1994 MTWCC 5

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

VICTORIA KLOEPFER,

Petitioner,

vs.

LUMBERMENS MUTUAL CASUALTY CO.,

Respondent/Insurer for

BECHTEL CONSTRUCTION CO.,

Employer.

WCC No. 9305-6796

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The trial in this matter was held on Wednesday, September 15, 1993, in Billings, Montana. Petitioner, Victoria Kloepfer (claimant), was present and represented by James G. Edmiston, III. Respondent, Lumbermens Mutual Casualty Company (Lumbermens), was represented by Steven S. Carey. Claimant, William S. Shaw, M.D., Patrick Stephenson, Evelyn Seymanski and Joe Marcotte were sworn and testified at trial. The parties stipulated that the Court could consider the deposition testimony of Peter V. Teal, M.D., Victoria Kloepfer, Evelyn Seymanski, Joe Marcotte, Todd Dundas, Patrick Stephenson and William S. Shaw, M.D. Exhibit Nos. 1 and 4 were stipulated into evidence. Exhibit Nos. 3 through 9 were admitted into evidence. Pages 1-14, 28 through 40, and 63 of Exhibit No. 2 were admitted over claimant's objections and pages 57 and 58 were admitted without objection. Page 64 of Exhibit No. 2 was taken under advisement, and after further consideration the claimant's objection to the exhibit is sustained.

Having considered the **Pretrial Order**, the testimony presented at trial and through depositions, the demeanor of claimant and the other witnesses and the exhibits, the Court makes the following:

FINDINGS OF FACT

1. Claimant is 43 years old and has a ninth grade education. The claimant has limited work experience. Between 1974 and 1986 she held no significant employment. Between 1987 and 1991 she was sporadically employed, mostly as a laborer.

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2. From April 1991 until September 24, 1991, the claimant worked as a general laborer for Bechtel Construction Co. at its Conoco Refinery in Billings, Montana.

3. Claimant filed an occupational disease claim for tendinitis or fibromyalgia arising while she was employed by Bechtel. The condition occurred in her right arm.

4. At the time of the claim, Bechtel was insured by Lumbermens.

5. Lumbermens accepted liability for the claim and paid certain medical benefits and temporary total disability benefits.

6. Claimant was initially treated for her occupational disease by Dr. James F. Schwarten, an orthopedic surgeon. She was then referred to Dr. William S. Shaw, who is board certified in internal medicine and occupational medicine. Dr. Shaw initially saw her on January 14, 1992. He prescribed physical therapy and then enrolled her in a work hardening program at the Billings Clinic Physical Rehabilitation Center (Rehabilitation Center). Claimant began the work hardening program on April 8, 1992.

7. At the time Dr. Shaw began treating claimant and while she participated in the work hardening program, Dr. Shaw provided medical supervision and consultation to Bechtel's company nurse. He also served as the associate director of the Rehabilitation Center.

8. The Rehabilitation Center's work hardening program puts injured workers through simulated work activities to prepare them to return to active employment. One of the work activities required of participants is moving gravel with an industrial sized wheelbarrow and dumping it into a gravel box.

9. On April 14, 1992, the claimant injured her back while emptying a wheelbarrow of gravel during work hardening activities. It is undisputed that claimant suffered an onset of back pain on that date. Joe Marcotte, operations manager for the Rehabilitation Center, made the following note in claimant's work hardening record:

> Worker continued with all activities assigned to date. Reported increased pain during wheelbarrow work on obstacle course . . . . . Worker left W/H in pain at level 7 in upper LB [low back] and thoracic region. Worker did two LB relax exercises which did little to decrease pain.

Ex. No. 1 at 77.

10. Claimant thereafter experienced low back pain and pain radiating into her right buttock and leg. In October 1992 a CT scan ordered by Dr. Shaw disclosed a herniated disc at the L5-S1 vertebral level. On June 2, 1993, Dr. Peter Teal, an orthopedic surgeon, excised the herniated disc and fused the L5 vertebra to the sacrum. Dr. Teal testified that he felt the chances of relieving claimant's pain and getting her back to work were not good without the operation.

11. Lumbermens, however, asserts that claimant's pain on April 14, 1992, was limited to the thoracic area of her back and it denies that she injured her lower back or herniated a disc at the L5-S1 level.

12. Lumbermens terminated claimant's occupational disease benefits on August 11, 1992, after Dr. Shaw indicated that claimant had reached maximum medical improvement and could return to her pre-injury job.

13. Lumbermens denial of liability is based primarily on the lack of any specific mention of low back pain in the April 14, 1992 records of the Rehabilitation Center and on Dr. Shaw's opinion that claimant's low back and right leg pain are part of a preexisting myofacial pain syndrome. Lumbermens also attacks the claimant's credibility.

14. I find that the claimant's low back pain was in fact triggered by her dumping the wheelbarrow on April 14. Her testimony relating the onset of her low back pain to the April 14 incident was credible and persuasive. It was also corroborated by Evelyn Seymanski, another participant in the work hardening program, who testified that she watched claimant dump the wheelbarrow and grab her back in pain, and that minutes later the claimant told her that she hurt in the lower part of her back.

15. The link between the April 14 incident and the claimant's subsequent low back pain is further corroborated by work hardening program records. During the program the claimant was required to maintain activity sheets and to record the location and degree of any pain she suffered. The degree of pain was recorded on a scale of 1 to 10; the higher the number, the greater the pain. Claimant's Bike Record of April 14, 1992 (Ex. No. 1 at 79, emphasis added) states "8 My **hole** [sic] back hurts and right arm". The obstacle course record for April 14, 1992 (*Id.* at 81, emphasis added) states in part, "My **hole** [sic] back hurts." The weight transfer activity sheet of April 15, 1992 (*Id.* at 82, emphasis added) states "8 hurt neck & back of right arm, **right lower backside hurts.**" Claimant's activity sheet for the obstacle course dated April 15, 1992 (*Id.* at 81, emphasis added), states "8 neck and right arm; **my tailbone and right backside**." Claimant's bike and walking records on April 15, 1992 also show complaints of back pain. On the April 23, 1992 Bike Record (*Id.* at 79) claimant wrote, ". . . small of back hurts; right back." The April 23, 1992 walking record (*Id.* at 80, emphasis added) states, "Back pain **lower** pain". The weight transfer record of

April 23, 1992 (*Id.* at 82) states, "7 back hurt . . . , " and the obstacle course record (*Id.* at 81) on that date states, "7 back pain . . ." On April 24, 1992, on the "Bike Record" activity sheet (*Id.* at 79), claimant wrote "8 back; lower back; right leg; right arm hurts". (The activity records are discussed in the Transcript at 88-98 and are found in Ex. No. 1 at 79-82.) In a note on April 17, 1992, Joe Marcotte recorded that claimant "[r]eported increased pain in LB [low back] over last 3 days" (Ex. No. 1 at 7.)

16. The work hardening program records also reflect a progression of claimant's pain into her right leg. Claimant's last day at work hardening was April 27, 1992. Joe Marcotte's progress note on that day states in part:

> Worker complained of continued pain in right shoulder, back, and right leg . . . Worker reports pain as a "cramping feeling that starts at the top of my back (T1 region) and continues down to my calves. The pain is strongest in my upper back and is like a burning feeling in my legs [posterior right leg]."

(*Id.* 1 at 75.)

17. Claimant saw Dr. Shaw on April 24, 1992. Dr. Shaw's April 24, 1992 report (*Id.* at 136) stated, in part:

> She notes increase in her symptoms with pain from the interscapular region into the buttocks and sometimes into the right knee as well as pain going from her neck into her arm down to the middle and ring fingers. Symptoms are aggravated by almost any activity.

Dr. Shaw testified that while he did not specifically note pain in claimant's low back, the area of pain he described encompassed the low back. However, in his opinion the claimant's symptoms were myofacial in nature, also called fibromyalgia, meaning diffuse muscular pain.

18. Dr. Shaw referred claimant to Dr. Mary D. Gaddy for a neurological examination. Dr. Gaddy's office notes of a June 9, 1992 examination of claimant reflect both the wheel barrow incident and claimant's pain in the lower back and right leg. In relevant part it states:

> . . . She [claimant] went to work hardening at the Billings Clinic warehouse and was shoveling eight shovels of gravel into a wheelbarrow. She then would push it around the room and

> then push it up to empty the wheelbarrow. She says she developed "a terrible pain between the shoulder blades." She worked with a person named Joe trying to do this over and over again but she could not do it. She then developed **pain in the right side of her back that went into the right buttock to the right posterior thigh to right posterior calf to the middle two toes which are the second and third toes.** [Emphasis added.]

(*Id.* at 137.) Although Dr. Gaddy documented claimant's report of back pain, the June 9, 1992 neurological examination was normal.

19. Claimant continued to have pain. She requested a referral to another doctor, but the respondent initially refused to allow her to change treating physicians. On her own the claimant then sought treatment through the Indian Health Service in Crow Agency, and was examined by Dr. Peter V. Teal on September 14, 1992. In his office note for that date, Dr. Teal mentioned claimant's injury at the work hardening center and diagnosed "thoracic and lumbar sprain, possible disc injury". (*Id.* at 88.)

20. Dr. Shaw examined claimant again on October 6, 1992. He diagnosed "[c]hronic low back and right leg pain with a left sided L5-S1 disk herniation." (*Id.* at 142.) A CT scan performed on that date revealed a small central disk herniation at the L5-S1 level.

21. On October 7, 1992, Dr. Shaw referred claimant to Dr. Lovitt, an orthopedic surgeon. Pursuant to claimant's request, Dr. Shaw then agreed that claimant could instead see Dr. Lovitt's partner, Dr. Teal. Dr. Teal became claimant's treating physician.

22. Dr. Teal performed a discogram on April 9, 1993. A discogram attempts to reproduce a patient's pain by injecting the disc with a liquid, thereby pressurizing the disc. According to Dr. Teal, if the patient's typical pain is reproduced, then the chances are very good that it is the source of the patients pain. A discogram of the L4-5 disc did not reproduce claimant's pain. However, the discogram of the L5-S1 disc did reproduce her pain, including pain radiating down the right leg into the foot and toes. Dr. Teal concluded that claimant's pain was caused by her herniated L5-S1 disc. Dr. Shaw testified that discograms are very controversial in the diagnosis of back pain. However, he conceded that "[t]there are some doctors that find them useful" and put the controversy in terms of, "I certainly couldn't say that a discogram would give much **more** accuracy than some other tests." (Dep. of Dr. Shaw at 49.) Dr. Shaws' testimony falls far short of showing that the test and the test results are beyond the pale of acceptable medical practice, and shows only that there is a reasonable difference of opinion among medical practitioners.

23. Dr. Shaw also testified that the claimant's herniated L5-S1 disc was not causing claimant's symptoms because the disc was herniated on the left side, while the claimant's symptoms were on her right side. Dr. Teal addressed the same matter but reached a different conclusion:

> Well, the entire L5-S1 disc is abnormal. And while there's a more prominent bulge on the left side, the entire disc bulge, and that disc, if it's been injured and if it's inflamed, the inflammation will be all around the disc, so that there may have been more irritation of the right side of the nerve root than the left side of the nerve root in spite of that bulge, especially if that bulge didn't occur directly under the nerve.

(Dr. Peter Teal Dep. at 20.) Dr. Teal concluded that claimant's pain was caused by the abnormality in the L5-S1 disc. Dr. Teal testified that while claimant's pain pattern was not a common pattern, it also was not unique and there are other cases in which pain occurs on the less prominent side of the degenerated disc.

24. Dr. Shaw and Dr. Teal also disagreed as to the cause of claimant's herniated disc and back pain. Dr. Shaw testified:

> I can find no evidence based on my own evaluations, those of other physicians, or of the review of the records that there was an instance or occurrence in April of 1992 which were the cause of Ms. Kloepfer's herniated disc or her subsequent complaints of low back and right leg pain.

(Tr. 2 at 110). Dr. Teal testified:

> Let me state first that I base this opinion on the history that she's given me of no back pain prior to the described injury and persistent back pain afterwards. And on review of those notes from the work hardening program, my opinion is that she injured her back at that time and it was that injury that subsequently led to the surgery that I did.

(Dep. of Dr. Teal at 25.)

25. In response to the question as to why claimant would have initially reported pain primarily in the mid-thoracic area, Dr. Teal explained:

A: It's not the usual pattern in most patients that injure their low back and report low back pain initially. But we also see another pattern. Patients immediately after an injury have a more generalized pain pattern that have poorly localized pain initially. As an example, it's common to see that pattern after a neck injury, and associated with a rear end automobile accident patients have pain in lots of locations afterwards and it takes a week or two for them to localize that pain to a more specific area. And that can happen in the low back, too, although it's not quite as common as in the neck.

Q: In looking at the notes from work hardening and the Billings Clinic and with Vicky Kloepfer's report, do you have an opinion as to whether that happened in Vicky Kloepfer's case?

A: Yes, I have an opinion as to what happened.

Q: What is your opinion?

A: I think that she injured her low back at the same time as she reported upper back pain, that her injury was in both areas, and that it resulted from that incident.

(Dep. of Teal at 25-26.)

26. Lumbermens has drawn the Court's attention to claimant's history of prior back pain. Medical records show that in February 1986 the claimant reported low back pain, diagnosed as a lumbar strain, after bending over the toilet to vomit. She had the flu at the time. The condition apparently resolved and there is no evidence that claimant continued to have chronic low back pain as a result of the incident. On February 14, 1988 claimant was involved in a sledding accident. The injury, of which Dr. Teal was aware, was to the neck and shoulder, not the low back. On May 18, 1979, claimant was experiencing "some right low flank pain. However, the medical notes states, "she had the same symptoms when she had a kidney infection several years ago." There is no evidence to indicate that her pain continued thereafter or that it was due to any sort of back injury or condition. In February 1987 medical notes reflect a complaint of right upper quadrant abdominal pain, but with "some radiation to the right side of the back." The diagnosis was "abdominal pain, etiology uncertain," and a workup was done to rule out possible gallbladder involvement. In 1991, a medical note reports a "history of recurrent right "upper quadrant pain" which "seems to be worsened with food, in particular certain foods and what sounds like large meals." There was also mention that the pain is "sometimes burning, sometimes radiating to the back."

But, again the significant complaint was abdominal pain. There was no mention of any right leg involvement, and the note does not indicate that the back pain was predominate or that claimant's complaints were due to any condition of the back itself.

27. After considering all of the evidence, I find Dr. Teal's opinions more persuasive than those of Dr. Shaw. In doing so, I am influenced by a number of factors. First, the onset of claimant's severe low back and right leg pain were associated with the April 14th incident. There is no credible evidence that they are merely a continuation of preexisting complaints. The severity of claimant's post April 14, 1992 pain is reflected in the Rehabilitation Center records, in medical records, and in claimant's willingness to submit to a major surgical procedure. Second, upon discovery of the herniated disc in October of 1992, Dr. Shaw referred claimant to an orthopedic surgeon asking for "a fresh view of this lady and her difficulties, and asking for "your best clinical judgement as to what's going on and what appropriately ought to be done." (Ex. No. 1 at 145.) The referral indicates some amount of deference to an orthopedic evaluation and also some uncertainty on Dr. Shaw's part concerning claimant's condition. Third, with Dr. Shaw's acquiescence, Dr. Teal became claimant's treating physician and has been treating her continuously since October 1992. Fourth, Dr. Teal has provided a reasonable and supported explanation for his opinions. Finally, I have considered Dr. Shaw's personal affiliation with both the Rehabilitation Center and the employer. While those affiliations may not have consciously affected his opinions in this matter, he is nonetheless not a neutral observer.

28. At the time of trial, claimant was continuing to suffer pain in her right leg, numbness in her toe area, pain from her hip to her knee when she sits, and pain from her hip to her foot on the right side when she stands. However, claimant had not yet reached maximum healing. Dr. Teal testified that claimant would not reach maximum healing until nine months after the operation and that he expects her condition to improve.

29. The Montana Medicaid program paid for claimant's surgery.

30. Dr. Teal's recommendation of surgery was reasonable and was directly related to claimant's condition resulting from the April 14, 1992 incident.

31. Lumbermens actions were **not** unreasonable. It based its decisions on the medical opinions of Dr. Shaw. When it received a report from Dr. Teal opining that claimant suffered a work-related back injury, it requested a further opinion from Dr. Shaw, who again stated that the herniated disc was unrelated to claimant's work hardening activities. Lumbermens also had legitimate concerns about claimant's credibility when reporting work-related accidents.

32. Claimant has not reached maximum medical healing following the April 14, 1992 incident.

CONCLUSIONS OF LAW

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

2. A preponderance of credible evidence shows that claimant sustained an injury to her mid- and low back on April 14, 1992.

Despite failure of the Rehabilitation Center's operations manager and the claimant to specifically mention low back pain in notes made on April 14, 1992, there is ample, overwhelming evidence that the incident precipitated severe low back and right leg pain. Claimant's version of the incident was corroborated by another witness. It was also corroborated by claimant's activity records, which state for April 14 that her "hole" [sic] back hurts. On April 15 claimant referred to her "right lower backside hurting" and her "tailbone and right backside" hurting. She did not participate in the program between April 16 and 22. When she returned on April 23, she noted "back pain lower pain" and pain in her "lower back" and right leg. When seen by Dr. Shaw on April 24, she was complaining of pain throughout her back and specifically mentioned pain in her buttocks and right knee. After April 14 claimant's pain was chronic and severe. It ultimately led to surgery.

While Lumbermens points to previous instances of back pain in arguing that claimant's condition is a preexisting one, the records on which it relies show that claimant suffered a lumbar strain in 1986, but that it apparently resolved. The records also show an injury to the neck and shoulder, which did not affect the low back, and abdominal pain complaints which periodically spilled over into the back. Nowhere in the records is a suggestion that claimant was suffering a chronic low back condition or that her complaints were myofacial in nature. After April 14 the claimant's pain was chronic, centered primarily in the low back, and extended into the buttocks and right leg.

While Dr. Shaw testified that the claimant's low back and right leg symptoms were not related to the April 14 incident, I find Dr. Teal's testimony more persuasive and more consistent with the historical events. Respondent cites several cases holding that in cases of conflicting medical testimony, the treating physician's testimony should be given greater weight. This court has previously held that between equally qualified physicians, the one who has treated claimant for a longer amount of time would generally be in a better position to more fully understand the claimant's diagnosis, prognosis and impairment than a physician who had evaluated the claimant on only one occasion or for a brief period. "The physicians who saw the claimant one time or several times over a short period is discredited when their opinions conflict with the treating physicians." ***Soelter v. Saint Vincent Hospital,***

WCC No. 182-231, decided December 18, 1984 (cited by respondent). However, each case must be judged on its own merits and medical testimony must be considered in conjunction with all of the other evidence presented in the case. A treating physician's opinion is not conclusively presumed to be correct, if it were, the factual inquiry conducted by the Court would be superfluous.

While Dr. Shaw was claimant's treating physician for her initial occupational disease, and initially saw her for her April 14 injury, Dr. Teal then took over as her treating physician for the back injury. Dr. Shaw saw claimant twice following her back injury; Dr. Teal has seen her at least seven times since September 1992 and performed surgery. Dr. Shaw also felt it necessary in October 1992 to refer claimant to an orthopedic surgeon for an evaluation. Dr. Teal is an orthopedic surgeon. In evaluating the conflicting testimony consideration has also been given to Dr. Shaw's role as the assistant medical director of the facility where claimant was hurt and his role as a medical advisor for the employer.

The burden is on the claimant to prove that her current disabilities were caused by injuries sustained during her employment. ***Hall v. Atlantic Richfield Co.,*** *248 Mont. 484, 487, 812 P.2d 1262 (1991).* Although claimant was participating in a work hardening program rather than working as an employee, as discussed in the next section, the same requirement applies. She has satisfied her burden.

3. Claimant's injury and her herniated disc are compensable consequences of her occupational disease even though they did not occur while she was actually working for Bechtel Construction. ***Larson's Workmen's Compensation Law,*** *section 13.21,* states:

> It is now uniformly held that aggravation of the primary injury by medical or surgical treatment is compensable. Examples include exacerbation of the claimant's condition, or death, resulting from antibiotics, antitoxins, sedatives, pain-killers, anesthesia, excessive surgery, electrical treatments, or corrective or exploratory surgery.
>
> Fault on the part of the physician, such as faulty diagnosis, improper administration of anesthesia, or a slip of the surgeon's knife, even if it might amount to actionable tortuousness, does not break the chain of causation. Indeed, in some of the cases in the present category, the compensability of the aggravation due to treatment is adduced to support holdings that the employer or physician cannot be sued in tort because of the exclusiveness of the compensation remedy.
>
> Similarly, injuries due to the negligence of persons other than physicians, connected with the process of treatment or

> convalescence, such as orderlies, first-aid personnel, or even cleaners in a hospital are within the compensable range of consequences.

When injured, claimant was participating in a medically prescribed work hardening program. The program was part of her "medical treatment" and was a form of physical rehabilitation. Accordingly, claimant is entitled to benefits and medical expenses related to her injury.

4. Claimant has the burden to prove by a preponderance of the evidence that the condition for which she seeks medical treatment was caused by her industrial accident. ***Hall v. Atlantic Richfield Co.,*** *248 Mont. 484, 487, 812 P.2d 1262 (1991).* She has met that burden.

Lumbermens denies liability for claimant's surgery on the grounds that the herniated disc did not cause her symptoms. Dr. Shaw believes the herniated disc to be a red herring which has nothing to do with claimant's complaints. Since claimant has not completed her recovery from surgery, and Dr. Teal expects her condition to improve as she continues to recover, it is premature to judge whether the surgery has been successful.

Even if the surgery was misdirected and the herniated disc was not the sole or primary cause of claimant's symptoms, Dr. Teal made a reasonable medical judgment that the herniated disc was the cause of claimant's symptoms. Under the Montana Occupational Disease Act, insurers are required to pay "reasonable medical services," section 39-72-704, MCA. There is no requirement that the services ultimately prove to be effective, or that the diagnosis of the underlying condition causing a claimant's symptoms be the correct one. Medicine is not a precise science. Physicians disagree and initial diagnoses sometimes prove to be wrong. While Dr. Shaw does not believe that the claimant's symptoms were caused by the herniated disc, or that surgery will alleviate her symptoms, Lumbermens has failed to show that Dr. Teal's opinions are outside the pale of reasonable medical judgment.

Moreover, I find that Dr. Teal's treatment of claimant, including the surgery, was reasonable and appropriate. Lumbermens is liable for those medical expenses. In discharging that liability, however, Lumbermens is on notice of Medicaid's payment for the surgery. Medicaid may have a statutory lien on amounts due from Lumbermens. See section 53-2-612, MCA.

5. Claimant is entitled to reinstatement of temporary total disability benefits retroactive to August 11, 1992, since she had not reached maximum medical healing when her benefits were terminated.

6. Claimant is not entitled to a penalty or attorney fees. A legitimate medical dispute existed concerning the cause of claimant's condition and her herniated disc. Lumbermens' adjuster sought advice from Dr. Shaw and was told that claimant had reached maximum

healing, no further treatment was indicated, and that claimant could return to work in the same capacity she was working at the time the claim was filed. Lumbermens subsequently received a letter from Dr. Teal indicating claimant's back injury resulted from an injury during work hardening. Lumbermens again wrote to Dr. Shaw, who responded by reaffirming his opinion that the disc herniation was unrelated to any activities during work hardening. While the Court has not adopted Dr. Shaw's opinions in resolving this case, that does not mean that Dr. Shaw's opinions were unreasonable or that Lumbermens' reliance on them was unreasonable.

Lumbermens also had legitimate concerns over claimant's credibility. While I have found claimant's testimony credible with respect to the industrial accident in this case, the evidence concerning claimant's various statements and claims regarding other injuries does raise questions concerning the veracity and accuracy of her reports, and it has been taken into consideration in judging her testimony.

7. Pursuant to section 39-71-611, MCA, claimant is entitled to an award of reasonable costs.

JUDGMENT

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

2. Claimant is entitled to reinstatement of occupational disease benefits retroactive to August 11, 1992.

3. Lumbermens is liable for medical and hospital bills for treatment of claimant's lower back condition, including the necessary surgery to excise the herniation and fuse the L5 vertebrae to the sacrum.

4. Claimant is not entitled to a penalty or attorney fees.

5. Claimant is entitled to an award of reasonable costs under section 39-71-611, MCA.

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

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

DATED in Helena, Montana, this 18th day of January, 1994.

(SEAL)

JUDGE

c: Mr. James G. Edmiston, III
Mr. Steven S. Carey