IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWCC 26

WCC No. 9303-6741

KEVIN IRISH

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Parties disputed whether claimant's current physical problems are related to industrial injury occurring June 13, 1977. Petitioner also argued that insurer is liable for temporary total disability benefits back to June 27, 1977, due to insurer's alleged failure to give 15 day notice of termination of benefits.

Held: Where claimant returned to work within a couple of weeks of his injury, and has worked continuously, section 92-615, R.C.M., 1947 (1977) does not operate to require retroactive benefits to claimant for failure to give notice of termination of biweekly benefits. Where claimant received only one check for benefits along with notice that the claim was accepted and this was claimant's benefit entitlement, there was no interruption or cessation of ongoing benefits to trigger the obligation argued by claimant. Where medical evidence along with claimant's testimony indicates that his current condition results from the 1977 work injury, he is entitled to medical expenses related to that condition.

Topics:

Trial: Submission on Record. In lieu of considering case on cross-motions for summary judgment, with stipulation of the parties, the Workers' Compensation Court issued Findings of Fact, Conclusions of Law and Judgment based on review of entire record, without live testimony of witnesses or trial proceedings.

Summary Judgment: Submission on Record in Lieu Of. In lieu of considering case on cross-motions for summary judgment, with stipulation of the parties, the Workers' Compensation Court issued Findings of Fact, Conclusions of Law and Judgment based on review of entire record, without live testimony of witnesses or trial proceedings.

Causation: Medical Condition. Where medical evidence along with claimant's testimony indicates that his current condition results from the 1977 work injury, he is entitled to medical expenses related to that condition.

Injury and Accident: Natural Progression. Where medical evidence along with claimant's testimony indicates that his current condition results from the 1977 work injury, he is entitled to medical expenses related to that condition.

Benefits: Termination of Benefits: Return to Work. Where claimant returned to work within a couple of weeks of his injury, and has worked continuously, section 92-615, R.C.M., 1947 (1977) does not operate to require retroactive benefits to claimant for failure to give notice of termination of biweekly benefits. Where claimant received only one check for benefits along with notice that the claim was accepted and this was claimant's benefit entitlement, there was no interruption or cessation of ongoing benefits to trigger the obligation argued by claimant.

This matter was initially presented to the Court on cross-motions for summary judgment. Subsequently, on March 13, 1995, a Stipulation was filed stating that the case could be decided based on the current record, including all depositions. As a result of the stipulation between the parties the decision in this matter will be issued as Findings Of Fact And Conclusions Of Law.

Nature of Dispute

The issues presented for decision are: (1) whether the petitioner (claimant) is entitled to temporary total disability benefits retroactive to June 27, 1977, by reason of the provisions of section 92-615, R.C.M. (now 39-71-609, MCA), as that section read on the date of his injury; and (2) whether his current physical problems with his low back are causally related to the injury which occurred on June 13, 1977.

Having considered the Court file, which includes the depositions of Dr. Brooke Hunter, M.D., C.E. Edquest and claimant, and the briefs and pleadings of the parties, the Court makes the following:

FINDINGS OF FACT

1. Claimant injured his back on June 13, 1977, while in the course and scope of his employment with Leonard C. Roessner Builders, Inc. A claim for compensation was filed and liability was accepted by the respondent, State Compensation Insurance Fund (State Fund).

2. Compensation benefits were paid for the period from June 13, 1977 to June 27, 1977, in the amount of $206.92. The benefits were paid in a single payment. In a letter which accompanied the payment, the State Fund notified the claimant that benefits were

being discontinued for the reason that the claimant had returned to work. In the letter, which was dated July 20, 1977, claims examiner Edward Eberly, explained:

> According to our file you sustained an industrial injury on June 13, 1977, which caused you to lose wages during the period of June 13, 1977 through June 27, 1977.
>
> The enclosed warrant in the amount of $206.92 is being paid pursuant to the above mentioned information and covers the compensation due you at this time. Since you returned to work on June 28, 1977, we are discontinuing further compensation benefits.
>
> If you have any questions in this regard, please do not hesitate to give this office a call.

(Edquest Dep. Ex. 1 at 15.)

3. A fifteen (15) day notice of termination of benefits was not given to the claimant or to the division. The only notice provided is set forth in the preceding finding of fact.

4. Claimant returned to work within a couple weeks of the date of the injury. He testified:

> **Q.** I believe you injured your back on June 13, 1977. Does that sound correct?
> **A.** Yes.
> **Q.** According to the records that I have, as near as I can tell, you returned to work a couple weeks after that. Is that your memory?
> **A.** Yes.

(Irish Dep. at 4-5.)

5. Claimant has worked continuously since June of 1977. He returned to work for Roessner Construction as a carpenter following his injury and worked for another four or five years. He then worked as a lead carpenter and foreman for Roger Wheelwright Construction for a year. (Irish Dep. at 30-32.) He left these jobs because he was missing too much work as a result of his back problems. (Claimant's Answers to State Fund's First Set of Discovery Requests.) For the next three years he was self-employed as a contractor for residential buildings in the Bozeman area. The claimant was again forced to change jobs due to being unable to handle the construction, "I was in a perpetual state of pain, and I just couldn't handle it any longer." (Irish Dep. at 40.) He moved to Helena where he went into partnership with his father in the insurance business and was working in that job at the time these proceedings were initiated.

6. In addition to his employment in the insurance business, the claimant owns and operates a small "hobby farm." (*Id.* at 42.) He raises grain and hay on the farm and is involved in most of the farming operations. His wife, son and daughter assist in the chores required for operating the farm. (*Id.* at 45-53.)

7. The claimant makes his living through the insurance business and not as a farmer.

Injury and Medical

8. On June 13, 1977, claimant was injured when he fell from a fourteen (14) foot ladder, landing on his back on a pile of cedar shakes. (Edquest Dep. Ex. 1 at 19.) Claimant described his fall,

> **A.** Yes, and my butt snapped over one side of it [pile of cedar shakes], and my shoulders and head went over the other side.

(Irish Dep at 20.)

9. Following the injury, claimant was treated by Dr. John Patterson (Patterson). The Court record contains the office notes of Patterson for treatments prior to and after the injury. On the date of the injury Patterson noted:

> Fell off ladder at work (carpenter) this a.m. from approx 10 foot, landing square on his low back and upper thoracic spine. Not unconscious but woosey since that time. Also quite uncomfortable. Was able to get up and walk for awhile but seemed to bother him more as time went on.
>
> . . . .
>
> Moderately distressed, obviously uncomfortable when moving, slightly pale and sweaty. Pain over upper thoracic spines in the midline and mid lumbar spine where there is also a slight abrasion. Tetanus imms current. X-rays unremarkable altho ? **some posterior compression** of a lumbar vert. Will review with radiologist. [Underlining in original, bold added.]

(Hunter Dep. Ex. 5 at 20-21.) Patterson prescribed bed rest, ice packs for two days and then heat, Valium and Emperin #3. Claimant returned two days later complaining of upper back and neck pain. There had been minimal improvement. The claimant was "[q]uite tender over lower cervical spine processes." (*Id.*)

10. The claimant was seen on June 27, 1977, with the doctor's note indicating "needs back check for release to go back to work." (*Id.* at 22.) The claimant wanted to go back to work and advised the doctor that he could quit early, and that he didn't feel an orthopod was necessary. Finally, the doctor wrote, " Back to work 6-27-77." (*Id.*)

11. As of June 27, 1977, the claimant had not received any worker's compensation benefits. He testified that he returned to work, even though his symptoms were the same, because he needed the money.

12. The claimant was again seen by Patterson on February 7, 1978. At this examination the doctor noted:

> S: Since injury of June 1977 has **continued having intermittent low back pain, radiation into his legs**, worse with prolonged sitting (driving 30 mi., etc.), especially worse in the a.m.'s and on bending and lifting. [Emphasis added.]
>
> . . . .
>
> O: Gets up and down somewhat slowly and stiffly from chair, exam limited to low back where there is some tightness in the low back (lumbar) musculature. No leg complaints, good flexibility and mobility at waist.
>
> A: Low back strain, chronic.

(Id.) Other than the doctor's examinations, the only diagnostic tool used in 1977-78, was an x-ray. The x-ray report was normal.

13. The claimant returned to work and, as previously noted, worked at various employments which could be classified as heavy work for the next several years. The claimant testified that during this time he was in pain or discomfort continually due to his low-back injury.

> **A.** Anything that I've lifted since that time [June 13, 1977] has caused me discomfort.
>
> . . . .
>
> **Q.** So when you were lifting heavily, say, something that weighed 70 pounds, your back would feel discomfort in the "P" [low- back] area?
>
> **A.** I didn't have to lift to feel discomfort.
>
> **Q.** You'd feel discomfort all the time?
>
> **A.** Continual.
>
> **Q.** Did you take medication for it?
>
> **A.** No.
>
> **Q.** You just lived with it?
>
> **A.** That's right.

(Irish Dep. at 29-30.)

14. In February of 1978, the claimant received physical therapy treatments from Gordon Herwig. These records are not a part of the Court's record.

15. For the time period between February of 1978 and September of 1992, claimant received chiropractic treatments from three different chiropractors. There are no records from these providers in the Court file. Claimant did attempt to secure these records and was advised they were no longer available.

16. Claimant sought chiropractic treatment "[a]s required. When it bothered me so bad that I couldn't function, I would go in." (*Id.* at 9.) When questioned about when he needed to go to the chiropractor, the claimant responded:

> **Q.** You said whenever you needed it. When would you need it? What would be the circumstances as you recall?
> **A.** Pain. When the pain got so bad I couldn't function, I would go in.
> **Q.** Was it pain related to labor that you were doing or pain related to -
> **A.** Not necessarily. Just getting up in the morning, sometimes it would be.
> **Q.** So you may have seen them every couple of months? I'm trying to get an idea of how frequently you saw them.
> **A.** Half a dozen times a year. A dozen times. It would vary.

(*Id.* at 10.) The claimant did not submit the chiropractic bills to the State Fund for payment.

15. During this time period the claimant suffered from a number of injuries, including an injury to his right wrist and elbow, a broken rib, injuries to his leg and foot when a horse rolled on him and injuries to his knees.

1992 Incident

16. In September of 1992, while working in the attic of his shop hooking up a hoist to pull axles off a tractor, the claimant lost feeling in his leg and fell through the ceiling sheetrock. He caught himself and was able to pull himself back up. *(Id.* at 56.) This total loss of feeling and numbness was an entirely different sensation from those the claimant had experience throughout the years. The incident occurred when the claimant's right leg gave out on him, causing him to fall. The seriousness of the episode prompted him to call the State Fund.

> I knew it was related to that injury. I've suffered ever since, and I felt that it was their responsibility to provide medical benefits, so I called them and told them what the situation was,

> and they told me to go to the family doctor first, that I would have to go to him.

(*Id.* at 17-18.)

Medical

17. Claimant was seen by Dr. Reginald Goodwin (Goodwin), a family practitioner, on September 22, 1992. Goodwin's office note for that day states,

> Chronic LBP since '77 IAB
> Legs became very weak over past 5 days for the first time & he fell thru the ceiling of his house from attic a week ago "due to his legs becoming weak" "Goes for chronic chiropractic" [Emphasis in original.]

(Hunter Dep. Ex. 3 at 3.)

18. An MRI was performed. It revealed a "large protruding or herniated disc at the L4-5 and L5-S1 levels." (*Id.* at 6, caps in original.)

19. On September 30, 1992, the claimant began physical therapy treatment which continued two to three times a week for two weeks. (Hunter Dep. Ex 5.)

20. The claimant was referred to Dr. Brooke Hunter (Hunter), an orthopedic surgeon, who saw the claimant on October 13, 1992. Hunter's examination and review of the MRI confirmed the herniated discs. Hunter also commented, "It appears that there is some end plate damage as well." (*Id.* at 41.) He went on to note, "There is no question he has sustained a severe amount of injury by looking at his MRI." (*Id.*) Claimant was encouraged to stop smoking, get into an aerobic exercise program, and to go through a spine stabilization program. He was given some anti-inflammatory drug samples and told to return in a month if he was not doing much better.

21. The medical testimony and records are critical to the question of whether the claimant's current low-back problems are related to his 1977 injury. The only medical deposition taken was that of Hunter. Hunter, to a reasonable degree of medical probability, related the claimant's condition to the 1977 injury.

> Q. Doctor, I'm going to ask you some questions regarding your opinions, and I want you to state your opinions, please, to a reasonable degree of medical probability, okay?
> A. Yes.
> Q. By that, I'm asking you to state them in terms of what's more probable than not.
> A. Okay.

Q. Do you have an opinion, Doctor, as to when this severe amount of injury that you noted on the MRI occurred to Mr. Irish's spine?
A. The pinning down of that is very difficult only that every test you have, every objective piece of information is after the fact. It's hard to know whether it's six months after the fact or ten, fifteen years after the fact. The MR [sic] doesn't speak to those kinds of things, and that's the most objective piece of information we have. The MRI done -- I'll get a date on it just to be more specific -- **did not show any new or acute bony problems** -- the date on that was 9/25/92 -- meaning if you would have had end plate damage sometime within the few weeks or few months before that, there should have been some soft tissue or bony edema, some fluid collection or free blood, noted around the disc or those vertebral end plates, signs of more acute trauma. And that's not hard and fast, but it's a starting point, I think.

That puts it back then, from my standpoint of recreating it from a historical standpoint, the kind of injury, the kind of mechanism to cause that kind of injury is usually an **axial loading phenomenon**, that is, not necessarily a lifting or pushing or pulling type of thing, but a direct load from top to bottom on the spine; and that can occur from falling and landing on you feet upright, it can be caused by falling and landing on your buttock and loading the spine that way. Occasionally you can do it by landing on your head or the top of your shoulders, causing that axial impact from the other end, and usually you end up with more damage higher up.

So with that mechanism of injury expected, and with his story of an axial loading injury some fifteen years earlier, whatever it was, that's the conclusion I came to obviously in talking to him at that time, was that it was dating back to that time frame.
Q. Back to the injury in 1977?
A. Correct.

(Hunter Dep. at 14, emphasis added.)

22. In reviewing this testimony the Court has taken into consideration that the claimant was seen by Hunter on a single occasion. However, there is no evidence in the file which contradicts the conclusions reached by the doctor. When considering the incident of September 1992, Hunter explained:

Q. How about the significance of his report of his right leg going numb?

> A. That's the red flag that brought him in, that had Dr. Goodwin ask me to become involved, was that he had reached the point where he was getting neurologic involvement, it is starting to compress either his spinal cord or one of the nerve roots. The exam at that time failed to show any significant nerve root damage, any neurologic embarrassment, but was the red flag to at least look at that.

(Hunter Dep. at 20; emphasis added.)

23. The doctor was extensively cross-examined by the State Fund about the claimant's work history and the various intervening injuries suffered by the claimant. It appears that at the time of his deposition the doctor had the opportunity to review all of the records which are a part of this record and that he based his conclusions not only on his examination, but also on his records review. This information did not alter the doctor's conclusion that the claimant's current low-back pain is the result of the June 13, 1977 injury.

> Q. Mr. Ward asked you some questions with respect to the X-rays that were taken back in 1977, and asked you whether they showed the end plate damage. My question is whether those X-rays are likely to show end plate damage? Are they as good at showing that sort of thing as an MRI?
> A. They're not as good.

(Hunter Dep. at 48.) The doctor relied on the June 13, 1977 office note that spoke to the compression problem, which he reported "is exactly what we're speaking of, the axial compression loading type of thing . . . ." (*Id.)*

24. The doctor testified regarding his conclusions as follows:

> Q. . . . Has any of the information that you reviewed today changed your opinions with respect to the causal relationship between this injury in June of 1977 and the condition that you found of Mr. Irish's back in October of 1992?
> A. The causal connection that I can make is based on some objective information, and I'm not trying to overstate what I know, but is based on some objective information, that is, the MRI and X-rays. The connection is actually made from that and extrapolating backwards, if you will, by the history that was given to me. The additional history that I've obtained today and sensing Mr. Irish, that is, through the Comp communications, would imply a lot of times that he could have been hurt. **This still fits as the best history for the type of injury.**

Q. What is the best history?
A. The **1977 axial loading injury** where he fell ten or twelve feet and landed on his back.

(*Id.* at 48-49, emphasis added.)

26. The State Fund argues that the opinion of Hunter is outweighed by the fact that the claimant continued to work as a carpenter/contractor and at other heavy-duty-type work and by the other injuries he suffered between 1977 and 1992. It also argued that the 1992 incident is the cause of the claimant's current condition and therefore the doctor's opinion should be disregarded .

27. However, the State Fund has offered no medical testimony contradicting Hunter's opinions.

Conclusions of Law

1. The law in effect at the time of claimant's injury applies when determining his entitlement to benefits. ***Buckman v. Montana Deaconess Hospital***, 224 Mont. 318, 730 P.2d 380 (1986). Therefore, the law in effect on June 27, 1977 applies in this case.

2. The first issue presented for the Court's consideration concerns claimant's entitlement, if any, to temporary total disability benefits retroactive to 1977. In seeking the additional benefits, claimant relies on section 92-615, R.C.M., 1947, as that section existed on June 13, 1977. The section was enacted in 1973, and amended in 1974.[1] It provides:

> **92-615. Notice of denial of claim by insurer.** Every insurer under any plan for the payment of workmen's compensation benefits shall within thirty (30) days of receipt of a claim for compensation either accept or deny the claim, and if denied shall inform the claimant and the division in writing of such denial. If the insurer determines to deny a claim on which payments have been made during a time of further investigation, **or after a claim has been accepted, terminates biweekly compensation benefits, it may do so only after fifteen (15) days' written notice to the claimant and the division**. However, an insurer may, after written notice to the claimant and the division, make payment of compensation benefits within thirty (30) days of receipt of a claim for compensation without such payments being construed as an admission of liability or a waiver of any right of defense. [Emphasis added.]

[1]The section, as subsequently amended, is now section 39-71-609, MCA.

Based on the section, claimant argues that the failure of the State Fund to provide him with fifteen (15) days notice renders its termination letter a nullity and entitles him to continuous temporary total disability benefits from June 28, 1977 to today.

The claimant argues that the fifteen (15) day notice requirement is clear on its face. He cites ***Clark v. Hensel Phelps Construction Co.,*** *172 Mont. 8, 10, 560 P.2d 515* (1977) and ***Catteyson v. Falls Mobile Home Center, Inc.,*** *183 Mont. 284, 599 P.2d 341 (1979)*, as supporting his contention that he is entitled to benefits until such notice is given.

In ***Clark*** the Supreme Court discussed the effect of section 92-615, R.C.M. 1947:

> The effect of this statute [R.C.M. 92-615] upon a **fact situation as in the instant case**, is a matter of first impression. However, the statute clearly and unambiguously states that notice to claimant and the division, and written approval of the division are prerequisites to the termination of compensation benefits. Where the language of a statute is plain, unambiguous, direct and certain, the statute speaks for itself and there is nothing left for the court to construe. [Citations omitted; emphasis added.]

The Court concluded that termination of benefits without fifteen (15) days advance notice was "ineffective" and that claimant was entitled to payment of benefits "until the termination is accomplished by following the statutory notice provision." However, the facts in ***Clark*** included a finding that "claimant was unable to do any kind of physical labor for the period in question." (*Id.* at 9-10; underlining added.)

In Catteyson, the insurer gave the claimant and division written notice of termination of temporary total disability benefits twenty-seven (27) days *after* actual termination of benefits. The notice followed claimant's release to return to work, but it does not appear from the decision that the claimant had actually returned to work. Citing ***Clark,*** the Court held the notice to be invalid and affirmed the order of the Workers' Compensation Court directing the insurer to pay temporary total benefits retroactively to the date of termination until the date of the Court's order.

At the time of the claimant's injury, there was no longer any requirement of Division approval prior to termination. However, the fifteen (15) day notice requirement was still in effect. Since no advance notice was given, at first glance it would appear that ***Clark*** and ***Catteyson*** require the result requested by claimant. However, I have concluded that the two cases are not controlling and that claimant is not entitled to benefits retroactive to 1977.

On its face, section 92-615, R.C.M., applies only in cases where biweekly benefits are terminated. In this case claimant was not receiving biweekly benefits. The insurer simultaneously sent the claimant payment and notice which said the insurer had accepted

liability and had determined that he was entitled to a single payment for two weeks of benefits. There was no interruption or cessation of ongoing benefits. Benefits were not terminated and the section was therefore inapplicable.

Even if the section 92-615, R.C.M., is deemed to apply to the notice given in this case, neither ***Clark*** nor ***Catteyson*** considered the effect of an actual return to work on the insurer's obligation to continue benefits. While it is generally true that if the words of a statute are plain, they speak for themselves and no interpretation is required, ***Holly Sugar v. Department of Revenue,*** *252 Mont. 407, 412, 830 P.2d 76 (1992),* all provisions of an Act must be coordinated and harmonized, if possible, ***McClanathan v. Smith,*** *186 Mont. 56, 61, 606 P.2d 507 (1980).* Particular sections of an Act should also be interpreted "in such a manner as to insure coordination with the other sections of the Act, and fulfill legislative intent." ***Hostetter & Leep v. Inland Development & Big Sky,*** *172 Mont. 167, 171, 561 P.2d 1323 (1977); accord* ***State v. Meader,*** *184 Mont. 32, 37, 601 P.2d 386 (1979).*

Moreover, the "plain words" rule cannot be blindly applied in every case:

> "There is, of course, no more persuasive evidence of the purpose of a statue than the words by which the legislature undertook to give expression to its wishes." ***United States v. American Trucking Assns., Inc.,*** *310 U.S. 534, 543, 60 S.Ct. 1059, 1063, 84 L.Ed. 1345 (1940). See* ***Caminetti v. United States****, 242 U.S. 470, 490, 37 S.Ct. 192, 196, 61 L.Ed. 442 (1917).* Nevertheless, **in rare cases the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters, and those intentions must be controlling. We have reserved "some 'scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning . . . would thwart the obvious purpose of the statute.'"** *. . . .* [Emphasis added.]

Griffin v. Oceanic Contractors, Inc., *458 U.S. 564, 571 (1982) (quoting* ***Commissioner v. Brown,*** *380 U.S. 563, (1965) (in turn quoting* ***Helvering v. Hammel,*** *311 U.S. 504, 510-511 (1941)).* In another case, the United States Supreme Court put it this way:

> The plain meaning of legislation should be conclusive, except in the "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." ***Griffin v. Oceanic Contractors, Inc.,*** *458 U.S. 564, 571, 102 S.Ct. 3245, 3250, 73 L.Ed.2d 973 (1982).* In such cases, the intention of the drafters, rather than the strict language, controls. . . .

United States v. Ron Pair Enterprises, Inc., *489 U.S. 235, 243 (1989).* Ultimately, statutory construction should not lead to an absurd result where reasonable construction will avoid it. ***Keller v. Smith****, 170 Mont. 399, 407, 553 P.2d 1002, 1007 (1976).*

In this case, the Court must consider the sections governing temporary total disability benefits. Those sections, as they read on the date of claimant's injury, were sections 92-439, R.C.M. (1973) and 92-701.1, R.C.M. (1973):

> **92-439. Temporary total disability defined.** "Temporary total disability" means a condition resulting from an injury as defined in this act that results in **total loss of wages** and exists until the injured workman is as far restored as the permanent character of the injuries will permit. [Emphasis added.]
>
> **92-701.1. Compensation for injuries producing temporary total disability.** Weekly compensation benefits for injury producing total temporary disability shall be sixty-six and two-thirds per cent (66⅔%) of the wages received at the time of the injury. The maximum weekly compensation benefits shall not exceed one hundred ten dollars ($110) beginning July 1, 1973. Beginning July 1, 1974, the maximum weekly compensation benefits shall not exceed the state's average weekly wage. **Total temporary disability benefits shall be paid for the duration of the worker's temporary disability**. [Emphasis added.]

On their face, the provisions provide that temporary total disability benefits are payable only when there is a "total loss of wages." One of the fundamental purposes of the Workers' Compensation Act is "to provide social insurance which protects the injured worker against disability from a work-connected injury" and "to provide for the injured worker a fund which replaces his lost earnings or his lost earning capacity . . . . " ***Wight v. Hughes Livestock Co.,*** *204 Mont. 98, 108, 664 P.2d 303 (1983).* The Act was never intended to provide tort-like damages to the worker. ***Mahlum v. Broeder,*** *147 Mont. 386, 394, 412 P.2d 572 (1966)*.

If the claimant's position is adopted, then the "total loss of wages" requirement and the very purpose of the Act would be nullified; claimant would be awarded an outrageous windfall. It is inconceivable that the legislature intended the result for which claimant argues, or that it intended the fifteen (15) day notice requirement to nullify the "total loss of wages" prerequisite to temporary total disability benefits. The rules of statutory construction do not require courts to scorn common sense. And, if indeed those rules require the result suggested by claimant, it is time for the courts to re-examine the rules

and make them sufficiently flexible to allow the use of common sense when interpreting statutes.

There are good reasons to conclude that failure to give fifteen (15) day notice renders termination of benefits ineffective where the claimant continues to sustain a total loss of wages. One physician's release to return to work is not conclusive since physicians may disagree over when an individual has reached maximum healing or may misapprehend legal standards. In such case the notice requirement gives a claimant an opportunity, albeit a short one, to respond before his benefits are cut off.[2] In contrast, a claimant's return to his old job presents no gray areas of dispute, and claimant is not threatened with any monetary loss.

The record in this case is quite clear that the claimant returned to work within a "couple of weeks." The claimant suffered no loss of wages after the injury. He returned to work with the same employer and remained at that job for the next three to four years. In fact, except for the two week period immediately following the injury, there is no evidence in this file indicating that the claimant has suffered a wage loss as a result of the 1977 injury. He is not entitled to retroactive temporary total disability benefits.

3. The claimant must prove by a preponderance of the evidence that his current condition was caused by his industrial accident. ***Walker v. United Parcel Service****, 262 Mont. 450, 454, 865 P.2d 1113 (1993)*. He has met his burden.

The facts in this case are similar to those in ***Walker.*** In ***Walker,*** the claimant worked for six years following a back injury. However, he testified that he suffered from persistent back pain and flare-ups following the original injury. The insurer countered that Walker had reached maximum healing and had suffered a number of subsequent injuries, thereby relieving it of liability. This Court entered judgment for the insurer but on appeal the Supreme Court reversed, holding that the insurer had failed to prove that the subsequent incidents constituted discrete injuries, or that they satisfied the legislature's definition of industrial accident. It also held that the insurer had failed to prove that any of the subsequent incidents were the cause of Walker's condition.

In this case, the claimant testified without contradiction that he has had continual pain in his low-back since his 1977 injury and that throughout the years he frequently received treatment from chiropractors to alleviate that pain. He presented medical opinion evidence establishing that his herniated discs are the result of an **axial loading injury** which occurred when he fell from the ladder in 1977. The State Fund's arguments that the claimant's condition is due to the 1992 incident or to other injuries which occurred

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[2]It is not quite so clear, however, why the failure to provide fifteen (15) days of advance notice should result in an indefinite continuation of benefits until a fifteen (15) day notice is given. The purpose of the notice provision could be served by merely extending the period of benefits by the fifteen (15) days. This alternative was not considered by the Supreme Court. In any event, the remedy specified in ***Clark*** and ***Catteyson*** is the law of Montana.

subsequent to claimant's reaching maximum healing are unpersuasive. It offered no medical opinions contradicting Dr. Hunter.

Maximum medical healing does not cut off the future liability of an insurance carrier. The Montana Supreme Court stated in 1987:

> We hold that under the law of Montana, the fact that a claimant has reached maximum healing does not eliminate the employer's future liability for temporary total disability benefits where, as here, a subsequent non-employment related event causes aggravation of the first injury. Such a case is not comparable to a case where there is a second industrial injury covered by workers' compensation.

Guild v. Bigfork Convalescent Center, *229 Mont. 466, 470, 747 P.2d 217 (1987).* In this case, claimant's condition has deteriorated over the years, ultimately resulting in the loss of feeling in the claimant's leg. Therefore, his current condition is related to his 1977 industrial accident.

4. At the time of claimant's industrial accident, the Workers' Compensation Act provided a ten (10%) percent penalty "[w]hen payment of compensation has been unreasonably delayed or refused, either prior to or subsequent to the issuance of an award . . ." Section 92-849, R.C.M. 1947. However, in this case the State Fund's refusal to pay benefits was not unreasonable. It has prevailed with respect to the temporary total disability benefits issue. While it has not prevailed with respect to the relatedness issue, it had a more substantial basis for its refusal to accept liability for claimant's current condition than it did in ***Beckers v. State Compensation Insurance Fund/Valley Excavation,*** *WCC No. 9407-7098 (decided 2/8/95).* In ***Beckers****,* this Court found that the claimant was entitled to a penalty because of the insurer's rejection of three medical opinions in the claimant's favor and its failure to seek out independent medical advice in the face of these opinions. (***Beckers*** at 11.) Beckers' treating physician had treated him for years, whereas, Dr. Hunter saw the claimant once. (***Beckers*** at 2-4.) In ***Beckers,*** the State Fund was also confronted with three medical opinions, two by physicians who had treated claimant, rather than a solitary one from a physician who saw claimant only once. Additionally, in this case the long period of time, nearly eighteen years since 1977, gave the State Fund substantial reason to question the claim.

5. At the time of claimant's injury the attorney fee statutes provided as follows:

> **92-616. Costs and attorneys' fees payable on denial of claim later found compensable.** In the event the insurer denies the claim for compensation or terminates compensation benefits, and the claim is later adjudged compensable, by the division or on appeal, the insurer shall pay reasonable costs and attorneys' fees as established by the division. However,

> under rules adopted by the division and in the discretion of the division, an insurer may suspend compensation payments for not more than thirty (30) days pending the receipt of medical information.
>
> **92-618. Payment by employer or insurer of fees for claimant's legal services and witnesses.** (1) If an employer or insurer pays or tenders payment of compensation under Title 92, but controversy relates to the amount of compensation due, and the settlement or award is greater than the amount paid or tendered by the employer or insurer, a reasonable attorney's fees as established by the division or the workmen's compensation judge if the case has gone to a hearing, based solely upon the difference between the amount settled for or awarded and the amount tendered or paid, may be awarded in addition to the amount of compensation.

Sections 92-616 and 618, R.C.M. 1947. Claimant did not prevail with respect to his claim for additional temporary total disability benefits and is not entitled to attorney fees with respect to that claim. However, he has prevailed with respect to his relatedness claim, which entitles him to payment of at least his medical expenses, and is, therefore, entitled to attorney fees and costs on this part of the case. ***Weaver v. Buttrey Food and Drug,*** *255 Mont. 90, 100, 841 P.2d 476 (1992) (holding that claimant who was awarded medical benefits was entitled to attorney fees and costs for litigating that issue but not entitled to attorney fees and costs with respect to issues on which she did not prevail*).

JUDGMENT

1. Claimant is not entitled to temporary total disability benefits retroactive to June 27, 1977.

2. Claimant's low-back condition is causally related to his injury of June 13, 1977, and the State Fund is therefore liable for medical expenses related to the claimant's low-back condition.

3. Claimant is not entitled to a penalty.

4. Claimant is entitled to attorney fees and costs with respect to the relatedness issue but not with respect to his claim for temporary total disability benefits.

5. The JUDGMENT in this case is certified as final for purposes of appeal pursuant to ARM 24.5.348.

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

DATED in Helena, Montana, this 10th day of April, 1995.

(SEAL)

/S/ Mike McCarter
JUDGE

c: Mr. Andrew J. Utick
Mr. Leo S. Ward