom, and a sick feeling in his stomach. He informed his battalion chief of his suspicions and was referred to Kathleen Campbell, a counselor providing services for the city. According to claimant, the counselor's recommendation was that he take Valium or find another job. (*Id.* at 71-73.)

18. Claimant testified that he felt he was a hazard to himself and others and resigned his position with the Billings Fire Department in December 1987. His last day of work was December 24, 1987. He requested a disability retirement, however, his physician was unwilling to sign a document stating claimant was unable to perform his job. (*Id.* at 74-75.) At that point, the treating physician had not treated claimant for PTSD.

19. After his resignation, claimant withdrew his vested retirement savings and moved to Basin, Wyoming. Claimant testified he moved to Basin to be closer to his children (his wife and children were there), avoid fire engines, and take advantage of the town's lower cost-of-living.

20. Since 1987 claimant has worked at a number of jobs. He first worked at the site of a forest fire in the Big Horn Basin, providing first aid to the firefighters. He did no firefighting. Later he provided food service for firefighters at a fire above Buffalo, Wyoming. He was employed by the United States Department of Agriculture and paid \$7 to \$8 per hour. (Ex. 13.)

21. Claimant joined the Basin, Wyoming Volunteer Fire Department in 1988. In his deposition he related his experiences with the fire department in Basin:

Q. [By respondent's counsel.] While you were signed up with the Volunteer Fire Department in Basin, did you go on any fire calls?

A. I got to cut a hole in a roof once. It was a really small attic fire; it was like this big (indicating); in the insulation.

Q. Mm-hmm.

A. And me and another guy went up and cut a hole and dumped two gallons of water on it and went back down, and we were done.

That's the extent of my career with them.

Q. Did it bother you at all?

A. That didn't bother me.

There was another fire that I went to; I didn't go in or anything. But it was in the basement of the bank, and it was billowing smoke, and I got up to the door and wouldn't go in. It was hot and just -- I kind of got panicky.

Q. Did anybody else go in?

A. Yeah, everybody went in. They put it out.

And shortly after that, I left. I didn't -- I didn't respond. I handed in my pager and didn't respond to anymore fires and kind of just let it go away.

(Yarborough Dep. at 108-109.)

22. Claimant's other jobs since December 1987 include temporary fuel truck driver for \$6.00 or \$7.00 per hour; produce worker for \$5.00 an hour; laborer for a drilling company; cook and assistant manager at a pizza store in Idaho for \$5.25 to \$7.50 per hour; laborer at a game processing operation; roofer; manager and bartender at a ski area for \$5.00 to \$6.00 per hour; laborer for a construction company; counselor at a group home for \$6.50 to 7.50 per hour; and laborer for a paving company. He has also been self-employed in the pizza business on two occasions - once in an unsuccessful partnership business called Zeppes Pizza, and more recently as the sole proprietor of Jo Poppa's Pizza, an ongoing enterprise which appears to be growing and prospering. (Ex. 13.)

23. Claimant supplied the Court with a compilation of his earnings since 1987. He has earned between \$4,882 and \$14,560 per year. (*Id.*)

24. Claimant was earning \$1780 per month or \$21,360 per year at the time he ceased working for the City of Billings.

Claimant's Preexisting Mental Condition

25. Claimant was treated for depression by Dr. Thomas W. Van Dyk in December 1983. Claimant was already taking anti-depressant medication when first seen by Dr. Van Dyk; however, he does not remember how he received the medication or whether it was prescribed by a physician.

26. Dr. Van Dyk is a board certified psychiatrist. When he first saw claimant, the claimant was confused, depressed, and upset with his job. Dr. Van Dyk prescribed a different anti-depressant.

27. Dr. Van Dyk thereafter saw claimant on May 3, 1984 and February 20, 1985. The purpose of these visits was to monitor claimant's medication. The claimant expressed no job dissatisfaction during either visit.

28. In June 1986 claimant was hospitalized in the Billings Deaconess Hospital after an argument with his wife. Dr. Van Dyk's intake summary provides the following history:

[H]e has been having problems with his wife. He says that she nags at him until she gets what she wants. He becomes anxious and upset and then yells and swears at her, throws things, and breaks things. She feels mentally intimidated by this. There was an episode of this yesterday as she left last night. He became distraught and hit himself several times with a piece of wood on the head and face. He also scratched his arms with the wood. In addition, he has problems in his job as a fireman. He hates his job. He feels like the other people there are disgusting. He feels trapped in it. He doesn't like the ambulance work that is required; seeing people die and having to resuscitate them. He says he has not been drinking recently. He drank a lot of beer on 5/2/86. He says he averages about two beers per month. He feels a lot of pressure at work. He does not feel he can do anything else. He has always worked as a fireman. He is nine credits short of an associates degree in fire science. He says he lives with animals and the other fireman talk about their sex life a lot.

(Ex. 1 at 53.) Dr. Van Dyk's impression of claimant's condition at that time was:

This patient appears to have a depressive illness, probably manic depressive illness, bipolar or mixed type. He appears to have periods of agitation in which he experiences overwhelming anxiety and acts out to control the anxiety. He also appears to have marital problems and there may be a spouse abuse syndrome here. There is also a history of excessive drinking, a history of atrial fibrillation, a history of hypertension, and a history of appendectomy last September.

(*Id.* at 54.)

29. Claimant testified at trial and in his deposition that he doesn't specifically remember telling Dr. Van Dyk that he hated his job, but he does not doubt he did so. He testified that, at that time, he hated everything about his life. (Yarborough Dep. at 93-94, Trial Test.)

30. Claimant was discharged from the hospital after two days. Dr. Van Dyk's diagnosis at that time was "manic depressive illness, depressed type. Chemical dependency." (Ex.1 at 59.)

31. After his release from Billings Deaconess Hospital and at the suggestion of Dr. Van Dyk, claimant underwent a thirty-day substance abuse treatment program at the Rimrock Foundation. (Yarborough Dep. at 95-96.) While at Rimrock, claimant completed a Clinical

Analysis Questionnaire and underwent a Minnesota Multiphasic Personality Inventory which were interpreted as follows:

The MMPI and CAQ indicate an individual who is in an extreme state of emotional turmoil. He is easily upset and threatened, viewing himself as having numerous problems. His impulse control is impaired indicating that he is undisciplined, uncontrolled. The tests indicate some depression, anxiety and nervousness as well as strong obsessional characteristics being present. The testing suggests that he may express feelings of hopelessness, despair, as well as intellectualize his problems and be over ideational in his approach to working through the problems. Testing also suggests that he may be complaining of concentration and suffer from obsessive indecision, doubts and vacillation. Others describe him as a fearful worrier who lacks self-esteem. The testing suggests difficulty in becoming close emotionally in inter-personal relationships. He has a tendency under pressure to withdraw and isolate.

(Ex. 11 at 3.)

32. While at Rimrock, claimant was examined by Dr. Ely, a psychiatrist. Dr. Ely wrote that claimant had "a lot of problems with impulsive anger, which is superimposed on an ongoing chronic depressive disorder, probably best categorized as an atypical depressive disorder . . . I am recommending that he be started on Desipramine 50 mg." (*Id.* at 7.)

33. After his release from Rimrock, claimant continued to see Dr. Van Dyk. He saw Dr. Van Dyk on July 30, 1986, August 27, 1986, December 31, 1986, January 21, 1987, February 4, 1987, and October 21, 1987. Dr. Van Dyk testified, and his records confirm, that claimant's condition waxed and waned during this time. Dr. Van Dyk's office notes for these visits indicate claimant's complaints about his job were not as extreme as when he was in the hospital. (Ex. 1 at 57-58, 61-62.)

34. I find that while claimant suffered depression between 1983 and October 21, 1987, and disliked parts of his job, he was still able to perform his job duties.

Claimant's Treatment for Psychological Problems After the October 22, 1987 Injury

35. As stated in Finding No. 17, Claimant was first seen by Kathleen Campbell following his injury.

36. Claimant then saw Dr. Van Dyk on December 11, 1987. He told Dr. Van Dyk about the October 22 incident and complained of a variety of ailments -- diarrhea, headaches, upset stomach, anxiety, nervousness, flashbacks, and nightmares. Dr. Van Dyk diagnosed PTSD. At his deposition, Dr. Van Dyk provided the following explanation for his diagnosis:

Q [By respondent's counsel.] What specific criteria, at least based on the history he provided you, did Mr. Yarborough meet for you to arrive at your diagnosis of post-traumatic stress disorder?

A He had a change in his mood state. Nightmares, he was preoccupied with the events during the day, and then these physical complaints he had.

Q Anything else that --

A Well, he had a lot of fear about his work and going back to his work and being faced with another fire.

Q Anything else?

A Well, the problem we're facing here is one I have had several times before where a person has something and then something happens and then they have something in addition. It is hard to sort out how much is how much.

I believe there was a change in his condition. He really had not had these nightmares and preoccupations like that before, as the problem normally in post-traumatic stress disorder you have a decreased ability to relate emotionally to other people, that causes you relationship and job problems. Well, he already had that, so it is hard to say how much is from what, but I think he was worse.

Q And that was based, and I just want to clarify, that was based on his change in mental state, which you described as nightmares and being preoccupied, the physical complaints?

A Yes, and the change in physical complaints.

(Van Dyk Dep. at 57-58.)

37. During the December 11, 1987 appointment, claimant asked Dr. Van Dyk to sign a retirement disability form. By this time claimant had determined he could no longer work as a firefighter and was seeking another way to support his family (Yarborough Dep. at 73-80.) Dr. Van Dyk refused to sign the document. He testified at trial and in his deposition that at that time he felt claimant's condition was treatable; he also was concerned with how claimant would support his family. (Van Dyk Dep. at 60-61, 65; Trial Test.)

38. Dr. Van Dyk saw claimant again on December 15, 1987. Claimant told him he was not returning to work no matter what. Dr. Van Dyk testified that claimant complained of shakes, anxiety attacks, diarrhea, nightmares, headaches, and chest pain. Claimant also reported having vomited at a movie and of being restless and grouchy. (Ex. 1 at 66-67; Trial Test.)

39. Claimant saw Dr. Van Dyk again on December 28, 1987. By that time claimant had moved to Basin, Wyoming. Dr. Van Dyk testified that claimant appeared more relaxed

during this visit, was sleeping better, and, while he still had daily memories of the fireball, he was no longer having nightmares. Thereafter, beyond prescribing refills for antidepressants for claimant, Dr. Van Dyk had no contact with claimant until December 12, 1995.

40. While living in Wyoming and, for a short time in Idaho, claimant received treatment on a sporadic basis from several providers. He had at least three stays at the Veterans Hospital in 1992. The records provided to the Court for claimant's treatment during this time period are limited. Claimant testified that his treatment during this time was primarily to address problems arising from his deteriorating marriage and resulting depression. He testified that he was also treated for PTSD. (Yarborough Dep. at 149.)

The Expert Opinions

41. On December 12, 1995, Dr. Van Dyke reexamined claimant. The doctor felt that claimant's condition was improved but not fully resolved.

42. At trial, Dr. Van Dyk gave the following opinions:

- a. Claimant suffered from preexisting conditions, namely depression and chemical dependency, prior to the incidents on August 14 and October 22, 1987.
- b. Following the October 22 incident, claimant had a change in condition and began displaying symptoms which were not present before the accident. He diagnosed claimant as suffering from PTSD as a result of this incident.
- c. Claimant presently suffers from PTSD, partially resolved, as a consequence of the October 22, 1987 incident.
- d. Claimant's condition precludes him from returning to work as a firefighter.

43. At the insurer's request, claimant was examined by Dr. Joseph McElhinny, Psy. D, a neuropsychologist. Dr. McElhinny met with claimant on September 25, 1995, for approximately four to four and a half hours. In addition to his examination, Dr. McElhinny reviewed all available records and administered two psychological tests -- the Millon Clinical Multiaxial Inventory (MCMI-II) and the Minnesota Multiphasic Personality Inventory (MMPI).

The psychological tests revealed claimant to be doing well at that time:

[T]here are no signs of any affective distress in the psychologic testing, which is congruent with Mr. Yarborough's self report. In other words, there are no signs of any post traumatic stress disorder, depression, or clinically relevant anxiety at this time.

(Ex. 3 at 8.) Dr. McElhinny felt that, from a psychological standpoint, claimant was probably never a good candidate to be a firefighter. He also felt that claimant's inability to function

as a firefighter after the October 22, 1987 incident was "primarily the result of his pre-existing personality style and the non-work related psychosocial stressors he was experiencing at the time." In his report he confirms that claimant did in fact suffer from PTSD and that the "work related accidents no doubt exacerbated his psychologic problems and it is difficult to determine at this late date when the post-accident trauma was actually resolved." (*Id.* at 9.) He estimated that 80% of claimant's difficulties after the accident were due to long-standing issues and 20% were due to exacerbation directly related to the incident. (*Id.*)

44. At trial Dr. McElhinny gave the following opinions:

- a. Claimant's preinjury diagnosis was depression. After the injuries in 1987, the major diagnosis was still depression.
- b. The accidents in 1987 exacerbated a preexisting condition and provided claimant a means to leave a job which he already disliked.
- c. At the time of trial claimant was not suffering from PTSD.
- d. Claimant is not precluded from returning to firefighting work due to PTSD.

45. Dr. McElhinny further testified that he was unable to state to a reasonable degree of medical certainty what claimant's condition was prior to seeing him in 1995. He testified that if claimant suffered from PTSD, it was of a temporary nature and should have resolved in a short while. He was unable to say when this exacerbation would have ended. Finally, Dr. McElhinny testified that claimant could return to work as a firefighter, but if he did so would be at great risk for recurrence of his depression and at some risk of recurrence of his PTSD. He based his opinion that the PTSD could recur on claimant's reports of "freezing up" when confronted with hazardous situations at work.

46. Dr. Fred Olson is an internist who reviewed claimant's medical records at the request of the insurer. He was asked to evaluate the risk to claimant's ability to perform firefighting duties in light of a heart condition, paroxysmal atrial fibrillation (PAT). The condition is briefly mentioned by Dr. Van Dyk in a report dated June 14, 1986 - "he also has a history of atrial fibrillation which was probably from alcohol." Dr. Olson gave the opinion that claimant did not suffer from PAT at the time of his evaluation and should not experience further trouble with the condition should he return to duty as a firefighter. He, like Dr. Van Dyk, attributed the condition to excessive alcohol consumption and felt it should not return unless claimant again began to drink heavily. Claimant testified in his deposition that he had stopped drinking three years ago. (Yarborough Dep. at 164.)

47. Claimant testified that he is doing much better now than in the first few years after the accident. He still believes he cannot perform as a firefighter.

48. After considering the medical/psychological testimony and records, along with claimant's testimony, I find that the shock of the October 22, 1987 incident aggravated claimant's preexisting depression and caused PTSD, and that his resulting psychological condition includes an aversion to dangerous firefighting situations which permanently precludes his return to work as a firefighter.

CONCLUSIONS OF LAW

1. Claimant's injuries occurred in August and October 1987. The statutes in effect on the date of injury apply in determining the benefits due. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 730 P.2d 380, 382 (1986). Therefore, the 1987 version of the Worker's Compensation Act applies in this case.

2. Claimant contends he is entitled to medical benefits and permanent partial wage loss benefits on account of his PTSD. The claimant has the burden of proving that his PTSD is compensable under the Workers' Compensation Act. *Gerlach v. Champion International*, 254 Mont. 137, 836 P.2d 35 (1992).

3. The claimant in this case was fully credible. Nonetheless, I conclude that as a **matter of law** claimant's psychological condition is not a compensable injury within the meaning of the Montana Workers' Compensation Act.

a. Under pre-1987 law, a psychological condition caused or aggravated by a work-related physical injury was compensable. In *O'Neil v. Industrial Accident Board*, 107 Mont. 176, 183, 81 P.2d 688 (1938), the Supreme Court said: "Neurosis resulting from an injury in an industrial accident is compensable." (Emphasis added.) In *Schumacher v. Empire Steel Manufacturing*, 175 Mont. 411, 574 P.2d 987 (1977), the Court extended its *O'Neil* holding to work-related physical injuries which aggravate preexisting psychological conditions. In *McMahon v. Anaconda Company*, 208 Mont. 482, 486, 678 P.2d 661, 663 (1984), the Court cited *Schumacher* in stating, "This Court has held that psychological disability **stemming** from a work-related injury is compensable under the Workers' Compensation Act." (Emphasis added.) In *O'Neil* the claimant suffered a physical injury to his back. After his healing period had ended he continued to suffer pain, but his physicians could find no physical cause for the pain and attributed it to post-traumatic psychoneurosis. In *Schumacher* the claimant suffered physical injuries to his neck, shoulder, and arm. The injuries healed but claimant continued to suffer pain. Finding no physical basis for his continued pain, claimant's physicians attributed it to hypochondriacal neurosis. In each of the cases the psychological condition was determined to be compensable as a direct consequence of a compensable physical injury.

b. The 1987 Montana Legislature revised the definition of injury, making it more specific and expressly excluding injuries which result from mental or emotional

stress or a nonphysical stimulus or activity. Section 39-71-119, MCA, was revised to read in relevant part:

39-71-119. Injury and accident defined. (1) "Injury" or "injured" means:

(a) internal or external physical harm to the body;

...

(2) An injury is caused by an accident. An accident is:

(a) an unexpected traumatic incident or unusual strain;

(b) identifiable by time and place of occurrence;

(c) ***identifiable by member or part of the body affected***; and

(d) caused by a specific event on a single day or during a single work shift.

(3) "Injury" or "injured" does ***not*** mean a physical or **mental condition arising from**:

(a) emotional or mental stress; or

(b) a nonphysical stimulus or activity. [Emphasis added.]

The incidents occurred in August and October 1987. The 1987 Workers' Compensation Act therefore applies to claimant's alleged injuries. *Buckman* (1986).

c. In this case, unlike the situation present in *O'Neil* and *Schumacher*, there is no evidence indicating that claimant's PTSD was caused by injuries he suffered on either August 14 or October 22, 1987. The injuries were resolved in a short time and were inconsequential. Rather, the evidence demonstrates that it was the mental shock or mental fright that gave rise to claimant's disability. Thus, his mental condition is one "arising from . . . emotional or mental stress" and is excluded from the injury definition. Since claimant's PTSD and resulting disability were not a consequence of his physical injuries, they are not compensable under the Workers' Compensation Act.

4. Claimant further argues, however, that his PAT was aggravated by the explosion and he is precluded from performing as a firefighter due to this condition. The testimony of Dr. Olson, which was uncontroverted, indicates, that claimant's PAT arose as the result of excessive alcohol consumption, appears to be resolved at this time, and does not preclude him from working as a firefighter. Claimant himself testified that he has not been drinking for several years. Claimant has not carried his burden of proving his PAT was either caused or aggravated by the August or October 1987 incidents or that it is disabling.

JUDGMENT

1. Claimant is not entitled to medical or compensation benefits on account of his PTSD.
2. Claimant is not entitled to attorney fees, costs, or a penalty.
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 28th day of June, 1996.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Patrick R. Sheehy

Mr. Oliver H. Goe

Submitted: June 12, 1996