

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2019 MTWCC 14

WCC No. 2017-3939

DAVID SCHIEBER

Petitioner

vs.

LIBERTY NORTHWEST INS. CORP.

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Summary: Petitioner suffered compensable left-shoulder and low-back injuries in 2012. A year-and-a-half later, his treating physician declared him at MMI, set restrictions, and approved a less-demanding JA. Although Petitioner eventually returned to work elsewhere, he left after a few months due to pain. Respondent reinstated TTD benefits until January 22, 2015, after a consulting orthopedic surgeon determined Petitioner needed no further surgery and his treating physician determined there was nothing more he could do for him. Thereafter, Petitioner saw additional surgeons, several of whom offered conditional recommendations for surgery. Petitioner argues he is entitled to past due and ongoing TTD benefits or past due and ongoing PTD benefits, and ongoing medical benefits, including surgery.

Held: Petitioner is not entitled to TTD benefits because he was at MMI when Respondent terminated TTD benefits on January 22, 2015 and has remained at MMI ever since. Petitioner is not currently a candidate for further surgery because the conditions set by the surgeons recommending it have not been met. Petitioner is, however, entitled to PTD and medical benefits from January 22, 2015, on. After Respondent met its initial burden of producing evidence that Petitioner was and is not permanently totally disabled with an approved JA, Petitioner met the ultimate burden of proving that he neither had nor has a reasonable prospect of performing regular employment given his older age, modest

education, narrow work history, limited transferable skills, and multiple physical conditions. Because he is permanently totally disabled, Petitioner is entitled to ongoing medical benefits. His entitlement to further surgery will depend on whether the specific procedure he seeks is considered a primary medical service at some point in the future.

¶ 1 The trial in this matter was held on July 5 and 6, 2018, in Helena, Montana. Petitioner David Schieber was present and represented by Thomas J. Murphy and Matthew J. Murphy. Respondent Liberty Northwest Ins. Corp. (Liberty) was represented by Leo S. Ward. Jamie Kern, claims adjuster, was also present on behalf of Liberty.

¶ 2 Exhibits: This Court admitted Exhibits 1 through 7, 9 through 31, 35 through 40, 42 through 45, 47 through 51, and 54 through 68.

¶ 3 Witnesses and Depositions: This Court admitted the depositions of Schieber, Alexander Bailey, MD, James Michael Eule, MD, Fermin Santos, MD, and Lisa Kozeluh, CRC, into evidence. Margot Luckman, CRC, Schieber, Kern, and Holly Roberts were sworn and testified at trial.

¶ 4 Issues Presented: This Court rephrases the following issues from the Pretrial Order:

Issue One: Is Petitioner entitled to past due and ongoing TTD benefits as a result of his 3/26/2012 injury?

Issue Two: Is Petitioner entitled to past due and ongoing PTD benefits as a result of his 3/26/2012 injury?

Issue Three: Is Petitioner entitled to ongoing medical benefits, including, but not limited to, back surgery?

Issue Four: Is Petitioner entitled to costs?

FINDINGS OF FACT

¶ 5 This Court finds the following facts by a preponderance of the evidence.¹

¹ Ordinarily, the claimant bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks. *Dumont v. Wickens Bros. Constr. Co.*, 183 Mont. 190, 201, 598 P.2d 1099, 1105-06 (1979) (citations omitted). However, "where the dispute is whether the claimant has the right to permanent total disability (PTD) benefits under § 39-71-702, MCA, the insurer bears the initial burden of proving that the claimant is not permanently totally disabled. . . . The insurer meets its burden by showing that a physician has: determined that the claimant is at maximum medical improvement, set the claimant's physical limitations, and approved a job analysis. If the insurer meets its initial burden, the burden shifts to the claimant to prove that he is entitled to PTD benefits notwithstanding the approved job analysis." *Davis v. Liberty Ins. Corp.*, 2017 MTWCC 21, ¶ 43 (quotation marks and citations omitted); see also *Kellegher v. MACO Workers' Comp. Trust*, 2015 MTWCC 16, ¶ 71; *Holmes v. Safeway Inc.*, 2012 MTWCC 8, ¶ 59; *Drivdahl v. Zurich Am. Ins. Co.*, 2012 MTWCC 43, ¶ 24; *Weisgerber v. Am. Home Assurance Co.*, 2005 MTWCC 8, ¶ 32.

Schieber's Background

¶ 6 Schieber is 62 years of age and a resident of Osawatomie, Kansas. He graduated from high school in 1975 and has had no further formal education or training. He has a commercial driver's license and has been a truck driver for most of his adult life, his only other experience being custodial work at a school.

¶ 7 On March 12, 2012, M.A. DeAtley Construction (DeAtley) hired Schieber to work at a jobsite in Harlowton, Montana. As a belly dump truck driver, Schieber's main job was transporting gravel from a pit across rough pasture ground to a field, between 60 and 80 times a day. However, DeAtley was short on laborers, so when other employees asked him to help with odd jobs during driving lulls, Schieber did. Among other things, he moved equipment, some of it weighing over 100 pounds. DeAtley never told him not to help out at the jobsite. Indeed, he felt it was an unwritten rule that if you were not a team player, especially as a new employee, DeAtley would not keep you around.

Schieber's Injury

¶ 8 While he was working on the night of March 26, 2012, Schieber hit a soft spot in the field and rolled his truck and trailer onto their right sides. The accident left him dangling from his seatbelt. After managing to free himself and get out of the truck, Schieber felt "beat up" but adrenaline masked the extent of his injuries.

¶ 9 DeAtley's night superintendent asked Schieber for a urine sample to test for drugs but decided not to administer a breathalyzer as those the company had on hand were expired. He told Schieber he could not work for 72 hours but to come back the next day to see the safety officer. Schieber returned to his camper nearby, drank a few beers to settle down, and eventually went to bed.

¶ 10 The next morning, the safety officer asked Schieber to take a breathalyzer, but he declined, indicating: "I don't think I could pass it, and I don't think it would be fair to me if I took one because I went home and drank some beer." However, because his left arm, lower back, and right buttocks were bothering him, Schieber did allow a DeAtley surveyor to bring him to the hospital to get checked out. He left with instructions to rest and take over-the-counter pain medicine as needed.

¶ 11 Schieber drove to his house in Huson to recuperate and await word from DeAtley. But when he called the company to check in, the secretary told him "they're going to terminate you because you did a lot of property damage on their vehicle." On April 2, 2012, Schieber received a letter from DeAtley confirming his termination but citing his refusal to take the breathalyzer as the cause.

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Medical Evidence

Schieber's Treatment in Montana

¶ 12 On April 4, 2012, Schieber saw Fred Westereng, PA-C, complaining of continued right-sided back and hip pain, and stiffness and soreness in his legs. Westereng thought the problem was “muscular in origin,” and referred him for physical therapy.

¶ 13 After a month, Schieber “ha[d] made good progress with his SI joint pain but his L[eft] shoulder ha[d] not reacted to conservative therapy.”

¶ 14 On May 10, 2012, Gloria Kornish, PA-C, took him off work, prescribed Lortab and Flexeril and referred him for orthopedic evaluation.

¶ 15 On June 11, 2012, Schieber saw Michael W. Woods, MD, for his back and shoulder. Dr. Woods ordered MRIs of both areas and released Schieber to modified duty, limiting his lifting to 10 pounds and indicating “no prolonged sitting, occasional bending/twisting of back.”

¶ 16 Notwithstanding, DeAtley never offered Schieber modified-duty work because it had already fired him.

¶ 17 Following review of the MRIs on July 12, 2012, Dr. Woods recommended a right L5-S1 transforaminal epidural steroid injection and continued physical therapy.

¶ 18 Liberty accepted Schieber's injury claim and paid wage-loss and medical benefits for his left shoulder and low back.

Schieber's Treatment in Alaska

¶ 19 Later that summer, after he relocated to Alaska, Schieber had shoulder surgery with Mark E. Clyde, MD. Although he was left with a “Popeye” biceps muscle from one of the procedures, Dr. Clyde thought Schieber would do fine and referred him for physical therapy. About six months later, notwithstanding that Schieber was not yet medically stable as to his shoulder, Dr. Clyde released him to return to regular work.

¶ 20 On November 9, 2012, Schieber saw James L. Glenn, PA-C, complaining of “central lower back pain with referral symptoms into the right buttocks, right posterior thigh into calf with occasional symptoms into the pads of his feet,” as well as “numbness and tingling in the right leg,” though “not on a constant basis.” Glenn recommended six more weeks of physical therapy, after which he gave Schieber a full-duty work status note.

¶ 21 Schieber returned to see Glenn in early January 2013, after exacerbating his lower-back pain while clearing flood water out of his basement. Glenn ordered an MRI,

performed a right L5 selective nerve root block, and gave Schieber a light-duty work status note.

¶ 22 Although the nerve block temporarily reduced his pain, Schieber decided to meet with Glenn's partner, James M. Eule, MD, to discuss surgical options. The orthopedic spine surgeon recommended a right L5-S1 foraminotomy with decompression, took Schieber off work completely, and performed the surgery on May 1, 2013.

¶ 23 On June 11, 2013, Dr. Eule noted that Schieber was doing "better and better." He had "less pain, although he ha[d] numbness on the ball of his foot still and he still [had] a little bit of pinching in his calf." Dr. Eule referred him for six more weeks of physical therapy and noted, "He is not able to go back to his work as a truck driver yet. [But] [i]f they have light duty he can do that."

¶ 24 Later that summer, perceiving Schieber's desire to get back to work, Dr. Eule referred him for a work hardening program with John DeCarlo, OTL. Schieber participated but left the program without completing the last few sessions or a final functional capacity exam (FCE) because he found the experience "too confining." As he put it, "people was [sic] always around me, and you know, asking me questions. And I never communicated with people that intensely."

¶ 25 In notes from Schieber's last work hardening session on September 27, 2013, DeCarlo wrote, "his pain complaints have been almost nonexistent most recently. I do anticipate return to work at full duties as a heavy equipment operator."

¶ 26 The same day, Schieber told Dr. Eule he had "accomplished what he need[ed] to" with work hardening and was "ready to get back to work." However, he had come to the realization that "he need[ed] to do something less laborious than what he ha[d] done in the past." Dr. Eule agreed, later testifying that people who have had injuries significant enough to need back surgery do not usually go back to heavy-labor-type jobs. Dr. Eule declared Schieber at maximum medical improvement (MMI) in relation to his spine issues, referred him for an impairment rating for his back and his left shoulder, and released him back to work with the standard restrictions he gave anyone with a back problem that had required surgery, including no lifting over 50 pounds, and limited bending, lifting, and stooping.

¶ 27 On October 10, 2013, Schieber underwent an impairment evaluation with Larry A. Levine, MD. He described his pain as a zero "when he [wa]s not moving around," and a five "if he work[ed] or exercise[d]." Dr. Levine noted no pain behavior and assigned Schieber a 16% whole person impairment, including 3% for the left-shoulder injury and 13% for the low-back injury.

¶ 28 Liberty paid Schieber the impairment benefit and terminated Schieber's temporary total disability (TTD) benefits as of December 9, 2013.

¶ 29 On December 16, 2013, Schieber returned to work as a maxi haul truck driver, hauling ice chips to build roads for oil companies in the North Slope region of Alaska.

¶ 30 On February 13, 2014, Schieber saw Glenn, complaining of “stabbing” pain in his right buttocks, and occasional symptoms into his right posterior thigh and calf. Schieber told Glenn he had been “doing quite well driving a truck up on the Slope[,] [but] [t]hey recently changed him to driving a water truck and he had to get in and out of the truck and load objects and load the water and this seemed to exacerbate his symptoms.” Glenn found no significant changes between new lumbar spine x-rays and those taken in 2013. He gave Schieber prescriptions for Mobic and Zanaflex and told him to get in touch if he was not better in the coming weeks.

¶ 31 Schieber returned to see Glenn on March 18, 2014. He reiterated that getting in and out of the trucks was “really taxing on him,” that he “ha[d] had some increased lower back pain,” and that he “[wa]s quite miserable.” He had stopped working, did not think he could go back, and inquired about disability. Glenn noted, “I think at this point he is capable of doing some type of job, maybe not what he was doing before, but he should be able to be gainfully employed somewhere.” Glenn ordered a lumbar spine MRI and prescribed Celebrex for further relief of Schieber’s symptoms.

¶ 32 In April 2014, Schieber’s claim file at Liberty was reassigned from Karen Toldness to Jaimie Kern.

¶ 33 At a follow-up appointment on April 8, 2014, Schieber told Glenn he was “quite uncomfortable” and did not think he could return to his job. Glenn reviewed Schieber’s MRI, concluding, “[Schieber] has significant right L5-S1 neuroforaminal narrowing that is most likely causing his ongoing symptoms. . . . [H]e is unable to return back to work at this point and is seeking out further treatment options.” Glenn suggested an epidural steroid injection, but Schieber wanted to think about it. Glenn took him off work pending his next appointment in two weeks.

¶ 34 Liberty started paying TTD benefits again as of April 8, 2014, under a reservation of rights.

¶ 35 On April 24, 2014, Schieber returned to see Glenn. Schieber reported that he could not return to work at that point. He was not interested in doing anymore injections but wanted to be re-evaluated by Dr. Eule. Glenn kept him off work pending his appointment with Dr. Eule on May 29, 2014. But, after splitting up with his girlfriend, Schieber could no longer afford to stay in Alaska and moved to Kansas before the appointment.

Schieber’s Treatment in Kansas/Missouri

¶ 36 Schieber requested approval from Liberty for Fermin J. Santos, MD, a physiatrist, to take over his care. However, when Kern called the office to schedule an appointment,

Dr. Santos would only agree to see Schieber if “it was as an IME, with the option to take over care.” Kern assented.

¶ 37 Dr. Santos first examined Schieber on June 9, 2014. Schieber complained of pain and stiffness in his back and into his right buttock and constant numbness and tingling in his feet, worse on the right than the left. His average pain level was an eight, the pain was continuous, and it was better when he kept moving and worse when sitting or standing for long periods of time or driving or doing steps. Dr. Santos recommended a trial of Gabapentin to treat the tingling in his feet and put Schieber on light-duty status, restricted him to sedentary work only, with alternate sitting and standing as needed for pain control, and indicated he should lift no more than 20 pounds and drive no more than three hours consecutively.

¶ 38 Shortly thereafter, Dr. Santos reviewed Schieber’s medical record, x-rays, available imaging studies, and last office visits at Kern’s request and responded to a set of questions she posed by letter. Dr. Santos recommended a lumbar MRI, with and without contrast, to determine if there was a “disc herniation, or scar tissue, contributing to [Schieber’s] foraminal stenosis,” as well as an EMG of Schieber’s right lower extremity “for objective data to evaluate for radiculopathy.” He anticipated that Schieber would be at MMI once the additional workup was done.

¶ 39 On July 19, 2014, a lumbar MRI with and without contrast indicated that Schieber had an “Essentially stable MRI lumbar spine since 4/2/2014” with “No acute abnormalities.”

¶ 40 On August 22, 2014, Dr. Santos performed an EMG of Schieber’s right lower extremity. The study was “Abnormal” and showed that Schieber had “chronic right L5 radiculopathy.” Dr. Santos recommended a right L5 transforaminal epidural steroid injection, which he performed on September 10, 2014.

¶ 41 At a September 29, 2014, follow-up appointment with Dr. Santos, Schieber reported “no significant improvement” after the transforaminal epidural steroid injection procedure. Dr. Santos kept the same work status and restrictions in place and, determining that he had nothing else to offer Schieber from a conservative standpoint, referred him to Mark Bernhardt, MD, an orthopedic surgeon, for surgical evaluation.

¶ 42 On November 7, 2014, after physical examination and review of Schieber’s x-rays, MRIs, and EMG, Dr. Bernhardt’s impressions included chronic low-back pain and chronic lumbar radiculitis in the right leg. He returned Schieber to light-duty work and set permanent restrictions of sedentary work and alternate sitting/standing as needed for pain control. He “[d]id not recommend further lumbar spine surgery.” Although Schieber claimed at trial that it was his own reticence that led Dr. Bernhardt to determine he was not a candidate for surgery, Dr. Bernhardt thought Schieber was doing “too well” to consider surgical treatment and that permanent activity restriction was probably his best option:

He would require right L5-S1 complete facetectomy and transforaminal lumbar interbody fusion (TLIF) in an attempt to resolve his persistent radicular symptoms. All things considered, I am not convinced that is his best interests.

. . . [I] [r]ecommend Mr. Schieber [sic] return to Dr. Santos for further non-operative treatments and disposition after optimization.

¶ 43 On December 11, 2014, Schieber had an FCE. Beforehand, Jessica Carlson, PTA, e-mailed Kern indicating that she would be doing Schieber's FCE and asking whether she should continue on with tolerance testing if Schieber failed to show his full ability with the lifting and hand strength assessment. Kern responded in the affirmative.

¶ 44 Schieber's FCE was determined to be "Invalid" due to the following:

- Cogwheeling was present during the manual strength testing and the lifting evaluation.
- The pain questionnaires are high for subjective pain reports and behaviors.
- There is an absence of correlation between lifts of unmarked steel bars and the corresponding lifts on the XRTS Lever Arm. Overall Percentage Change = 38.9%.

The FCE report states that because Schieber "failed to give maximum voluntary effort during [the] FCE . . . it is undeterminable at this time safe, maximum lifting capabilities and/or other functional capabilities." Nevertheless, the report indicates that Schieber was able to lift up to 46 pounds to waist height and sit constantly, and that he demonstrated the ability to meet the demands of the Transit Bus Driver, Dispatcher, and Purchasing Agent jobs.

¶ 45 On December 22, 2014, Dr. Santos notified Liberty that he had determined Schieber was at MMI, restricted his lifting to 45 pounds at any level based on the FCE, and approved his time-of-injury job.

¶ 46 On January 7, 2015, Kern wrote to Schieber, noting Dr. Santos' findings, and stating that TTD benefits would be terminated as of January 22, 2015.

¶ 47 Around mid-March 2015, Schieber wrote to Kern, offering alternative explanations for his invalid FCE results and disputing Dr. Santos' finding that he was at MMI. He referenced consulting with a local chiropractic office and requested authorization to begin treatment there as soon as possible.

¶ 48 In a reply dated March 25, 2015, Kern reiterated her reliance on Dr. Santos' medical opinion and denied authorization for chiropractic care.

¶ 49 By letter dated April 6, 2015, Schieber told Kern: "I do not feel at this time that I can safely return to work driving a truck with the pain and discomfort that I feel," and expressed concern that, according to the Montana Department of Labor & Industry, there was no retraining that would allow him to earn wages equal to what he earned at the time of his accident.

¶ 50 In mid-April, Schieber returned to see Dr. Santos to discuss further treatment options. Dr. Santos referred him for a second opinion with Alexander Bailey, MD, an orthopedic surgeon. Kern authorized the consultation and posed questions for Dr. Bailey to answer afterward.

¶ 51 On June 25, 2015, Dr. Bailey met with Schieber and prepared what he termed a "new patient Workers' Compensation consultation with medical record review and second surgical opinion." Notwithstanding that Liberty had already accepted Schieber's claim, Dr. Bailey opined that Schieber's back problems were the result of a pre-existing degenerative condition. In his report, Dr. Bailey acknowledged that the FCE was technically invalid, but he thought "medium duty status [wa]s quite reasonable" for Schieber anyway. He summarized Schieber's treatment options as: "live with it regular duty, live with it with permanent work restrictions obtained through a functional capacity examination, repeat attempts at conservative management, or surgical intervention." Of surgical intervention, which would be "an anterior-posterior lumbar spinal fusion," Dr. Bailey opined, the "outcome is unpredictable at this time frame and motivational factors are of critical importance." In particular, he noted that Schieber appeared to have a primary goal of seeking out disability, and that "If that is a motivational factor, surgery would be a very poor choice." Nevertheless, beyond outlining options, Dr. Bailey "d[id] not have a direction to offer."

¶ 52 In a letter to Kern dated July 21, 2015, counsel for Schieber indicated that "David continue[d] to suffer severe low back pain" and that "he want[ed] to proceed with fusion surgery." He requested approval of "another appointment for David to see the surgeon" and reinstitution of "TTD benefits from the date of TTD termination."

¶ 53 In a written response dated August 17, 2015, Kern explained that because Schieber had been released to return to his time-of-injury occupation, as well as alternative occupations, he was not temporarily totally disabled. She therefore denied counsel's request for TTD benefits. She further denied authorization for Schieber to proceed with fusion surgery, citing Dr. Bailey's opinion that his need for surgery was not related to his work injury.

¶ 54 On May 31, 2017, Schieber saw Geoffrey L. Blatt, MD, a neurosurgeon, "to get an opinion outside the worker's compensation arena" for his persistent back pain, and numbness and tingling in both feet. Dr. Blatt explained that "there is about a 60 – 70%

chance that he would do well with a fusion . . . but there is also a chance that he would go on and have failed back syndrome and actually be worse.” Dr. Blatt advised that “if he could live with the symptoms in his low back,” he “would recommend that over surgery.” Dr. Blatt thought Schieber was “planning to just live with his symptoms.”

¶ 55 Although he had moved to Kansas over three years prior, Schieber traveled to Alaska on December 12, 2017, to see Glenn and Dr. Eule about his “ongoing right lower back pain and right leg radicular symptoms.” Schieber indicated that his work status at the time was “retired,” that he was taking Celebrex, Neurontin, and occasionally Percocet, and that he wanted to discuss his surgical options.

¶ 56 Dr. Eule expressed hope that an L5-S1 fusion and decompression could give him some relief. For his part, Glenn noted that Schieber’s symptoms may have gotten slightly worse since they last met, advised that Schieber’s “tobacco abuse could be contributing,” and prescribed Chantix to help him quit.

Dr. Bailey’s Testimony

¶ 57 At his deposition on April 24, 2017, Dr. Bailey testified that Schieber’s chances for clinical success from fusion surgery were “exceptionally low” based on his “current clinical presentation” and “the complexities of the Workers’ Compensation case.” Although Dr. Bailey opined that Schieber could substantially improve his chances for surgical success by eliminating secondary gains, he thought his present options were “basically down to live with it with the recommended work status restrictions.”

Dr. Eule’s Testimony

¶ 58 At his deposition on May 1, 2018, Dr. Eule opined that Schieber would not be at MMI until he got L5-S1 fusion surgery. In particular, he testified that the procedure would get rid of Schieber’s leg pain, decrease his back pain, and possibly increase his function. He estimated that Schieber had between a 50 and 90 percent chance of relief from the surgery, “if all things were controlled, he was quitting smoking, and we got a good fusion and good decompression.”

¶ 59 As to whether he would operate on Schieber if he were still smoking, Dr. Eule explained that, generally, when patients are “having progressive neurological changes . . . then often we don’t require them to quit smoking. But when they have a significant back pain problem or degenerative problem without progressive neurological deficit, we will often require them to have a negative nicotine test before we do the surgery.” Dr. Eule acknowledged that he had not seen Schieber in over four months. Nonetheless, he opined that “if he was in the same state as he was before, then, no, we would probably recommend he quit smoking before we did the surgery.”

¶ 60 At the time of trial, Schieber was still smoking 5 or 6 cigarillos a day.

Vocational Evidence

¶ 61 After Schieber's accident, Deedee Pearson from DeAtley Human Resources was in touch with Liberty, providing details about Schieber's position with the company. In a written description of the job, she indicated that DeAtley's belly dump truck drivers had to be able to sit for three to five consecutive hours at a time for 11 total hours per day and stand or walk for one hour at a time for one total hour per day. While there were no lifting/carrying requirements, DeAtley's drivers had to "be able to assist in arranging load for truck."

¶ 62 On October 2, 2012, Liberty's certified rehabilitation counselor (CRC), Lisa Kozeluh, completed an interview with Schieber by phone. Schieber told her he thought he would be able to go back to belly dump truck driving since it was a "light duty job" and that DeAtley's description of the job sounded "accurate."

¶ 63 On October 3, 2012, Kozeluh prepared a time-of-injury job analysis (JA). She based it on previous JAs she had done for belly dump truck driving and information provided by DeAtley and Schieber. Among the requirements detailed on the time-of-injury JA are that the driver must be able to sit in the vehicle seat for up to 120 minutes at a time up to 11 hours a day. The time-of-injury JA also states: "lifting and carrying are nearly non-existent with the exception of lifting up the tractor hood to inspect engine"; and pushing and pulling less than 10 pounds, from waist to chest, is occasionally "necessary when climbing in and out of truck, fueling, inspecting, and when putting truck into gear."

¶ 64 Kozeluh sent the time-of-injury JA to Pearson for review, and she signed off on it on October 30, 2012.

¶ 65 In the Fall of 2013, around the time Liberty paid the impairment benefit, Kozeluh spoke with Schieber about vocational rehabilitation options, including direct placement, short-term retraining, and job assistance. However, because he was planning on returning to truck driving, he was not interested in either going back to school or these other services at the time.

¶ 66 On November 21, 2013, Dr. Eule approved the JA for Schieber's time-of-injury position of Belly Dump Truck Driver (identified as "Light Duty"), as well as alternate JAs for Truck Driver (identified as "Medium Duty"), Mixer Driver (identified as "Medium Duty"), Dispatcher (identified as "Sedentary Duty"), and Purchasing Agent (identified as "Sedentary Duty").² Dr. Eule also signed and dated an additional JA for Transit Bus Driver (identified as "Light Duty"), but checked neither "approved" nor "disapproved."³

² Kozeluh ended up withdrawing the Purchasing Agent job from consideration because she determined that, with only one job in the state, there was not a viable labor market for that position. As such, this Court makes no further mention of that job.

³ Although Kozeluh's business prepared a JA for Water Truck Driver (identified as "Medium Duty," which may be modified to "Light Duty") in mid-April 2017, it was never presented to Dr. Eule.

¶ 67 On March 10, 2014, around the time the water truck job was exacerbating his symptoms, Schieber spoke with Kozeluh again about rehabilitation options. Kozeluh testified, however, that she closed her file in April 2014, because there were still approved jobs, including Schieber's time-of-injury job, and because Schieber moved to Kansas.

¶ 68 Dr. Santos formally signed his approval of the time-of-injury JA on December 30, 2014. He did not review any other JAs. Notwithstanding, Schieber has not tried to return to work in Kansas since he became eligible for and went on social security disability in late 2014.

¶ 69 In a letter to Kern dated July 21, 2015, counsel for Schieber alleged that Liberty's CRC erroneously listed his time-of-injury job as light duty. He included descriptions of the types of heavy-duty tasks Schieber performed around the time of his injury. Kern forwarded this letter to Kozeluh and asked her to investigate.

¶ 70 Kozeluh contacted Pearson to review counsel's concerns. Pearson responded that the specific duties Schieber raised were not "requirements" of its belly dump truck driver position:

We will sometimes ask individuals to do other things to keep them busy when the trucks aren't running. However, th[ese] [are] not [] normal requirement[s] of a belly dump position.

Although there were no current DeAtley employees who had worked at the same time as Schieber who she could ask about these issues, Kozeluh spoke with Holly Roberts.

¶ 71 Roberts had been driving belly dump trucks for 17 years, most recently for five years at DeAtley. She worked at the same jobsite in Harlowton as Schieber but did not arrive until several months after he left. She advised Kozeluh that she "does not do any lifting in her job."

¶ 72 On September 4, 2015, Kozeluh responded to Kern by letter. After completing her investigation, Kozeluh determined that the heavy-duty tasks Schieber described doing were not part of his job because he did not have to do them; in other words, they were "marginal" as opposed to "essential" job functions. She did not recommend any changes to the belly dump truck driver JA, noting to Kern that she had reviewed it over the phone with Schieber on October 3, 2012, and he concurred with the duties they reviewed.

¶ 73 On September 10, 2015, Kozeluh sent Kern her Employability and Wage Loss Analysis for Schieber. It indicates that Schieber has transferable skills specifically related to trucking, as well as basic math, critical thinking, judgment, decision making, following oral and written instructions, reading and understanding maps, and time management. It also indicates that there is a labor market for several of the alternate positions, including Mixer Driver and Dispatcher, although it notes that Schieber could be more competitive for the latter position if he took a basic computer course.

Schieber's Testimony

¶ 74 Schieber testified that he did not think of his belly dump truck driving job as light duty, given the weight of what he was lifting, and that he could no longer do that job since it beat him up too much and required too much continuous sitting. Schieber thought he could probably drive a maximum of 2.5 hours, on medication, which, at the time of trial, included Gabapentin, Hydrocodone, muscle relaxants, and anti-inflammatories, before he started having problems.

¶ 75 He testified that he can walk 20 minutes on the treadmill or a few acres outside for exercise but has physical problems that affect his ability to work, including his deafness in one ear and partial deafness in the other, numbness in his hands, and pain in his buttocks, shoulder, arm, lower back, and, though unrelated to his accident, his neck.

¶ 76 In terms of his skills, Schieber testified that he has a laptop and smartphone and can use the Internet, Facebook, and e-mail. However, he testified that he “hunts and pecks” on the keyboard, cannot spell or read “worth a darn,” has illegible handwriting, does not think he could multi-task, and has no professional experience using a computer system, working with a dispatcher, or coordinating loads, locations, equipment times, fuel, mapping, or DOT documentation. He explained that DeAtley was his first truck-driving job that involved filling out logs and he ended up needing his supervisor’s assistance filling them out. He testified that he would love to have some kind of job but was told “there is nothing they could train me in to make the kind of money I was making driving a truck”; he wants to make a livable wage, which he considers to be at least \$15 an hour.

Holly Roberts' Testimony

¶ 77 Roberts testified at trial that the run between the gravel pit and dump in Harlowton was well-maintained and any time it got bumpy, she could ask DeAtley to send a blade over to smooth it out. She also explained that the belly dump trucks have air ride seats, which make the work more comfortable but does not take away side-to-side jerking. She further stated that she does not do maintenance on her truck but is required to lift landing legs for her trailer, which weigh about 35 pounds, as well as the hood of her truck, which does not weigh any more than the legs.

¶ 78 Roberts testified that she has never seen anyone from DeAtley ask a driver to do laborer work and has never seen a driver doing it. However, she did say that drivers had the option of helping out during lulls if they wanted to and would be paid at their driving rate if they did so. In her view, it would not be adverse to a driver’s employment to decline to help.

Lisa Kozeluh's Testimony

¶ 79 Kozeluh is a CRC with 22 years of previous claims examiner experience. She testified at her deposition that she chose the positions for which she prepared JAs in this

case based on Schieber's knowledge of and experience in trucking and driving. However, she testified that there was actually a broader range of jobs he would have been qualified for based on his background and his physical capacity, including Mail Truck Driver, Delivery Truck Driver, and Shuttle Driver.

¶ 80 Kozeluh testified that it was not challenging to find a 62-year old man work in Montana. She estimated that at least 100 employers in Montana employ dispatchers and thought Schieber was qualified for such a position. From a vocational standpoint, she thought he was personable over the phone and had good communication skills from every-day life, and she assumed from his 30 years in the trucking industry that he had experience keeping records, dealing with dispatchers, and handling stress. She noted that many dispatchers are former truck drivers because they know DOT regulations and what drivers are expected to do, and they communicate with dispatchers daily.

¶ 81 Moreover, although she did not test Schieber's competency with computers, Kozeluh gleaned from his ownership of a laptop that he had basic knowledge, including how to use a mouse and keyboard, and how to navigate a screen. She never tested Schieber for writing or spelling and conceded that a person who could not write at all or spell could probably not do the Dispatcher job. Nonetheless, Kozeluh testified that dispatchers do not need to type full sentences, just enter data, and even though Schieber did not type well, he could do a free online tutorial to update those skills. Kozeluh testified that it takes one to two weeks to get basic computer skills. She saw no indication that Schieber could not learn new skills and had no reason to think he could not be gainfully employed.

¶ 82 From a physical standpoint, Kozeluh thought Schieber could do the Dispatcher job standing and noted that the dispatchers at Stacks Trucking have sit/stand desks. She acknowledged, however, that she did not factor in Schieber's neck problems or left-arm numbness, as she never saw Dr. Blatt's records, or his hearing problems, because he never mentioned wearing hearing aids.

Margot Luckman's Testimony

¶ 83 Margot Luckman is a CRC with 33 years of experience who Schieber hired to perform a vocational analysis, i.e., to assess how Schieber's injuries have affected his ability to work and earn. She testified that a JA should include job duties that the person was performing, whether essential or nonessential:

[W]hen the doctor signs, he needs to see all of it so he can say oh, yeah, all but these three things I don't want him doing. I'm going to disapprove it because of this. And then we can go back and negotiate whether or not those things can be modified or eliminated. So the actual job analysis needs to be accurate for what the person was doing at the time of injury."

Luckman further testified that when she prepares a time-of-injury JA, she visits the job site where the worker worked if she “possibly can,” and if she does not, she calls it a “description,” not an “analysis.”

¶ 84 Based on the lifting tasks Schieber performed and DeAtley’s concession that it asked him to do those tasks, Luckman would label the Belly Dump Truck Driver job as heavy duty. Indeed, she had previously analyzed the position and testified that it is not typically classified as light duty.

¶ 85 Based on the JA Kozeluh prepared for the Dispatcher position, Luckman did not think Schieber was either vocationally qualified or a good match for physical reasons. She thought he was personable enough and a capable communicator but not a strong reader, lacking in computer and customer service experience, and unable to sit for prolonged periods. Moreover, Luckman testified that she did not think Schieber was competitively employable due to his age, and because of his pain levels and the amount of Gabapentin he takes.

¶ 86 Luckman was not asked about Schieber’s ability to do such jobs as Mail Truck Driver, Delivery Truck Driver, or Shuttle Driver. However, when asked whether she had formed any opinions as to whether Schieber could currently work, she opined:

[I]f you’re going to be realistic . . . [t]here might be something, maybe, that we could find that would be like entry-level wage, and maybe part time, and maybe, you know, answer a phone, or run down the hall, or do a few things. I mean, I don’t know. It would have to be very creative. I don’t think he’s really competitively employable right now.

¶ 87 As to the physical or medical issues that she believed prevented Schieber from being employable, Luckman testified that with his level of Gabapentin, “people aren’t cognitively very quick. They’re not functioning real well. They’re not driving real well.”

[T]hrow hydrocodone and a muscle relaxant in on top of that, we’re talking drowsy, dizzy, not really clearly thinking. So that is a limitation, that level of medication.

So then when we’re looking at someone that can’t sit for prolonged periods, that can’t drive, use his best skill, and now we’re going to try to force him into something sedentary to light that he can change his positions throughout the day, not thinking too clearly, in a lot of pain, and doesn’t have any skills. I just think the combination of all of that is impaired.

¶ 88 Luckman opined that after fusion surgery, Schieber might be able to do a part-time, entry-level position, where he could be trained on the job. She did not recommend retraining; she thought it would take one to two years for Schieber to get the appropriate

level of computer skills. She also noted that when he starts getting more symptoms into his arms, his doctors are going to recommend neck surgery.

Dr. Bailey's Testimony

¶ 89 As to Schieber's ability to work, Dr. Bailey testified that Schieber has a painful condition, that his pain can sometimes be severe, and that a wide variety of activities, including sitting, standing, and walking can aggravate it. He did not know whether Schieber still required the medications he was taking when they met but explained that he allows his patients to work while taking Gabapentin, and muscle relaxants like Zanaflex and Skelaxin, which are less sedating than Flexeril. Dr. Bailey believed Schieber could "[a]t least" do medium-duty work, and possibly more; however, to render an opinion on that "would require an undated [sic] functional capacity exam." Although he also testified that, if he had been Schieber's treating physician, he would have released him to regular duty without any restrictions, Dr. Bailey acknowledged that he was never Schieber's treating physician.

Dr. Santos' Testimony

¶ 90 At his deposition on April 26, 2017, Dr. Santos testified that he would approve the Belly Dump Truck Driver position even if Schieber's counsel were to prove that lifting was actually required, as long as the lifting did not exceed 45 pounds. However, if the lifting went up to 100 pounds, he would disapprove that job. He did not think being required to sit for 11 hours a day would necessarily be a problem for Schieber since there are people with "bone on bone severe disc space narrowing with no disc there at all" that "aren't symptomatic." However, he testified that he would defer to Dr. Bernhardt and Dr. Bailey on the issue of restrictions.

¶ 91 Dr. Santos also opined that Gabapentin and the muscle relaxant Cyclobenzaprine were needed — as long as they continued to help him — to sustain Schieber's highest level of function but testified that both drugs carry warnings not to drive while taking them.

Dr. Eule's Testimony

¶ 92 Dr. Eule testified that Glenn was right to take Schieber off work on April 8, 2014: "[I]f he's miserable and he can't do his job, then, yes, we would recommend that he not go back to work." As for whether his prior job approvals should be considered no longer approved as of the same date, Dr. Eule testified:

Well, because he's not back to the job he could do before, so yes. And we've already said we thought after his work hardening thing that he could go back to this work. But as we've said, he's kind of proven that it has not worked for him. So, yes, he's not able to get back to the jobs that we would have — because that would have been one of them that was in there that we approved.

¶ 93 Counsel for Schieber then took Dr. Eule one-by-one through a handful of JAs he had reviewed in November 2013. Dr. Eule testified that the following JAs should be disapproved as of April 2014: Truck Driver, Transit Bus Driver (“he was having trouble sitting for extended periods of time . . . so I think that this would be difficult for him to do”), Mixer Driver (“[t]his job would be more heavy than the . . . previous job that you mentioned . . . [b]ecause . . . in this one he has to carry . . . [and] do a lot of other stuff other than just sit in the chair”), and Belly Dump Truck Driver (“generally these are more off-road-type stuff . . . uneven surfaces . . . sitting it’s going . . . to be more stressful than the bus driver one that was not approved”).

¶ 94 After going through each of the driving jobs with Dr. Eule, counsel for Schieber asked, “Sitting here right now, do you know of any job that you would approve for Mr. Schieber that you’ve seen a job analysis for?” Dr. Eule answered, “None that I’ve seen a job analysis for.” Dr. Eule then opined that someone with Schieber’s back condition would have difficulty sitting and standing for long periods of time. Indeed, he explained, “[a]ny kind of thing without changing positions can, you know, give people back pain when they have that degenerative disc.”

¶ 95 As for the effects of Schieber’s medications, Dr. Eule testified that Celebrex was not a big deal, but that Schieber could not be on Percocet and drive commercially. He further testified that it would not be wise for a person on Gabapentin to drive commercially due to its sedative effects, and that the muscle relaxant Robaxin has less sedative effects than Flexeril.

Resolution of Dispositive Facts

MMI Status

¶ 96 Schieber was at MMI when Liberty terminated TTD benefits on January 22, 2015. When Dr. Santos found Schieber at MMI on December 22, 2014, he had performed several diagnostic procedures, as well as an L5 transforaminal epidural steroid injection that produced no significant relief. Dr. Bernhardt, to whom Dr. Santos had sent Schieber for a surgical opinion, recommended against fusion surgery. At that time, no other provider was recommending that Schieber undergo further treatment. This Court agrees with Dr. Santos’ determination that Schieber was at MMI on December 22, 2014, and there is no evidence that Schieber’s condition changed between then and January 22, 2015.

¶ 97 Schieber remains at MMI. Although two of Schieber’s medical providers later opined in 2017 that fusion surgery could be helpful, both qualified their recommendations in significant ways. First, even though Dr. Blatt thought surgery had a 60-70% chance of success, he advised that if Schieber could live with his symptoms, he should do that instead. Dr. Blatt thought Schieber was planning to just live with his symptoms and Schieber introduced no evidence that he cannot do so. Second, while Dr. Eule testified that Schieber had between a “50 and 90 percent chance of relief” if he got surgery, he

explained that those results depended upon a variety of factors, including Schieber's "quitting smoking." Moreover, Dr. Eule testified that if Schieber were in the same neurological state as he was at his last appointment, he would require Schieber to quit smoking before he did the surgery. Schieber introduced no evidence that he suffered any neurological decline since seeing Dr. Eule on December 12, 2017, and at trial, he testified that he still smoked. Thus, Schieber is not currently a candidate for fusion surgery, and there is no primary medical service from which he could reasonably expect to gain further material functional improvement.

Job Analyses

¶ 98 The only JA that was still approved on January 22, 2015, and remains approved, is the Dispatcher JA.

¶ 99 Dr. Eule's, Dr. Santos', and Dr. Bailey's approvals of the time-of-injury JA are null. Because DeAtley occasionally asked Schieber to lift over 50 pounds and would not have continued his employment had he declined to do it, Schieber's job was "heavy duty." Had the time-of-injury JA been accurate, Dr. Eule and Dr. Santos would have disapproved it because the position exceeded their lifting restrictions for Schieber. Dr. Bailey would have disapproved it because, as he explained, he could not determine whether Schieber could do more than medium-demand work without an updated FCE, which was never done.

¶ 100 As for the other positions, Dr. Eule retroactively disapproved the Truck Driver and Mixer Driver JAs as of April 8, 2014. However, he did not retroactively disapprove the Dispatcher JA. Thus, his approval of that position has been in effect since November 21, 2013.

Prospect of Performing Regular Employment

¶ 101 Because it had at least one approved JA as of January 22, 2015, Liberty met its initial burden of producing evidence that Schieber was and is not permanently totally disabled. Nevertheless, Schieber met the ultimate burden of proving that he neither had nor has a reasonable prospect of performing regular employment.

¶ 102 Schieber neither had nor has a reasonable prospect of performing the Dispatcher job. According to the JA Kozeluh prepared, the essential job functions of the Dispatcher position include: answering and routing calls from a 12-line phone system and radio; arranging drivers' schedules and directing them on their routes; entering route, load, and driver information into computer systems; and completing daily and weekly activity reports. The position specifically requires, among other things, excellent communication and customer service skills, basic computer knowledge, and the ability to read maps. The position also requires the ability to hear, both in person and over the phone, as well as continuous sitting with occasional walking and standing for breaks, copying, and filing.

¶ 103 Having observed Schieber's presentation while testifying at trial, this Court finds that he would not be a successful dispatcher. He did not hear well and had difficulty understanding some of the questions he was asked.

¶ 104 At his deposition, Dr. Eule noted that Schieber was having trouble sitting for extended periods of time. Indeed, he retroactively disapproved the Transit Bus Driver position because he thought it would be too difficult for Schieber to do the continuous sitting and rare standing and walking the position required. Although Dr. Eule was not asked, at his deposition, whether the JA for Dispatcher should be disapproved as of April 2014, this Court finds that, for the same reasons Schieber could no longer be a Transit Bus Driver, he could no longer be a Dispatcher. Similar to Transit Bus Drivers, Dispatchers are required to sit continuously, and can only walk rarely and stand occasionally for breaks, to make copies, and to file.

¶ 105 Moreover, Luckman did not think that Schieber was qualified or competitive for the Dispatcher position. This Court gives her opinion substantial weight because she considered a wide array of factors and analyzed each in a realistic manner. For example, she identified significant physical and vocational obstacles, including Schieber's inability to sit for prolonged periods, difficulty reading, and lack of customer service experience, and understood that the computer skills he would need on the job were more than he could acquire online in one to two weeks. Luckman also recognized the effect Schieber's age, and levels of pain and medication had on his viability as a candidate.

¶ 106 Although Kozeluh thought Schieber was qualified for the Dispatcher position, this Court gives her opinion less weight for several reasons. First, she lacked important information that could impact Schieber's physical ability to perform the job, including Schieber's hearing and neck problems, as well as his left-arm numbness. Second, although she testified that she thought Schieber could do the job standing up, Liberty introduced no evidence that Kozeluh verified that any Montana employers would accept that modification. Third, she made assumptions that turned out to be inaccurate. For example, she assumed that Schieber had experience keeping records and dealing with dispatchers. Schieber testified, however, that he had never kept records before working for DeAtley and ended up needing his supervisor's help to complete them. He further testified that his work had never involved communicating with dispatchers. Finally, Schieber's testimony also revealed that he did not have several of the attributes he would need to be effective in the position. For example, he struggled with communication, generally, had difficulty reading, spelling, and writing legibly, and did not think he could multi-task.

¶ 107 Schieber also neither had nor has a reasonable prospect of performing the Mail Truck Driver, Delivery Truck Driver, or the Shuttle Driver jobs. Although Kozeluh testified at her deposition that she sent Dr. Eule JAs for Truck Driver, Transit Bus Driver, and Mixer Driver because they paid better than entry-level and Schieber had the requisite knowledge and experience, and the JA for Dispatcher because Schieber had a working

knowledge of the trucking industry, she explained that there was a broader range of jobs Schieber would have been qualified for, based on his background and physical capacity, than she sent to Dr. Eule. These included Mail Truck Driver, Delivery Truck Driver, and Shuttle Driver. Nonetheless, neither Dr. Eule, Dr. Santos, nor Luckman were ever asked whether Schieber was qualified for those positions.

¶ 108 Finally, although this Court “is free to adopt any reasonable conclusion supported by the evidence,”⁴ it declines to find that Schieber either had or has a reasonable prospect of performing any other position. As this Court has previously ruled:

[D]etermining the essential functions of a job, which is not always performed in public view, and whether [the claimant] would be competitive for a particular position, is beyond common experience. Certainly, the Legislature recognized that these duties are beyond common experience when it required JAs to be prepared by a “rehabilitation provider,” which it defines as “a rehabilitation counselor certified by the commission on rehabilitation counselor certification.”⁵

Furthermore, the evidence shows that Schieber is at an older age, has a modest education, and his experience is essentially confined to truck driving. His non-trucking-related transferable skills are few, and include limited reading, writing, and computer abilities. He also suffers from a number of physical problems, including deafness, partial deafness, numbness, and pain, may be facing neck surgery soon, and uses medications that can slow down cognition and be sedating. Together, these factors weigh against a finding that Schieber either could or can find regular employment.⁶

CONCLUSIONS OF LAW

¶ 109 This case is governed by the 2011 version of the Montana Workers’ Compensation Act since that was the law in effect at the time of Schieber’s industrial accident.⁷

Issue One: Is Petitioner entitled to past due and ongoing TTD benefits as a result of his 3/26/2012 injury?

¶ 110 Section 39-71-701(1), MCA, provides, in pertinent part, “a worker is eligible for temporary total disability benefits: (a) when the worker suffers a total loss of wages as a result of an injury and until the worker reaches maximum healing” And, under § 39-71-116(21), MCA, MMI means “a point in the healing process when further material

⁴ *Davis*, ¶ 40 (citation omitted).

⁵ *Davis*, ¶ 40.

⁶ See *Davis*, ¶ 41 & cases cited at n.7.

⁷ *Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶ 32, 365 Mont. 405, 282 P.3d 687 (citation omitted); § 1-2-201, MCA.

functional improvement would not be reasonably expected from primary medical services.”

¶ 111 Schieber contends that Liberty failed to comply with the *Coles* criteria because it did not identify jobs that he could perform post-injury. Therefore, he argues that Liberty is responsible for past due and ongoing TTD benefits beginning on January 22, 2015, the date TTD benefits were terminated, and continuing until a proper *Coles* analysis is completed.

¶ 112 Liberty argues that TTD benefits were properly terminated because § 39-71-609, MCA, was satisfied: Schieber had achieved MMI from his shoulder and back injuries, Dr. Eule determined physical restrictions and approved jobs, including Schieber’s time-of-injury job, and notice of Dr. Eule’s determinations were provided to Schieber. Liberty further argues that there was no basis for reinstatement of TTD benefits because Dr. Eule’s position on fusion surgery is contradicted by multiple physicians, he never recanted the Dispatcher and Purchasing Agent JAs, and his recanting of the other JAs was neither credible nor based on objective medical evidence.

¶ 113 This Court concludes that Schieber is not entitled to past-due TTD benefits because, as found above, he was at MMI on January 22, 2015, when Liberty terminated TTD benefits. This Court further concludes that Schieber is not entitled to ongoing TTD benefits because, again as found above, he remains at MMI.

Issue Two: Is Petitioner entitled to past due and ongoing PTD benefits as a result of his 3/26/2012 injury?

¶ 114 Pursuant to § 39-71-702(1), MCA, “If a worker is no longer temporarily totally disabled and is permanently totally disabled, as defined in 39-71-116, the worker is eligible for permanent total disability benefits.” Under § 39-71-116(28), MCA:

“Permanent total disability” means a physical condition resulting from injury as defined in this chapter, after a worker reaches maximum medical healing, in which a worker does not have a reasonable prospect of physically performing regular employment. Lack of immediate job openings is not a factor to be considered in determining if a worker is permanently totally disabled.

¶ 115 Section 39-71-116(33), MCA, defines “regular employment” as “work on a recurring basis performed for remuneration in a trade, business, profession, or other occupation in this state.” The Montana Supreme Court has held that regular employment means a job for which a claimant is both physically and vocationally qualified.⁸ This Court has ruled that for a claimant not to be permanently totally disabled, the statute requires

⁸ *McFerran v. Consol. Freightways*, 2000 MT 365, ¶ 13, 303 Mont. 393, 15 P.3d 935.

the existence of specific jobs for which claimant is not only qualified, but competitive, as well.⁹

¶ 116 As found above, Liberty met its initial burden of producing evidence that Schieber was and is not permanently totally disabled with an approved JA. However, this Court found that Schieber met the ultimate burden of proving that he neither had nor has a reasonable prospect of performing regular employment. Therefore, he is entitled to past-due and ongoing PTD benefits.

Issue Three: Is Petitioner entitled to ongoing medical benefits, including, but not limited to, back surgery?

¶ 117 Under § 39-71-704, MCA, an insurer must furnish, among other benefits, reasonable primary medical services for conditions that are a direct result of the compensable injury. However, § -704(1)(f), MCA, provides:

(i) The benefits provided for in this section terminate 60 months from the date of injury or diagnosis of an occupational disease. A worker may request reopening of medical benefits that were terminated under this subsection (1)(f) as provided in 39-71-717.

(ii) Subsection (1)(f)(i) does not apply to a worker who is permanently totally disabled as a result of a compensable injury or occupational disease or for the repair or replacement of a prosthesis furnished as a direct result of a compensable injury or occupational disease.

¶ 118 Section 39-71-717, MCA, states, in pertinent part:

(2) Medical benefits may be reopened only if the worker's medical condition is a direct result of the compensable injury or occupational disease and requires medical treatment in order to allow the worker to continue to work or return to work. Medical benefits closed by settlement or court order are not subject to reopening.

. . . .

(5) A petition for reopening of medical benefits must be filed with the department within 5 years of the termination of medical benefits pursuant to 39-71-704(1)(f). A petition may not be filed more than 90 days before benefits are to terminate.

¶ 119 In his post-trial brief, Schieber argues that Liberty should pay for his future low-back surgery for two reasons: either because 1) he was permanently totally disabled on

⁹ *Crowell v. State Comp. Ins. Fund*, 1999 MTWCC 27.

December 22, 2014, when Dr. Santos declared him at MMI, and thus he is entitled to ongoing medical care; or because 2) he was at MMI on December 22, 2014, but fell out of it, and therefore became temporarily totally disabled again, when he asked for fusion surgery twice, the first time being on July 21, 2015, and the second time being on January 30, 2017, and both requests were prior to the 5-year statutory closing date of March 26, 2017.

¶ 120 Liberty argues that it should not have to pay medical benefits because the 5-year closure date passed on March 26, 2017, and: either 1) Schieber is not permanently totally disabled, in which case if surgery is needed to return him to work, he has to file a petition for the reopening of medical benefits with the department pursuant to § -717(5), MCA; or 2) Schieber needed to have a physician, rather than his attorney, request surgery on his behalf in order for it to be covered.

¶ 121 Because Schieber is permanently totally disabled, the 5-year closure rule set forth in § -704(1)(f)(i), MCA, does not apply, and he is entitled to ongoing medical benefits.¹⁰ However, his entitlement to coverage for fusion surgery specifically, will depend on whether that procedure is considered a primary medical service at some point in the future.

Issue Four: Is Petitioner entitled to costs?

¶ 122 Under § 39-71-611, MCA, “(1) The insurer shall pay reasonable costs . . . as established by the workers’ compensation court if: (a) the insurer denies liability for a claim for compensation or terminates compensation benefits; (b) the claim is later adjudged compensable by the workers’ compensation court.”

¶ 123 Because Schieber is entitled to past-due and ongoing PTD benefits, as well as ongoing medical benefits, he is entitled to his costs.

JUDGMENT

¶ 124 Schieber is not entitled to past due and ongoing TTD benefits.

¶ 125 Schieber is entitled to past due and ongoing PTD benefits.

¶ 126 Schieber is entitled to ongoing medical benefits.

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¹⁰ See § 39-71-704(1)(f)(ii), MCA.

¶ 127 Schieber is entitled to his costs.

¶ 128 After awarding Schieber his costs, this Court will certify this Judgment as final.

DATED this 20th day of September, 2019.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: Thomas J. Murphy
Leo S. Ward

Submitted: April 5, 2019