IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2006 MTWCC 14

WCC No. 2005-1295

MARK PETERSON

Petitioner

vs.

MONTANA SCHOOLS GROUP INSURANCE AUTHORITY

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Appealed to Supreme Court 05/05/06
Dismissed by Stipulation 07/26/06 at DA-06-0363

Summary: Petitioner suffered a compensable occupational disease in his right arm and shoulder, rendering him unable to return to his custodian/maintenance position with the school district. After Petitioner reached maximum medical improvement and his treating physician approved five job analyses, Respondent terminated Petitioner's temporary total disability benefits. However, Petitioner's treating physician only considered whether Petitioner was employable in the five job analyses based solely upon the condition of Petitioner's shoulder, and did not take Petitioner's other serious health problems into consideration.

Held: Petitioner's occupational disease, taken in conjunction with the rest of his health problems and his lack of education or skills, renders him unemployable. Because he has reached maximum medical improvement, he is no longer eligible for temporary total disability benefits, as defined by § 39-71-116(34), MCA (1997). Petitioner is therefore permanently totally disabled within the meaning of § 39-71-116(24), MCA (1997).

Topics:

> **Witnesses: Credibility.** While the Court did not find Petitioner to be credible, Petitioner's credibility had little bearing upon his claim because the Court's decision was reached on the basis of the testimony from the medical and vocational experts and Respondent's claims adjuster.

Benefits: Temporary Total Disability Benefits. By definition, temporary total disability (TTD) exists only until the injured worker reached maximum medical improvement (MMI). Section 39-71-116(34), MCA. Where it is undisputed that Petitioner has reached MMI, Petitioner is no longer eligible for TTD benefits.

Employment: Qualifications. Where Petitioner has reached MMI, and his doctor approved but subsequently disavowed his approval of submitted job analyses, the Court, having had the opportunity to observe Petitioner's demeanor at trial and to assess the evidence as a whole, determined that Petitioner is unable to perform the five submitted jobs, either because of physical limitations, a lack of required skills, or both.

Vocational – Return to Work Matters: Job Analysis. Where Petitioner has reached MMI, and his doctor approved but subsequently disavowed his approval of submitted job analyses, the Court, having had the opportunity to observe Petitioner's demeanor at trial and to assess the evidence as a whole, determined that Petitioner is unable to perform the five submitted jobs, either because of physical limitations, a lack of required skills, or both.

Employment: Qualifications. In *McFerran v. Consolidated Freightways*, 2000 MT 365, ¶ 13, 303 Mont. 393, 15 P.3d 935, the Montana Supreme Court concluded that regular employment means a job which a claimant is qualified for both physically and vocationally, and may encompass part-time employment if it is substantial and significant. In this case, the Court determines that Petitioner is not qualified both physically *and* vocationally for any one of the five jobs identified.

Employment: Qualifications. While benefits may be terminated when a worker has been released to work, there must be some realistic chance that the worker can perform the jobs for which he was approved. The Court may take such factors as intelligence, skills, and abilities into account in considering whether a claimant has a reasonable prospect of regular employment in the identified position. *Palmer v. Home Ins. Co.*, 1999 MTWCC 42, ¶¶ 44, 48. Petitioner spent twenty years working as a school custodian. The record demonstrates he lacks the social skills, education, and training to perform two customer service positions identified by the vocational rehabilitation counselor as requiring the same or lesser skills as Petitioner possesses.

Vocational – Return to Work Matters: Employability. While benefits may be terminated when a worker has been released to work, there must be

some realistic chance that the worker can perform the jobs for which he was approved. The Court may take such factors as intelligence, skills, and abilities into account in considering whether a claimant has a reasonable prospect of regular employment in the identified position. *Palmer v. Home Ins. Co.*, 1999 MTWCC 42, ¶¶ 44, 48. Petitioner spent twenty years working as a school custodian. The record demonstrates he lacks the social skills, education, and training to perform two customer service positions identified by the vocational rehabilitation counselor as requiring the same or lesser skills as Petitioner possesses.

Employment: Qualifications. The fact that a worker who was employed as a school custodian for twenty years took a basic computer class several years ago is insufficient to render him qualified for customer service positions requiring computer skills.

Vocational – Return to Work Matters: Physical Restrictions. A vocational rehabilitation counselor's opinion that "maybe" a job no longer requires lifting which exceeds Petitioner's restrictions is inadequate evidence that this job is now suitable for Petitioner's physical limitations.

Vocational – Return to Work Matters: Evidence. A vocational rehabilitation counselor's opinion that "maybe" a job no longer requires lifting which exceeds Petitioner's restrictions is inadequate evidence that this job is now suitable for Petitioner's physical limitations.

Vocational – Return to Work Matters: Physical Restrictions. A job which requires lifting which exceeds the Petitioner's lifting limitations is a job for which Petitioner is not qualified physically to perform.

Employment: Qualifications. A job which requires stocking shelves and coolers, reaching overhead, mopping, and sweeping, cumulatively exceed the physical limitations of Petitioner's shoulder condition, and thus is a job which Petitioner is not qualified physically to perform.

Vocational – Return to Work Matters: Physical Restrictions. A job which requires stocking shelves and coolers, reaching overhead, mopping, and sweeping, cumulatively exceed the physical limitations of Petitioner's shoulder condition, and thus is a job which Petitioner is not qualified physically to perform.

Employment: Qualifications. Petitioner suffers from a compensable occupational disease in his right shoulder which led to permanent lifting restrictions after he attained MMI. Petitioner's other disabilities, including his

nonwork-related uncontrolled diabetes, must be taken into consideration in evaluating his ability to work.

Vocational – Return to Work Matters: Employability. Petitioner suffers from a compensable occupational disease in his right shoulder which led to permanent lifting restrictions after he attained MMI. Petitioner's other disabilities, including his nonwork-related uncontrolled diabetes, must be taken into consideration in evaluating his ability to work.

Physicians: Treating Physician. Although Respondent's argument that the doctor who treats Petitioner for follow-up care for his compensable shoulder injury is not Petitioner's treating physician for his non-orthopedic conditions is worthy of consideration, Respondent was willing to accept this doctor's signature on Petitioner's job analyses as proof positive that Petitioner could work. When the doctor subsequently opined that Petitioner's overall health precluded him from working, Respondent disregarded this opinion on the grounds that the doctor was not Petitioner's treating physician for his diabetes. Respondent cannot consider the doctor to be Petitioner's treating physician when the doctor approves a release to work and then argue that the doctor is not qualified to render an opinion when the same doctor later opines that Petitioner cannot work.

Vocational – Return to Work Matters: Employability. In spite of signing his "approval" to the five job analyses, Petitioner's doctor consistently and concurrently opined that Petitioner's overall health would preclude him from successfully returning to the workforce, and this Court concludes Petitioner is not employable in the jobs which Respondent has identified.

Vocational – Return to Work Matters: Job Analyses. In spite of signing his "approval" to the five job analyses, Petitioner's doctor consistently and concurrently opined that Petitioner's overall health would preclude him from successfully returning to the workforce, and this Court concludes Petitioner is not employable in the jobs which Respondent has identified.

¶ 1 The trial in this matter was held on Tuesday, October 25, 2005, in Helena, Montana. Petitioner Mark Peterson was present and represented by Mr. John C. Doubek. Respondent Montana Schools Group Insurance Authority (Respondent or MSGIA) was represented by Mr. Leo S. Ward.

¶ 2 Exhibits: Exhibit 1, Bates No. 00620, was objected to and removed and the rest of Exhibit 1 was admitted. Exhibits 2 through 21 and 45 through 61 were admitted without objection. Exhibits 22 through 44 were objected to and not admitted.

¶ 3 Witnesses and Depositions: The parties agreed that the depositions of Petitioner, Dr. V. Lee Harrison, Dr. David B. Heetderks, and Shauna Foley can be considered part of the record. Petitioner was sworn and testified at trial. John Peterson, Margot Hart, Georgeanne Paul, and Shauna Foley were also sworn and testified.

¶ 4 Issues Presented: The Pretrial Order states the following contested issues of law:

> ¶ 4a Whether Petitioner's temporary total disability benefits should be retroactively reinstated.
>
> ¶ 4b Whether Petitioner is totally permanently disabled and should receive such benefits.
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> ¶ 4c Whether Petitioner is entitled to attorney fees and a penalty.

(Pretrial Order at 2.)

FINDINGS OF FACT

¶ 5 On July 15, 1997, Petitioner filed a claim for benefits for an occupational disease he suffered to his upper right arm and shoulder arising out of and in the course of his employment with the Helena School District, Lewis and Clark County.[1]

¶ 6 Petitioner is 50 years old and has a GED.[2,3] He worked as a custodian or maintenance person for the Helena School District for approximately twenty years at the time he left this employment.[4]

¶ 7 At the time of the injury, Petitioner's employer was enrolled under Compensation Plan 2 of the Workers' Compensation Act and its insurer was MSGIA.[5]

¶ 8 Respondent accepted liability for this claim and has paid certain benefits.[6]

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[1] Pretrial Order at 2, Uncontested Fact, ¶ 1.

[2] Peterson Dep. 4:19.

[3] Trial Test.

[4] Peterson Dep. 11:9-10.

[5] Amended Petition for Hearing, ¶ 2.

[6] Pretrial Order at 2, Uncontested Fact, ¶ 3.

¶ 9 Petitioner contends that he remains unable to work because of his occupational disease. He requests this Court to order Respondent to resume payment of temporary total disability (TTD) benefits from the time they were terminated and continue payment of TTD benefits until Petitioner is able to return to work.[7]

¶ 10 Petitioner further contends that he is permanently totally disabled and that his benefits should be converted as such.[8]

¶ 11 Respondent disagrees, asserting that Petitioner is not entitled to reinstatement of his benefits because he achieved maximum medical improvement (MMI), and qualified physicians have approved jobs Petitioner could perform.[9]

¶ 12 Petitioner's claim is complicated by other health issues which negatively impact his ability to maintain employment. Petitioner is an insulin-dependent type I diabetic[10] and has difficulty managing this disease.[11] Petitioner's health is further compromised by smoking, alcoholism, depression, high blood pressure, peripheral neuropathy, pancreatitis, and other health problems.[12] Petitioner also lacked diligence in following through with his medical treatment and vocational rehabilitation subsequent to the development of the occupational disease which is the subject of this action.[13]

¶ 13 Petitioner was initially found to be at MMI either on December 12, 2000, or January 12, 2001.[14] After undergoing a third shoulder surgery, Petitioner was again found to be at MMI on February 17, 2004.[15]

¶ 14 The central issue in this case is whether Petitioner is employable. It is undisputed that his occupational disease will no longer allow him to perform the custodial/maintenance

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[7] Pretrial Order at 2, Petitioner's Contentions, ¶ 2.

[8] *Id.*

[9] Pretrial Order at 3, Respondent's Contentions, ¶ 1.

[10] Ex. 51 at 1.

[11] Peterson Dep. 35:19-37:14.

[12] Exs. 21 and 51.

[13] Ex. 21.

[14] Dr. Heetderks' records indicate that Petitioner was placed at MMI on December 12, 2000. *See Dr. Heetderks Dep. 15:17-25; Ex. 1 to Dr. Heetderks Dep. at 7.* However, Ms. Foley's records indicate that Petitioner was placed at MMI on January 12, 2001. *See Ex. 8*.

[15] Ex. 9.

job he performed for the school district, and that there are no accommodations which could be made which would fit within Petitioner's physical limitations.[16] Five job analyses were created for Petitioner by a certified rehabilitation counselor, and these job analyses were approved by Dr. David B. Heetderks, Petitioner's orthopedic treating physician, on January 2, 2000.[17] Notwithstanding his initial approval, however, in December 2002, Dr. Heetderks informed the claims adjuster on Petitioner's claim that he believed these job analyses exceeded Petitioner's current capabilities and involved lifting and repetitive motions exceeding safe limits.[18] Dr. Heetderks further stated he did not believe Petitioner would be able to return to work.[19] Nevertheless, on June 24, 2003, Dr. Heetderks once again approved these same job analyses.[20] However, in his deposition, Dr. Heetderks testified that he did not believe Petitioner was capable of working due to his health problems.[21]

Georgeanne Paul

¶ 15 Georgeanne Paul, certified rehabilitation counselor, worked with Petitioner after his shoulder injury. After interviewing Petitioner and considering his background information, education, work history, and medical files, Ms. Paul conducted a vocational assessment to determine what jobs Petitioner could perform. Ms. Paul developed job analyses for positions found in Petitioner's local labor market and submitted them to Dr. Heetderks for approval.[22]

¶ 16 The Court finds Ms. Paul to be a credible witness.

¶ 17 The jobs which Ms. Paul analyzed were Subway crew member, Jorgenson's motel clerk, Wal-Mart pharmacy sales associate, Town Pump cashier, and AT&T customer sales and service representative.[23]

¶ 18 In determining which jobs might be appropriate for an individual, Ms. Paul examines the injured worker's work history, aptitudes, and level of functioning and applies that

[16] *See, e.g.*, Ex. 21 at 11.

[17] Ex. 20.

[18] Ex. 1 to Dr. Heetderks Dep. at 1.

[19] *Id*.

[20] Ex. 20.

[21] Dr. Heetderks Dep. at 11-14.

[22] Trial Test.

[23] Ex. 20.

information to jobs that exist in the local labor market which would require the same or lesser skills as the injured worker. For each job she submitted to Dr. Heetderks, she spoke with the employers.[24]

¶ 19 As part of Petitioner's rehabilitation plan, he completed eight weeks of training at a career training institute. Petitioner learned basic keyboarding and computer skills and participated in a career development class.[25] Ms. Paul acknowledged that this training occurred several years ago and may be somewhat stale. However, she believed Petitioner would be able to pick those skills back up if he were to become employed in an entry level clerical position.[26]

¶ 20 When he approved the job analyses, Dr. Heetderks noted that Petitioner would be unable to carry guests' luggage, as the motel desk clerk job evidently required.[27] Ms. Paul disagreed that motel desk clerks are required to carry guests' luggage. She stated that the industry has moved away from having desk clerks perform this function and that motels generally have other employees carry luggage. On the particular job analysis for Jorgenson's, however, the clerk's stated duties included operating a shuttle van and helping with luggage that weighs thirty pounds. Ms. Paul stated that she thinks that since this job analysis was completed, the job description had changed and no longer requires luggage handling.[28]

¶ 21 Ms. Paul also noted that when she discussed the cashier position with Town Pump, the company indicated that, although stocking is part of a cashier's job, cashiers could choose to break down packages into smaller, lighter units instead of lifting larger cartons. She also explained that while a cashier at Town Pump must reach into overhead racks when customers purchase cigarettes, he could reach with either arm. The job duties for this position also include cleaning, mopping, sweeping the parking lot, and emptying garbage.[29]

¶ 22 Ms. Paul agreed that the AT&T customer sales position would involve standing and sitting for prolonged periods of time, waiting on customers, and the ability to operate a

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[24] Trial Test.

[25] Ex. 18.

[26] Trial Test.

[27] Ex. 20 at 2.

[28] Trial Test.

[29] *Id.*

computer. She noted that at Subway, the job requires continuous standing and walking and an employee must be on his feet to perform the job.[30]

¶ 23 Ms. Paul acknowledged that she did not take into account whether these jobs would allow employees to change positions from standing to sitting, because she believed the doctor was dealing only with Petitioner's shoulder and standing is not an issue for a shoulder condition. However, after she completed the job analyses, she recontacted the employers, who all reported that they would allow for a stool which the employee could sit upon when not busy.[31]

¶ 24 Throughout the time that Ms. Paul worked with Petitioner, she had ongoing concerns that Petitioner was not following through with his responsibilities. Petitioner missed appointments, did not attend some physical therapy sessions, refused to take Ms. Paul's phone calls, and lacked motivation to obtain employment. Petitioner experienced significant difficulties in his personal life, including relationship problems and the deaths of two family members. Petitioner was also having more difficulty than usual in managing his diabetes and his problems with alcoholism worsened.[32]

Margot Hart

¶ 25 Margot Hart, a certified rehabilitation counselor and licensed clinical professional counselor, assessed Petitioner's case to determine whether he was employable.[33]

¶ 26 The Court finds Ms. Hart to be a credible witness.

¶ 27 In the course of her assessment, Ms. Hart interviewed Petitioner, reviewed his medical records, and contacted his physicians. She then examined labor market data and job listings to formulate an opinion as to his employability. Ms. Hart also reviewed Dr. Heetderks' deposition.[34]

[30] *Id.*

[31] *Id.*

[32] Ex. 21.

[33] Ex. 19.

[34] Trial Test.

¶ 28 Ms. Hart examined Petitioner's work history and educational background and had Petitioner submit to a "wide range achievement test" to measure his academic skills.[35] She then considered the five job analyses.[36]

¶ 29 When Ms. Hart took Petitioner's lifting restrictions into consideration, based upon her knowledge of those approved jobs, she believed that several of those positions would not generally be compatible with the limitations attendant Petitioner's shoulder condition although individual employers might have positions which would be compatible. She noted that a motel desk clerk job typically includes tasks such as carrying guests' luggage, doing laundry, and moving rollaway beds. Convenience store cashiers are generally expected to reach over their heads to retrieve cigarettes and are further expected to restock coolers, which also involves repetitive lifting which could exceed twenty pounds. A Subway crew member is typically expected to lift more than twenty pounds of food product. Pharmacy sales associate and customer sales representative positions require more training than Petitioner has.[37]

¶ 30 In her Rehabilitation Assessment Report, Ms. Hart concluded that, based on her interview with Petitioner, her review of Petitioner's medical file, Dr. Heetderks' opinion that Petitioner is not employable, and her own experience as a certified rehabilitation counselor and licensed clinical professional counselor, Petitioner is not employable in the general labor market.[38]

Shauna Foley

¶ 31 Shauna Foley is the insurance adjuster who has worked on Petitioner's claim since May 2002.[39] Ms. Foley testified both in person and by deposition.

¶ 32 The Court finds Ms. Foley to be a credible witness.

¶ 33 Ms. Foley explained that when she adjusts a claim for an injury, it is her normal practice to look at the person as a whole. She stated that insurance adjusters take the overall health of the claimant, as directed by the treating physician, into consideration.[40]

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[35] *Id*.

[36] *See* ¶ 17, above.

[37] Trial Test.

[38] Ex. 19 at 3.

[39] Trial Test.

[40] Foley Dep. 7:6-21.

At the time she adjusted this claim, she was aware that, in addition to his shoulder condition, Petitioner suffered from diabetes and peripheral neuropathy.[41]

¶ 34 On February 17, 2004, Ms. Foley sent Petitioner a fourteen-day notice terminating his TTD benefits. Ms. Foley decided to terminate Petitioner's TTD benefits based on Dr. Heetderks' conclusion that Petitioner had reached MMI with an 8% whole person impairment and Petitioner had been released to work.[42] She testified that claims adjusters look at a claimant as a whole, including any preexisting disabilities and injuries, when they make a determination to terminate benefits.[43]

¶ 35 Ms. Foley admitted that, at the time of the termination letter, if she had received a letter from Dr. Heetderks stating that Petitioner is not employable due to his overall health, she would not have terminated his benefits at that time. Rather, she would have continued her investigation, including requesting information from Petitioner's other treating physician and anyone qualified to comment on his preexisting conditions.[44] She based her termination of Petitioner's benefits solely on Dr. Heetderks' approval of the job analyses and his determination that Petitioner was at MMI with the same impairment as previously determined.[45] She noted that Dr. Heetderks was not Petitioner's treating physician for his health problems other than his shoulder condition.[46]

¶ 36 Ms. Foley testified at trial that, although Dr. Heetderks had informed her by letter in December 2002 that Petitioner's other health conditions might preclude his employability, she did not ask Dr. Heetderks whether those conditions still negatively affected Petitioner's employability after his third shoulder surgery because Dr. Heetderks is not Petitioner's treating physician for those conditions.[47] Ms. Foley submitted the five job analyses to Dr. Heetderks and asked him to address those analyses based upon his medical information for Petitioner.[48] She believed that when Dr. Heetderks approved the analyses,

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[41] *Id.* at 14:15-23.

[42] Ex. 8.

[43] Foley Dep. 10:16-25.

[44] *Id.* at 46:7-25.

[45] Trial Test.

[46] Foley Dep. 39:8-9.

[47] Trial Test.

[48] Foley Dep. 13:19-25.

he was doing so based on his evaluation of Petitioner's functional capacity, and not solely on the condition of his shoulder.[49]

¶ 37 Ms. Foley was aware that Petitioner experienced chronic pain from his peripheral neuropathy, but she had only limited medical information about his preexisting conditions because she did not obtain a medical release.[50, 51] Although she sent Petitioner's attorney a letter in which she requested additional medical information, she never sent Petitioner a release request and she did not receive the information.[52]

¶ 38 Ms. Foley explained that the treating physician is the person who directs the claim and the return to work.[53] The treating physician stipulates whether a claimant is at MMI, if he is employable, if he is compliant, and whether all appropriate benefits have been given.[54] The physician makes a determination as to whether or not a claimant can work, and then informs the claims adjuster about that determination.[55] Ms. Foley reiterated throughout her deposition that, as long as Dr. Heetderks continued to sign off on the job analyses and released Petitioner to work in a light-duty or sedentary job, she was obligated to use that information in assessing the claim and was not at liberty to second-guess the doctor's decision.[56]

¶ 39 Although Ms. Foley also reviewed Ms. Hart's report, since Ms. Hart was neither a party nor a medical doctor, Ms. Foley did not give much weight to her opinion that Petitioner was not employable.[57]

Mark Peterson

¶ 40 Petitioner's history of medical issues and personal problems predate his occupational disease claim by a number of years. In spite of these challenges, Petitioner

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[49] *Id.* at 31:10-32:19.

[50] *Id.* at 15:1.

[51] *Id.* at 15:10-24.

[52] *Id.* at 16:3-11.

[53] *Id.* at 7:19-21.

[54] *Id.* at 8:4-8.

[55] *Id.* at 11:1-17.

[56] *See, e.g.*, Foley Dep. 11:11-17, 12:4-9, 23:8-10, 37:1-39:1.

[57] Foley Dep. 47:11-24.

maintained employment as a custodian or maintenance worker with the Helena School District for approximately twenty years until his shoulder condition made it impossible for him to continue performing his duties.

¶ 41 Petitioner testified about the various health ailments he experiences and the medications he takes to treat them. Petitioner is an insulin-dependent type I diabetic. Although his treating physician recommends that he test his blood sugar levels five or six times per day, Petitioner usually tests his blood sugar levels three or four times a day because he cannot afford the test strips. He testified that his blood sugar levels are "off the map," fluctuating from high to low, and he has been unable to maintain consistent blood sugar levels.[58]

¶ 42 Petitioner has had three surgeries on his shoulder. He returned to work after the first surgery, but after the second surgery he worked only two days. He has not worked since then. His treating physician continues to monitor his shoulder and he occasionally receives injections and other pain management treatments.[59]

¶ 43 Petitioner admitted that he does a better job controlling his diabetes when he is not drinking. Petitioner was an active alcoholic prior to the development of his shoulder condition and continued to abuse alcohol until January 1, 2002.[60] Petitioner testified that since that date, he consumed part of a beer on one occasion but has consumed no other alcohol.[61]

¶ 44 Petitioner lives with his mother and assists her with household tasks. His other activities include visiting relatives and walking. Petitioner testified that he has days when his shoulder does not hurt, but only if he is careful not to irritate it.[62]

¶ 45 Petitioner does not believe he could successfully perform any of the five jobs which were approved for him. He does not believe he could sit in a chair for an eight-hour shift as a customer service representative for AT&T. He believes he lacks the social skills for this job, and his shoulder and peripheral neuropathy pain affects his ability to concentrate. Petitioner believes that the Town Pump cashier job would be too much work for his arms and legs. While he feels that he might be able to do a job such as that for a few hours on occasion, he does not believe he could handle it on a daily basis. He does not believe his

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[58] Trial Test.

[59] *Id.*

[60] Peterson Dep. 25:17-19.

[61] *Id.* at 25:21-23.

[62] Trial Test.

shoulder could tolerate emptying the trash, mopping the floor, and sweeping the parking lot. Petitioner stated that he does not have the skills or training to be a pharmacy sales associate. He believes that he would be physically unable to perform either the motel clerk or Subway jobs. Petitioner's entire work history has been manual labor jobs and he does not know if there are any other jobs he has the skills to perform. Petitioner further testified that when taking all of his health problems into consideration, it would be impossible for him to remain sitting or standing for hours at a time.[63]

¶ 46 Inconsistencies between Petitioner's testimony and his deposition are apparent to this Court, as are inconsistencies between Petitioner's version of events and his medical history. In general, this Court does not find Petitioner's testimony to be credible. However, Petitioner's credibility has little bearing upon his claim, because the Court's decision in this case is reached on the basis of the testimony from the medical and vocational experts and Respondent's claims adjuster. The extensive testimony elicited from Petitioner on such topics as personal relationships, gambling, and which restaurants he frequents are wholly irrelevant to the issues before this Court and, accordingly, will not be detailed here.

David B. Heetderks, M.D.

¶ 47 Dr. Heetderks is a board certified orthopedic surgeon and is one of Petitioner's treating physicians.[64] Petitioner has been Dr. Heetderks' patient since late 1990 for an unrelated condition.[65] Petitioner currently sees Dr. Heetderks for follow-up treatment for his right shoulder.[66]

¶ 48 Dr. Heetderks stated that surgical intervention, extensive physical therapy, a variety of medications, and injections have been only partially successful in eliminating the discomfort Petitioner experiences in his shoulder.[67] Dr. Heetderks testified that Petitioner has "been through basically everything in the book" and Dr. Heetderks does not have further treatment options to suggest, nor does he believe additional surgeries would be beneficial.[68]

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[63] *Id.*

[64] Heetderks Dep. 4:16-24.

[65] *Id.* at 5:6-12.

[66] *Id.* at 6:3-4.

[67] *Id.* at 8:11-19.

[68] *Id.* at 8:22-9:4.

¶ 49 In a letter to Ms. Hart, dated April 25, 2005, Dr. Heetderks explained that Petitioner's "current diagnosis is persistent shoulder pain status-post right shoulder decompression" which is likely complicated by superimposed peripheral neuropathy. Dr. Heetderks added that Petitioner's diabetes also predisposes him to shoulder problems.[69]

¶ 50 Dr. Heetderks testified that Petitioner's diabetes has slowed his recovery.[70] Dr. Heetderks further noted that people with diabetes have a higher incidence of stiffness and pain in the shoulder than the general population, and that Petitioner's shoulder stiffness and difficulty in recovering from surgical interventions has been worsened by his diabetes.[71]

¶ 51 Dr. Heetderks approved the five job analyses prepared by Ms. Paul on January 2, 2000, and again on June 24, 2003.[72] Dr. Heetderks approved those jobs based on his belief that Petitioner's shoulder could tolerate them, even though he believed that Petitioner's overall health might preclude him from being able to perform these jobs.[73]

¶ 52 On December 20, 2002, Dr. Heetderks responded to an inquiry from claims adjuster Shauna Foley, in which he stated:

> I have reviewed the [job analyses] on Mark Peterson. I believe these exceed his current capabilities and involve lifting and repetitive motions exceeding safe limits. I do believe in theory Mr. Peterson may be employable from the standpoint of his shoulder. However, his overall medical condition is poor and although the shoulder is continuing to be problematic, it is much less of a problem [than] his diabetes, chronic pancreatitis, etc. My recommendation to you is to not get your hopes too high about Mr. Peterson ever returning to the work force. It is my anticipation that this is unlikely.[74]

¶ 53 On April 15, 2005, in response to written questions from Ms. Hart, Dr. Heetderks asserted that, in his opinion, Petitioner was permanently precluded from returning to work in the general labor market due to his medical condition.[75]

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[69] Ex. 12.

[70] Heetderks Dep. 10:6-13.

[71] *Id.* at 19:3-13.

[72] Ex. 20.

[73] Heetderks Dep. 16:11-18.

[74] Ex. 1 to Heetderks Dep. at 1.

[75] Ex. 11 at 1.

¶ 54 Discussing the December 2002 letter at his deposition, Dr. Heetderks explained that strictly from the standpoint of Petitioner's shoulder, he believed Petitioner's shoulder would tolerate the typical activity for an eight-hour day found in a computer job, a sedentary job, or a light-duty job within certain restrictions such as no overhead lifting. However, Dr. Heetderks added, Petitioner does not have a desirable set of skills for these jobs and without educational training and some type of occupational rehabilitation, Petitioner would not be employable.[76]

¶ 55 Dr. Heetderks explained:

> There's two separate issues. One is his overall health; and from the status of his overall health, I don't think he's going to be able to [resume an eight-hour-a-day, forty-hour-a-week position].
>
> The second is just the mechanics of his shoulder. And work comp, they don't give a hoot about his overall health. They just are going to cover his shoulder. They want to know, from the standpoint of his shoulder, could he do a computer job, a sedentary job, a light-duty job, and would the shoulder tolerate that type of activity for an eight-hour day.
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> Strictly from the standpoint of his shoulder, he probably could. He has, with the functional capacities evaluation, been approved for sedentary/light duty. We've recommended no repetitive overhead lifting, etc. And I think within those restrictions, the shoulder itself might tolerate that level of activity.[77]

¶ 56 Dr. Heetderks further opined that, although Petitioner has occasionally missed appointments and there have been occasions where Petitioner's treatment has been delayed while waiting for approval from the insurer, Petitioner's overall condition would be the same today regardless of any difficulties in treatment.[78]

¶ 57 Dr. Heetderks stated that, having treated Petitioner for more than fourteen years, although he has not specifically treated Petitioner's diabetes he has observed how Petitioner is affected by his diabetes and diabetic complications, and that the diabetes is a "big problem" for Petitioner and affects his employability.[79] However, Dr. Heetderks

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[76] Heetderks Dep. 13:1-19.

[77] *Id.* at 12:19-13:11.

[78] *Id.* at 14:4-25.

[79] *Id.* at 27:7-14.

stated, this question is best-directed at Dr. Will Snider, Petitioner's primary care physician and he would defer to that physician's opinion.[80]

Will Snider, M.D.

¶ 58 Petitioner is under the care of Dr. Snider for treatment of his diabetes and related conditions. Dr. Snider was unwilling to address whether Petitioner is capable of working with his diabetes and whether Petitioner is employable.[81]

V. Lee Harrison, M.D.

¶ 59 Dr. V. Lee Harrison is a hospitalist who reviewed Petitioner's medical files. Dr. Harrison is board certified in geriatrics and internal medicine.

¶ 60 Dr. Harrison spent approximately two hours in her initial review of Petitioner's case, and an additional two hours reviewing the case prior to her deposition. Dr. Harrison is not an orthopedist, does not do functional capacity evaluations, and does not determine impairment ratings. She testified in her deposition that she would defer to Dr. Heetderks' determinations regarding Petitioner's orthopedic limitations and how those limitations might be impacted by Petitioner's other physical conditions. In addition to Petitioner's medical files, she reviewed written notes from surveillance Respondent conducted on Petitioner. Dr. Harrison has not examined Petitioner, nor has she spoken with Dr. Heetderks concerning Petitioner.

¶ 61 Through her review of Petitioner's medical records, Dr. Harrison was aware of the medications which Petitioner takes, and of the various conditions with which he has been diagnosed including diabetes, peripheral neuropathy, depression, alcoholism, high blood pressure, and his shoulder condition. Dr. Harrison did not know the degree to which Petitioner is depressed, his daily symptoms from diabetes, or the extent of his shoulder pain.

¶ 62 Dr. Harrison stated that diabetes, alcoholism, depression, and high blood pressure are all common, treatable illnesses and that as an internist she has treated hundreds of patients who have been diagnosed with one of these diseases. Dr. Harrison opined that Petitioner could engage in a sedentary or light-duty occupation, although she did not analyze any specific jobs or talk to any employers. The sum of Dr. Harrison's opinion appears to be that she has treated many patients with diabetes who can work, therefore, she opined that Petitioner can as well.

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[80] *Id.* at 28:10-17.

[81] Ex. 19 at 2.

¶ 63 Dr. Harrison erroneously concluded that Petitioner suffers from type II diabetes. In her letter to Respondent's counsel following her file review, she stated, "Type 2 diabetes mellitus with extremely poor control despite frequent in-depth counseling with excellent diabetes educators . . . ."[82]

¶ 64 It was drawn to Dr. Harrison's attention and she conceded in her deposition that Petitioner, who is insulin-dependent, is a type I diabetic.[83] However, Dr. Harrison asserted that this error would not change her other conclusions.[84]

¶ 65 In spite of Dr. Harrison's qualifications, this Court does not find her contribution to this case deserving of much weight. Dr. Harrison did not examine Petitioner, nor did she speak with Petitioner or his treating physicians. Although Dr. Harrison's function in reviewing Petitioner's medical files was to reach a determination as to whether Petitioner's health problems precluded him from being employable, Dr. Harrison never investigated employment options beyond reading the five job analyses which were part of Petitioner's file.

¶ 66 Finally, despite the fact that Dr. Harrison was retained to render an opinion specifically regarding Petitioner's nonorthopedic limitations, most notably his diabetes, Dr. Harrison incorrectly identified Petitioner's condition as being type II diabetes rather than insulin-dependent type I diabetes. When this error was called to Dr. Harrison's attention, she dismissed consideration of whether this error would have affected the conclusions she reached in any way. In light of the fact that the goal of Dr. Harrison's file review was to render an opinion as to whether Petitioner's diabetes and other health problems rendered him unemployable, this error suggests to the Court a lack of attention that the Court must consider in determining what weight to ascribe to Dr. Harrison's opinions.

CONCLUSIONS OF LAW

¶ 67 This case is governed by the 1997 version of the Montana Workers' Compensation Act since that was the law in effect at the time Petitioner filed his claim.[85]

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[82] Ex. 45 at 1.

[83] Harrison Dep. 41:7-10.

[84] *Id.* at 41:13-15.

[85] *Bouldin v. Liberty Northwest Ins. Corp.*, 1997 MTWCC 8. Except as specifically noted, any reference to statutes cited from the Montana Code will employ the language from the 1997 version.

¶ 68 Petitioner bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.[86]

Temporary Total Disability Benefits

¶ 69 The determination of TTD must be supported by a preponderance of objective medical findings.[87] "Objective medical findings" means medical evidence, including range of motion, atrophy, muscle strength, muscle spasm, or other diagnostic evidence, substantiated by clinical findings.[88]

¶ 70 Section 39-71-609(2), MCA, states that TTD benefits may be terminated on the date that the worker has been released to return to work in some capacity. Section 39-71-701(1), MCA, states that a worker is eligible for TTD benefits when he suffers a total loss of wages as a result of an injury and until he reaches maximum healing *or* until he has been released to return to the employment in which he was engaged at the time of injury or to employment with similar physical requirements.

¶ 71 By definition, TTD exists only until the injured worker reaches MMI.[89] It is undisputed that Petitioner has reached MMI. Therefore, Petitioner is no longer eligible for TTD benefits.

Permanent Total Disability Benefits

¶ 72 Petitioner argues alternatively that he is entitled to permanent total disability (PTD) benefits. PTD is a physical condition resulting from injury, after a worker has reached MMI, in which the worker does not have a reasonable prospect of physically performing regular employment.[90] PTD must be supported by a preponderance of objective medical findings.[91]

¶ 73 Respondent urges this Court to apply *Daulton*[92] to the case at hand and deny Petitioner's request for reinstatement of benefits because Petitioner, like *Daulton*, has

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[86] *Ricks v. Teslow Consol.,* 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wickens Bros. Constr. Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

[87] § 39-71-701(2), MCA.

[88] § 39-71-116(19), MCA.

[89] § 39-71-116(34), MCA.

[90] § 39-71-116(24), MCA.

[91] § 39-71-702(2), MCA.

[92] *Daulton v. MHA Workers' Comp. Trust*, 2001 MTWCC 37.

reached MMI and had been released to work in some capacity. Although it is undisputed that Petitioner has reached MMI, it is arguable whether Petitioner has been released to work. Dr. Heetderks has disavowed his approval of the five job analyses. Moreover, having had the opportunity to observe Petitioner's demeanor at trial and to assess the evidence as a whole, it is this Court's opinion that Petitioner is unable to perform these five jobs, either because of physical limitations, a lack of the required skills, or both.

¶ 74 In *McFerran*, the Supreme Court concluded that regular employment means a job which a claimant is qualified for both physically and vocationally, and may encompass part-time employment if it is substantial and significant.[93] In the situation before this Court, Petitioner is not qualified both physically *and* vocationally for any one of the five jobs identified.

¶ 75 While benefits may be terminated when a worker has been released to work, there must be some realistic chance that the worker can perform the jobs for which he was approved. The Court may take such factors as intelligence, skills, and abilities into account in considering whether a claimant has a reasonable prospect of regular employment in the identified position.[94] Petitioner spent the last twenty years working as a school custodian. He testified, and the record demonstrates, that he lacks the social skills, education, and training to perform the pharmacy sales associate or AT&T customer sales and service representative jobs. Ms. Paul testified that she determines appropriate jobs by finding positions in the local labor market which require *the same or lesser skills* than the injured worker has. Neither pharmacy sales associate nor AT&T customer sales and service representative positions could be considered to require the same or lesser skills as Petitioner has. Petitioner also testified that his pain affects his ability to concentrate and his ability to remain seated for hours at a time. The fact that Petitioner completed a basic computer class several years ago is not sufficient in this case to render him qualified for such positions. Having had the opportunity to observe Petitioner and hear his testimony at trial, the Court's observation is that Petitioner would not have a reasonable prospect of being hired to perform a customer service position.

¶ 76 The motel, Subway, and Town Pump jobs all exceed Petitioner's physical capabilities. Ms. Paul's testimony that she *thinks* that *maybe* the motel job no longer requires the desk clerk to lift luggage is inadequate evidence that this job is now suitable for Petitioner's physical limitations. Ms. Paul admitted the Subway job cannot be performed sitting. Ms. Hart's research, which Ms. Paul did not contradict, demonstrated that the lifting requirements for this job would exceed the limitations of Petitioner's shoulder. The Town Pump job requires stocking shelves and coolers, reaching overhead, and mopping and

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[93] *McFerran v. Consolidated Freightways*, 2000 MT 365, ¶ 13, 303 Mont. 393, 15 P.3d 935 (*reversing on other grounds* 2000 MTWCC 31).

[94] *Palmer v. Home Ins. Co.*, 1999 MTWCC 42, ¶¶ 44, 48.

sweeping – tasks which, taken together, exceed the limitations of Petitioner's shoulder condition.

¶ 77 Even without taking Petitioner's other health problems into account, it is questionable whether these three jobs would be appropriate for Petitioner's shoulder. Dr. Heetderks questioned this in his 2002 letter to Ms. Foley. An insurer must take a claimant as they find him, and not obtain a physician's approval based on physical limitations arising solely out of the occupational disease at issue.[95] In evaluating a claimant's ability to work, consideration is to be given to physical and psychological disabilities which exist at the time of his occupational disease.[96] In *Weisgerber*, a hair stylist who developed an occupational disease which precluded her working as a hair stylist had job positions identified by her treating physicians.[97] However, her treating physicians approved the job descriptions based solely on physical restrictions arising from her occupational disease and did not take into account her preexisting limitations.[98] This Court concluded that consideration should have been given to claimant's limitations in addition to her occupational disease.[99]

¶ 78 Dr. Heetderks' opinion that workers' compensation does not "give a hoot" about Petitioner's other physical limitations notwithstanding, Dr. Heetderks erred when he approved the job analyses without taking Petitioner's overall health into consideration. Petitioner's other disabilities must be taken into consideration in evaluating his ability to work. However, Ms. Paul did not consider Petitioner's overall health in making her initial determinations. As she testified, she knew continuous sitting or standing was not an issue with a shoulder injury and, therefore, she did not take this limitation into consideration when she created the five job analyses for Petitioner. As an afterthought, she recontacted the employers who agreed that an employee might sit on a stool when "not busy." This is insufficient, however, for the Court to find that these job descriptions are effectively modified. The Court would be surprised to discover many service industry employees who are at work, but "not busy" for any substantial amount of time during their shifts.

¶ 79 Respondent's argument that Dr. Heetderks is not Petitioner's treating physician for his nonorthopedic conditions is worthy of consideration. However, as Ms. Foley testified, Respondent was willing to accept Dr. Heetderks' signature on Petitioner's job analyses as proof positive that Petitioner could work. Nevertheless, when Dr. Heetderks informed Ms. Foley that Petitioner's overall health precluded him from working, Ms. Foley

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[95] *Weisgerber v. American Home Assurance Co.*, 2005 MTWCC 8, ¶ 33.

[96] *Id.*, ¶ 34.

[97] *Id.*, ¶ 26.

[98] *Id.*, ¶ 27.

[99] *Id.*, ¶ 34.

disregarded this opinion because Dr. Heetderks was not the physician treating Petitioner's diabetes. Ms. Foley acknowledged, however, that a treating physician stipulates whether a claimant has reached MMI, if he is compliant, and if he is employable.[100] Dr. Heetderks performed those duties. Respondent cannot consider the doctor to be Petitioner's treating physician when the doctor approves a release to work and then argue that the doctor is not qualified to render an opinion when the same doctor later opines that the Petitioner cannot work.

¶ 80 Certainly, this Court would have liked to have heard from an internist who had actually treated or at least examined Petitioner. However, Dr. Heetderks has treated Petitioner for more than fourteen years and his deposition made it clear that he has great familiarity with Petitioner's overall health as well as his shoulder condition. Dr. Heetderks is also familiar with how Petitioner's shoulder is affected by his diabetes. Dr. Heetderks' testimony is the strongest evidence before this Court. In spite of his signing his "approval" to the five job analyses, Dr. Heetderks consistently and concurrently expressed his opinion that Petitioner's overall health would preclude him from successfully returning to the workforce.

¶ 81 Once Petitioner's other health problems are taken into account, this Court concludes Petitioner is not employable in the jobs which Respondent has identified. Since Respondent has failed to identify a job which Petitioner has a reasonable prospect of physically performing,[101] the Court concludes Petitioner is permanently totally disabled and entitled to benefits.

Attorney's Fees, Costs, and Penalty

¶ 82 To be entitled to his attorney's fees, Petitioner must prove that the insurer's actions in denying liability or terminating benefits was unreasonable.[102] This Court may, in its discretion, increase by twenty percent the full amount of benefits due to a claimant if an insurer unreasonably delays or refuses to pay benefits.[103] As evidenced in the preceding nineteen pages, this was a complicated claim involving the interplay of multiple medical conditions and their impact on Petitioner's employability in light of his orthopedic limitations. This Court does not find Respondent's termination of Petitioner's benefits to be unreasonable and declines to award attorney's fees or a penalty in this case.

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[100] See ¶ 35, above.

[101] § 39-71-116(24), MCA.

[102] § 39-71-611, MCA (2005).

[103] § 39-71-2907, MCA (2005).

¶ 83 Petitioner is entitled to his costs in the judgment of this Court since he prevailed on the substantive issues of this action.[104]

JUDGMENT

¶ 84 Petitioner's request for reinstatement of his temporary total disability benefits is **DENIED**.

¶ 85 Petitioner's request for permanent total disability benefits is **GRANTED**.

¶ 86 Petitioner's request for attorney's fees is **DENIED**.

¶ 87 Petitioner's request for a penalty pursuant to § 39-71-2907, MCA (2005), is **DENIED**.

¶ 88 Petitioner's request for his costs is **GRANTED**.

¶ 89 This JUDGMENT is certified as final for purposes of appeal.

¶ 90 Any party to this dispute may have twenty days in which to request reconsideration from these FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT.

DATED in Helena, Montana, this 7th day of April, 2006.

(SEAL)

/s/ James Jeremiah Shea
JUDGE

c: Mr. John C. Doubek
Mr. Leo S. Ward
Submitted: October 25, 2005

[104] *Marcott v. Louisiana Pac. Corp.*, 1994 MTWCC 109 (*aff'd after remand at* 1996 MTWCC 33).