IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWCC 89

WCC No. 9410-7159

WARREN BIRD

Appellant

vs.

CITY OF LEWISTOWN and
MONTANA MUNICIPAL INSURANCE AUTHORITY

Respondents.

ORDER ON APPEAL

Summary: Claimant appealed DOL Hearing officer's determination under 1989 law that he could return to work in a related occupation suited to his education and marketable skills pursuant to option (c) of section 39-71-1012, MCA (1987-1989).

Held: The hearing officer misapprehended the evidence and the appropriate legal standard. The only evidence presented that claimant could return to work in a related occupation involved the single position of Street Maintenance Supervisor, but the evidence does not show that this job is typically available, as required by statute.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-1012, MCA (1987-1989). DOL hearing officer misapprehended the evidence and applied inappropriate legal standard in determining that claimant could return to work in a related occupation suited to his education and marketable skills pursuant to option (c) of section 39-71-1012, MCA (1987-1989). The only evidence presented that claimant could return to work in a related occupation involved the single position of Street Maintenance Supervisor, but the evidence did not show that this job is typically available, as required by statute.

Benefits: Rehabilitation Benefits: Rehabilitation Options. DOL hearing officer misapprehended the evidence and applied inappropriate legal standard in

determining that claimant could return to work in a related occupation suited to his education and marketable skills pursuant to option (c) of section 39-71-1012, MCA (1987-1989). The only evidence presented that claimant could return to work in a related occupation involved the single position of Street Maintenance Supervisor, but the evidence did not show that this job is typically available, as required by statute.

This is an appeal by Warren Bird (claimant) from Findings of Fact, Conclusions of Law, and Order entered October 14, 1994, by a hearing examiner of the Department of Labor and Industry. The decision found that Option (2)(c) —return to a related occupation suited to the claimant's education and marketable skills — is the first appropriate vocational option for claimant.

Factual and Procedural Background

1. Vocational History

Claimant is presently 58 years old. He graduated from high school, attended a semester or two of college, and then enlisted in the Air Force, where he was trained as an aircraft technician. After discharge from the Air Force, he worked in construction from 1959 to 1964. In 1964 he went to work for the City of Orofino, Idaho, where over the years he successfully held every position within the public works department, ultimately attaining the position of Superintendent of Public Works. During this time he obtained a Water Treatment Certificate. He next worked as the Utilities Superintendent with the Assiniboine Tribe in Harlem, Montana. In 1981 or 1982 he was hired by the City of Lewistown as the Superintendent of Public Works, the position he held until the time of his injury on August 30, 1990. That position required him to engage in heavy labor.

Through the years, the claimant performed a wide variety of job duties ranging from heavy labor to supervising as many as 20 employees. He was required to keep records of daily operations for wastewater treatment and street maintenance; was responsible for the operation and maintenance of water lines, sewer lines, streets, alleys, cemeteries, parks; kept time sheets used for payroll; and maintained employee performance records. He was responsible for job costing, budget preparation, and long-range expenditure planning. He used a computer to make daily diary entries and for drafting quarterly reports, although he described his computer usage as "typing."

2. Industrial Accident and Subsequent Medical History

Claimant injured his low back on August 30, 1990, while working for the City of Lewistown. He was assisting a co-worker in lifting a 70-pound pump into a pickup. He felt his back "snap" and fell to the ground. Following his injury he was hospitalized for

approximately three weeks, first in Lewistown and then at St. Vincent's Hospital in Billings. He submitted to x-rays, three MRIs of the lumbar and thoracic spine (Ex. 3 at 1, 39, 89, 99), one MRI of the skull (*Id.* at 35), a cervical-thoraco-lumbar myelogram (*Id.* at 68, 70) and a cystometrogram. (*Id.* at 95.)[1] The diagnostic studies showed age-appropriate structural integrity of the spine with mild desiccation of the L2 to S1 disks, and a small but insignificant disc protrusion at L5-S1. The cystometrogram was within normal limits. (*Id*. 3 at 95.) The discharge summary prepared by claimant's treating physician, Dr. James T. Lovitt, reported that claimant had been admitted "with symptoms suggestive of acute back strain" (*Id.* at 65) and was "[d]ischarged in satisfactory condition." (*Id.* at 66.)

Since his 1990 hospitalization the claimant has been unable to urinate normally and catheterizes himself to empty his bladder. (Ex. 11.) However, claimant's physicians have been unable to find any physical basis for his bladder problem and believe that his condition is psychogenic.

In October of 1990, the claimant made the first of a number of trips to Arizona. During this trip he obtained additional MRI of his low back and brain. The brain scan was normal. The results of the lower-back scan were consistent with those done in Billings in September 1990.

The claimant thereafter received no regular medical care until June 19, 1992, when he returned to Dr. Lovitt. Dr. Lovitt's impression at that time was that of "[b]ack strain with considerable emotional overlay." (Ex. 2 at 2.) He ordered yet another MRI, which revealed a normal lumbar spine. Dr. Lovitt advised claimant's attorney, Tom Lewis, on July 16, 1992, "[t]hat basically the **objective** clinical findings and demonstrable studies are out of concert with the patient's clinical symptoms. . . . I think maybe his emotional response to injury is markedly out of proportion to the physical response to injury--physical injury such as it was." (*Id.* at 4, emphasis added.) On July 17, 1992, Dr. Lovitt reported:

> His problem is basically a chronic low back strain without identifiable motion segment injury. I think he would qualify for a 7% whole man impairment rating.

(*Id.* at 5.) Dr. Lovitt encouraged the claimant to find employment in a tolerable job. He reported:

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[1]A cystometrogram is the result of a cystometrography which is a "graphic recording of the pressure exerted at varying degrees of filling of the urinary bladder." Dorland's Medical Dictionary, 27th Edition.

> Realistically, I think he could sit for 2 hours if he can get up and move about, stand for 2 hours at a time if he's allowed to sit briefly, I think he can work an 8 hour day. I think his lifting maximum on an occasional basis would be 25 lbs. more frequency with less weight. He has no problem manipulating his hands or feet for controls. No problem with heights and no problem with temperature, etc.

(*Id.*) Dr. Lovitt also concluded that claimant's inability to urinate was physically unrelated to the back injury. He referred the claimant to Dr. Edward Shubat, Ph.D., a clinical psychologist.

Dr. Shubat examined claimant and noted, "His behavior does reveal a lot of pain behaviors that are counterproductive to his current status." Shubat's diagnostic impression was, "Chronic low back pain; conversion disorder - bladder [Dr. Lovitt]; rule out incompetent bladder." (Ex. 10 at 1.)

The claimant was then seen by Dr. John Mendenhall, who is a psychiatrist, on September 30, 1992. He found that claimant suffered from major depression and somatoform pain disorder. Dr. Mendenhall thought the bladder problems were a "red herring" and that no treatment was necessary. He suggested that claimant be referred to a pain rehabilitation clinic. (Ex. 9 at 2.)

In November 1992, the claimant was referred to Dr. Bradley Root, a physiatrist, who prescribed a four-week pain rehabilitation program offered by Montana Plains Rehabilitation beginning on December 13, 1992. (Ex. 12 at 1.) The reports from this program are set forth in some detail in the hearing examiner's findings. Claimant was discharged on January 15, 1993. Of specific interest is the Discharge Summary by occupational therapist Lynette Slaybaugh:

> **LIFTING:** Warren has **proven** the ability to lift up to 20 pounds occasionally to selected heights and 10-15 pounds frequently. This places Warren in light work level with lifting to selected heights. [Emphasis added.]

(Ex. 14 at 39.) Ms. Slaybaugh also noted the claimant was able to carry up to 20 pounds on an occasional basis, climb stairs, kneel, crouch, squat, walk up to one-half mile, stand for 25-30 minutes, walk and stand for up to 45 minutes and tolerate sitting for up to 30 minutes with position changes. In the Valpar 9 test, which measures the agility of a person's gross body movement of trunk, upper/lower extremities, and fine motor dexterity and manipulative ability of hands/fingers, claimant scored in the 85th percentile in a timed test. (*Id*.) In his Discharge Summary Dr. Root misstates the occupational therapy report and states that the claimant "can lift/carry 15 pounds occasionally and 10 pounds frequently." (Ex 14 at 122.)

Dr. Johnson, a psychologist, worked with the claimant throughout the pain rehabilitation program. At the time of the claimant's release, he noted that claimant "agrees to work toward an immediately productive schedule, e.g. volunteer work now, part-time work (at least) as soon as released. He indicates agreement." (*Id.* at 49.)

Claimant was discharged from the pain rehabilitation program on January 15, 1993. The discharge summary by Dr. Root stated in part:

> WORK STATUS: Patient is cleared to work at discharge in **sedentary to light work level.** I anticipate maximum medical improvement to be declared at four week follow up. This was discussed with patient prior to his discharge. It was also stressed to patient the importance of obtaining his urodynamic studies. [Emphasis added.]

(*Id.* at 123.)

Claimant did not follow through with the recommendations of the pain rehabilitation program. He failed to continue with his conditioning program; he did not attempt volunteer work or part-time work; and he did not obtain urodynamic studies for his bladder condition.

On April 27, 1993, Dr. Root assigned the following impairment rating:

> At this time, secondary to soft tissue lesion with medically documented pain greater than six months, I would give him an impairment rating of 5%. I will not consider the bladder as part of his impairment rating at this time secondary to the etiology being undetermined and the patient having not followed through with his urodynamic studies.

(Ex. 12 at 9.) Dr. Root did consider the claimant's psychological problems and his bladder catheterization when he determined maximum healing had been reached. Dr. Root concluded that catheterization and the use of prescribed antidepressants would not interfere with claimant working. (*Id.* at 13.)

Claimant was next seen by Dr. Bill J. Tacke, who is also a physiatrist. Dr. Tacke's assessment was:

1) Chronic lumbosacral strain with myofascial pain syndrome.
2) Apparent conversion disorder affecting motor function as well as bladder function.

3) History of L5-S1 small disc herniation per MRI with no significant nerve compression.
4) Depression.

(Ex.11 at 3.) Dr. Tacke further gave the opinion,

> There'll need to be an expectation from Warren that each day he's going to demonstrate an improved level of function. . . . **If he really doesn't have the commitment to do that it'll be clear that he's actually quite comfortable with the dysfunctional state that he's ended up in.** That's sad but it is a psychological problem that sometimes people are not able to overcome. As far as his being disabled to the point that he can't work by that condition that would be better evaluated from the perspective of a psychologist. [Emphasis added.]

(Id. at 5.)

Claimant was then treated by James English, Psy.D., who is a psychologist, from May until July 27, 1993 and again beginning in March 1994. Dr. English opined,

> I would like to see Warren on an antidepressant medication that would help him with analgesic relief, with sleep and with energy. . . . He needs an expert in the field and would request that his physiatric [sic] evaluate this. We could consider also sending him to a psychiatrist.

(Ex.15 at 9.)

The claimant reports that he experiences continuous pain in the lower back which is aggravated by unexpected movement, turning, or sitting in one position for a long time. He says that he cannot bend over, twist or stoop; that he is able to walk up to a mile each day, but must take medication prior to walking. At the time of the hearing before the DLI, the claimant testified that he was taking Paxel, an anti-depressant, Imipram [sic], which is also an anti-depressant, Dapro, which is a muscle relaxant, and Ibuprofen Extra Strength. (Tr. at 17-19.)

3. Social Security Disability

Claimant has been declared disabled for the purposes of Social Security benefits.

4. Vocational Evaluation

Pursuant to section 39-71-1014, MCA (1989), the insurer designated Crawford Health Care Management as its rehabilitation provider. Bruce Carmichael, who is a certified rehabilitation counselor, was assigned the claimant's case. Carmichael was instructed to "work with Mr. Bird in an attempt to identify alternative vocational options and also assist Mr. Bird with job placement." (Ex. 1-1 at 2.) He did not interview or meet with the claimant because claimant's counsel refused to permit him to do so.[2] Thus, Carmichael based his evaluation on documentation presented at claimant's deposition (Ex. E) and medical records provided by the insurer.

Carmichael concluded that claimant is employable. He emphasized the claimant's many transferable skills:

> The occupations in the claimant's work history have transferability to jobs in Managerial Work, Construction/Maintenance, Processing, Construction, and Supervision. In addition, Mr. Bird has specific background in work activities such as managing/operating fresh and waste water treatment systems, heavy equipment operation, supervision, sanitary landfill operation, and utility billing.
>
> Mr. Bird has demonstrated specific skills and abilities in his previous work in directing the work of others; staying within prescribed standards/guidelines; talking easily with people; using judgement and reason to cope with emergencies; performing a variety of changing activities on short notice; and using common sense and basic language and math skills to solve problems, total costs, fill out forms, and instruct others as to specific procedures to follow in completing tasks. Further, he has demonstrated the skills and abilities in using his hands, eyes, and fingers to adjust machine controls, manipulate hand tools, and assemble objects. He has [sic] also familiar with the utility billing systems.

(Ex. 1-1 at 9-10.)

Carmichael presented Dr. Root with descriptions of five potential jobs he believed claimant to be capable of performing. Those jobs were Superintendent of Public Works, Utility Division Supervisor, Maintenance Section Supervisor, Utilities Billing Supervisor, and

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[2]In this case, Carmichael had sufficient information for a vocational evaluation without personally interviewing the claimant. However, the Court takes note here that every claimant has a duty to cooperate with the designated vocational counselor and must cooperate in the evaluation process. When requested, the claimant must submit to a personal interview.

Street Maintenance Supervisor. In April 1993, Dr. Root approved two of five job descriptions: He determined that claimant was physically able to perform the positions of Utility Billing Supervisor and Street Maintenance Supervisor.

5. Proceedings before the Department.

In June 1993, the insurer requested the Rehabilitation Panel to review the matter. On September 27, 1993, the Panel issued its report. (Exhibit C to City of Lewistown's Witness and Exhibit List.) It approved option "c" — return to a related occupation suited to the claimant's education and marketable skills — as the first appropriate return to work option. The Department affirmed the Panel's recommendation in its Initial Order of Determination issued on October 25, 1993. (Exhibit D to City of Lewistown's Witness and Exhibit List.) Claimant then requested a hearing before the Department.

The claimant, his wife, two vocational rehabilitation counselors, and Bill Michaelson, who is the street maintenance supervisor for the city of Helena, testified at the hearing. Thereafter, the hearing examiner issued his decision on October 14, 1994, finding that option (c) is the first appropriate rehabilitation option. That conclusion was based on the hearing examiner's determination that claimant was able and qualified to work as a Street Maintenance Supervisor and that the position is typically available.

Issues Raised on Appeal

Claimant contends that the record does not support the hearing examiner's decision. Specifically, he argues that the hearing examiner erred in finding that 1) claimant has transferable skills to perform the street maintenance supervisor position; 2) there are six positions for a Street Superintendent Supervisor within the state which fit the description in the job analyses; 3) the Street Superintendent Supervisor position is typically available; and 4) there are 350 street maintenance supervision positions within the state. Additionally, the claimant argues that Findings of Fact 27 and 28 (which he does not dispute) do not support a conclusion that the claimant can perform gainful activity reasonably available in the State of Montana. Finally, he requests the Court find the Rehabilitation Panel's determination was "unlawful" because it placed conditions on its determination. (Petitioner/appellant's Opening Brief in Support of Appeal Concerning Rehabilitation Issue at 5.)

The claimant has also raised constitutional issues. However, those issues were previously bifurcated pending the Court's decision regarding the other issues. (Court Memorandum, December 19, 1994.) In light of the present decision on those other issues, it is unnecessary to consider the constitutional challenges.

Standard of Review

Section 39-72-612(2), MCA (1987), provides the standard of review applicable to this appeal. It provides in relevant part:

> The judge may overrule the division only on the basis that the division's determination is:
>
> . . .
>
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Under the clearly erroneous standard of subparagraph (e), the hearing examiner's findings of fact must be overturned on judicial review where they are ". . . clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." *State Compensation Mutual Insurance Fund v. Lee Rost Logging*, 252 Mont. 286, 289, 827 P.2d 85 (1992) (quoting section 2-4-704(2)(a)(v), MCA). The Supreme Court has adopted a three-part test for determining whether the decision of a lower tribunal is clearly erroneous. That test is as follows:

> First, the Court will review the record to see if the findings are supported by substantial evidence. Second, if the findings are supported by substantial evidence we will determine if the trial court has misapprehended the effect of evidence. [Citations omitted] Third, if substantial evidence exists and the effect of the evidence [h]as not been misapprehended, the Court may still find that '[A] finding is "clearly erroneous" when, although there is evidence to support it, a review of the record leaves the court with the definite and firm conviction that a mistake has been committed." *U.S. v. U.S. Gypsum Co.* (1948), 333 U.S. 364, 68 S. Ct. 525, 92 L.Wd. 746.

Estate of Thies, 52 St.Rep. 970 (Mont. 1995).

On the other hand, the Court will not reweigh the evidence; the findings and conclusions of the fact finder will be upheld if they are supported by substantial credible evidence in the record. *Nelson v. EBI Orion Group*, 252 Mont. 286, 289, 829 P.2d 1, 3 (1992). Substantial evidence is more than a mere scintilla of evidence but may be less than a preponderance of the evidence. *Miller v. Frasure,* 248 Mont. 132, 809 P.2d 1257, 1261 (1991). Conclusions of law, however, must be examined to determine if they are correct. *Steer, Inc. v. Department of Revenue,* 245 Mont. 470, 474-75, 803 P.2d 601, 603 (1990).

DISCUSSION

This case involves yet another application of a procedure which has been repealed by the legislature but which continues to be applied in cases arising during the four years the procedure was in effect. Initially, section 39-71-1012, MCA (1987-1989), provides:

> **39-71-1012. Rehabilitation goal and options.** (1) The goal of rehabilitation services is to return a disabled worker to work, with a minimum of retraining, as soon as possible after an injury occurs.
>
> (2) The first appropriate option among the following must be chosen for the worker:
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> (a) return to the same position;
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> (b) return to a modified position;
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> (c) return to a related occupation suited to the claimant's education and marketable skills;
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> (d) on-the-job training;
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> (e) short-term retraining program (less than 24 months);
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> (f) long-term retraining program (48 months maximum); or
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> (g) self-employment.
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> (3) Whenever possible, employment in a worker's local job pool must be considered and selected prior to consideration of employment in a worker's statewide job pool.

Subsequent provisions establish the procedure which must be followed whenever an injured worker is determined to be disabled. Section 39-71-1014, MCA (1987-89), requires the insurer to designate a rehabilitation provider to evaluate the worker. Section 39-71-1015, MCA (1987-89), requires the rehabilitation provider to identify the first appropriate option for the worker. (The options are those listed in section 39-71-1012, MCA (1987-89).) Section 39-71-1016 and -1017, MCA (1987-89), provide for a Rehabilitation Panel designated by the Department to review the options whenever the worker does not return to work. Section 39-71-1018, MCA (1987-89), provides for a review of the Panel determination, including the right to a contested case hearing and an appeal to this Court.

As previously mentioned, Mr. Carmichael identified two jobs which, in his opinion, the claimant could perform, and recommended option (c) as the first appropriate rehabilitation option. On September 27, 1993, the Rehabilitation Panel concurred in the recommendation. Two of the three panel members endorsed the option outright. The third panel member endorsed it with reservations, commenting that the two jobs identified by Carmichael "are marginally related to [his] past work and/or marketable/transferable skills," that on-the-job training may be appropriate if the employment was in larger communities, and that "the Street Maintenance Supervisor [position] may not fit the [claimant's] physical limitations with a majority of employers." (Rehabilitation Panel Report at 2.) One of the other panel members also noted that the position of Utilities Billing Supervisor could not be verified as "typically available." Nonetheless, all three panel members recommended

option (c), and two of the members unequivocally endorsed the position of Street Maintenance Supervisor.

In his Findings of Fact, Conclusions of Law, and Order, the hearing examiner determined that option (c) was the first appropriate rehabilitation option for the claimant. His finding was based solely on the Street Maintenance Supervisor position since the insurer had abandoned its contention that Utility Billing Supervisor was an appropriate position. (Conclusion of Law 2.) The hearing examiner found that (1) the position of Street Maintenance Supervisor is typically available; (2) the claimant possesses the skills necessary to compete for the position in the current job market; and (3) the claimant is physically and psychologically able to perform the duties of the position. (Findings of Fact, Conclusions of Law, and Order at 21-26.) The claimant disputed, and continues to dispute, each of these matters.

While I find one issue dispositive of this appeal, I will address all issues raised by claimant since they may arise during the proceedings which follow remand of this case.

1. Transferable Skills.

Initially, the claimant argues that he does not have the transferable skills required for Street Maintenance Supervisor. Specifically, he argues that the position requires, and he does not have, computer and business skills. His argument is based on testimony of his vocational expert, Margot Luckman, who in turn based her opinion on her analysis of a single position in Great Falls. Luckman's opinion was contradicted by testimony of Bill Michaelson, who is the Street Maintenance Supervisor for the City of Helena, and by Carmichael. Michaelson testified that his job requires no computer skills and that he is not computer literate. Carmichael's research disclosed no requirement of computer skills for positions in Helena or Kalispell. (Tr. at 108-109.) He also ascertained that the position with the Montana Department of Transportation required only those computer skills which were taught on the job. (Tr. at 109.) Thus, there is substantial evidence contradicting the claimant's contention. However, while the other positions may not require computer skills, the Great Falls position cannot be included among the jobs available to claimant since, lacking specific computer training, he is not qualified for the position. Thus, while his lack of computer skills does not disqualify him from all of the six jobs identified by Carmichael, they do reduce the number of available jobs to no more than five. That reduction is significant to the discussion, which follows, as to whether the Street Maintenance Supervisor position is "typically available."

As to claimant's more general contention that he lacks sophisticated accounting and business forecasting skills necessary for the position, his own vocational counselor, Margot Luckman, deemed claimant fully qualified for the position with the exception of computer skills. (Tr. at 65.) Moreover, claimant's work history undermines his contention. As noted

earlier, over the years he has kept records of daily operation, maintained time sheets and employee performance records, and done job costing, budget preparation and long-range expenditure planning.

2. Physical requirements

Claimant next argues that the physical requirements of Street Maintenance Manager exceed his physical abilities. His argument is based on the fact that the job description submitted to Dr. Root, which was based on the Great Falls job, described the lifting requirements as 5 to 10 pounds, whereas the other specific jobs identified by Carmichael had physical requirements of 20 pounds or less. Claimant argues that since no doctor specifically approved a position description with 20 pounds of lifting, those other jobs cannot be considered.

The Court does not agree with claimant's contention that each and every job position must be specifically approved by a physician, and if not approved then discarded. *Wood v. Consolidated Freightways, Inc.,* 248 Mont. 26, 808 P.2d 502 (1991), which is cited by claimant, does not so hold. *Wood* held that the insurer must present evidence of "a *physician's determination,* based on his knowledge of the claimant's former employment duties, *that he can return to work,* with or without restrictions, *on the job on which he was injured or another job for which he is fitted by age, education, work experience, and physical condition.*" 248 Mont. at 30, 808 P.2d at 505. In *Wood* no physician's opinion was ever obtained. The Supreme Court did not address the form which the opinion must take or suggest that every single position must be specifically approved by the physician.

These matters require the use of common sense. Where a physician approves one job description, his approval can reasonably be applied to other jobs which have equal or lesser physical requirements. Where the physician's medical notes state that claimant can return to work and reflect the specific physical limitations or abilities of the claimant, jobs within the physical restrictions or abilities may be deemed approved.

On the other hand, whatever form a physician's approval takes, it must be clear that the physician has approved **all** of the physical requirements of the job. In this case the Great Falls job, as approved by Dr. Root, had lifting demands of less than 5 to 10 pounds on an occasional basis and carrying requirements of less than 5 pounds on an occasional basis. However, in inquiring about the other jobs, the employers were asked if they had positions that required lifting of objects less than 20 pounds. (Tr. at 118-120.) The occupational therapy report from claimant's attendance of the pain clinic in December 1992, found that claimant could "lift up to 20 pounds occasionally to selected heights and 10-15 pounds frequently" and could carry 20 pounds occasionally and 10-15 pounds frequently. In his pain clinic discharge report, Dr. Root erroneously stated that in occupational therapy the claimant had progressed to the sedentary/light area and can lift/carry 15 pounds

occasionally and 10 pounds frequently. Assuming that Dr. Root endorsed the actual limits set forth in the occupational therapy discharge report, other than for Great Falls and Helena[3], we still do not know whether the physical requirements for the jobs identified by Carmichael were within claimant's capabilities since there is no information concerning the maximum weight to be lifted and the frequency of lifting. Nineteen pounds on a frequent basis, for example, would be outside the documented limits.

Some jobs may be standardized so that one position description will basically fit all. It is not clear that this is the case here. We already know that there are differences among the specific jobs. Great Falls, for example, requires computer skills, Helena does not. We also know from Carmichael's final report and his testimony that many Street Maintenance Supervisory positions require the Supervisor "to perform occasional hands-on physically demanding duties." (Ex. 1-1 at 12; Tr. at 137-38.) We do not know whether the Street Maintenance Supervisor positions in Billings, Butte, Kalispell and Miles City, which do not require such hands-on physically demanding work, require lifting of more than 15 pounds on more than an occasional basis, although we know that the lifting requirements do not exceed 20 pounds.

In a case such as this, where the number of jobs identified is small, it is important to make sure that the physical requirements do not vary, or if they vary, that all jobs are physically matched to the claimant's physical abilities. This was done in this case for only two of the six positions identified for the claimant, and one of those two positions is unsuitable because of the computer skills requirement.

Claimant also argues that the hearing examiner's Finding of Fact 27 contradicts his finding that claimant is capable of performing the duties of a Street Maintenance Supervisor. Finding of Fact 27 reads as follows:

> 27. Claimant continues to experience continuous pain in the lower back and if not careful can have episodes of what he describes as extreme pain that lasts for several days. Activities that aggravate or increase his pain involve: "Any unexpected movement, any turning, sitting for a long time in one position, if I take an unexpected step off the stairs or a curb or something like that. Those things all create extreme pain for me." He can do only minor bending, no twisting, and cannot stoop without pain. He usually sleeps only about four hours per night, one or two hours at a time, and in between gets up to walk and take pain medication. (*Trans.* pp. 18→20 @ 9→1)

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[3]Bill Michaelson's testimony established that the Helena job involves lifting no more than a cup of coffee and, in a real pinch, a shovel. These items do not exceed ten pounds.

He points out that the description submitted to Dr. Root for the Great Falls job indicates that bending, squatting, twisting, and climbing are required up to 2.6 hours a day. Dr. Root approved these activities when he signed off on the job description, but the hearing examiner's Finding of Fact 27 raises the question of whether he rejected the doctor's analysis of these activities. At the very least the hearing examiner should have explained how he reconciled Finding of Fact 27 with his further finding that claimant can perform the Street Maintenance Supervisor position.

3. Typically Available.

Claimant next argues that the Street Maintenance Supervisor position is not "typically available." This argument is based on section 39-71-1011, MCA (1989), which states in relevant part:

> (7) (a) "Worker's job pool" means those jobs **typically available** for which a worker is qualified, consistent with the worker's age, education, vocational experience and aptitude and compatible with the worker's physical capacities and limitations as the result of the worker's injury. **Lack of immediate job openings is not a factor to be considered.**
>
> (b) A worker's job pool may be either local or statewide, as follows:
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> (i) a local job pool is the job service office area that includes the worker's residence; and
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> (ii) the statewide job pool is the state of Montana.

The Workers' Compensation Court considered what is meant by "typically available" in *Roby v. Canavan and State Compensation Insurance Fund,* WCC No. 9001-5695 (1990). In that case Roby argued the term.

> "should be construed to mean that a claimant must have a reasonable opportunity to compete for and obtain a job in view of the claimant's access to the job, the number of job positions, the **frequency of turnover**, the number of competing applicants, and the relative qualifications among applicants, together with any other factors which might make the job unavailable to the claimant." [Emphasis added.]

Roby at 6. However, this Court concluded that

> [t]he term "typically available" denotes that there is labor market documentation of positions, not necessarily openings, for which an injured worker has marketable skills and access to within his or her job pool. The mere existence of the positions are not enough, however, **if there are positions**

> **for which the claimant has the skills and physical capabilities to perform, those positions are typically available.** [Emphasis added.]

Id. at 6-7.

Neither the last sentence of section 39-71-1011(7)(a), MCA, nor the language in *Roby* should be read as stating that the mere identification of one or more specific jobs that claimant is capable of performing satisfies the "typically available" criteria. In *Dilling v. Buttrey Foods*, 251 Mont. 286, 825 P.2d 1193 (1992), the Supreme Court adopted the *Roby* standard but nonetheless held that the job identified for claimant, and which she was capable of performing, was **not** typically available because it was a modified position available through only a single employer.

The discussion in *Roby* was in reply to a contention that the Court must consider a host of other factors in determining whether a job is typically available. The last sentence in section 39-71-1011(7)(a), MCA, is clearly aimed to counter arguments that there must be immediate and readily available job openings. Nevertheless, the Court must still consider whether within a reasonable period of time there are a reasonable number of openings for the job. Jobs which appear only on paper and for which there are no foreseeable openings are not available at all.

The word "typically", used as an adjective to "available", means "normally"; "normally" is a synonym for "typically."[4] The word "available" is defined as follows:

> **available 1:** *archaic:* having a beneficial effect **2:** Valid — used of a legal plea or charge **3:** present or ready for immediate use **4:** Accessible, Obtainable **5:** qualified or willing to do something or to assume a responsibility **6:** present in such chemical or physical form as to be usable. [Underlining added.]

Webster's Ninth New Collegiate Dictionary, 1991 Ed. Thus, while the immediate openings are not required, job openings must occur over a reasonable period of time. Any other construction of the "typically available" requirement would nullify the requirement.

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[4] **typical 1.** serving as a type; symbolic **2.** having or showing the characteristics, qualities, etc. of a kind, class, or group so fully as to be a representative example **3.** of or belonging to a type or representative example; characterisic. see NORMAL — **TYPICALLY**

Webster's New World Dictionary Of The Amerian Language, Second College Edition.

The evidence presented in this case does not support a finding that the job of Street Maintenance Supervisor is "typically available."

While the hearing examiner characterized the six positions identified by Carmichael as a "representative sample of the Street Maintenance Supervisor positions available," Carmichael in fact identified only six potential positions. (Finding of Fact 34.) The other positions he inquired about required physical labor exceeding claimant's capacities (Tr. at 137-38) and no evidence was presented from which the hearing examiner, or this Court, could infer the existence of additional positions.

The hearing examiner's finding that there are 350 statewide Street Maintenance Supervisor positions (Finding of Fact 35) was erroneous. The 350 number was the number of Montana positions for DOT job code 182.167-026. (Ex. 25 at 2; Tr. 138-39.) That job code is for "Construction Managers," which includes Street Maintenance Supervisors. (*Id.*) However, the code includes a number of other, more physically demanding jobs, including two of the five positions disapproved by Dr. Root. Since the category included numerous other inappropriate positions, the identification of 350 positions in the category is meaningless.

Thus, at best, only six potential positions were identified for claimant. Claimant, however, did not qualify for one of those positions because of his lack of computer skills, and the insurer failed to present evidence showing that four of the other positions were within claimant's physical ability.

Even assuming all six of the positions were appropriate, actual job openings in the positions occur so rarely that none can be characterized as typically available. There has been no job opening in any of the six cities in at least three years to four years. (Tr. at 125, 127.) Helena's Supervisor plans to keep his job for 10 or 11 more years. Carmichael was asked whether there was "any reasonable prospect of an opening for employment in any of these six jobs at this time for Mr. Bird or anybody else in the State of Montana?" He replied, "Well, based on, based on the information that I have, **I can't say that there is,** but I don't have a crystal ball and I can't, I can't foresee the future either." (Tr. at 127; emphasis added.) The evidence concerning the availability of jobs is unequivocal and does not support a finding that the job of Street Maintenance Supervisor is typically available.

4. The Panel Report

In an alternative argument, claimant asserts that the panel determination was unlawful because it placed conditions on its determination. Claimant is simply wrong in his assertion. The so-called conditions were merely the articulated reservations of one panel member. The other two did not share in his reservations, and all three ultimately approved

option (c) without any conditions. Moreover, the hearing before the hearing examiner was de novo and the hearing examiner was required to make his own determination.

CONCLUSION AND ORDER

The hearing examiner misapprehended the evidence, as well as the legal standard for determining whether jobs are typically available. I am left with a firm conviction that his decision is not supported by substantial evidence and is based on an error of law. Therefore, his conclusion that option (c) is the first appropriate option was erroneous and is **reversed**.

In reaching my decision in this case, I acknowledge that in light of the claimant's physical ability, education, work history, and transferable skills, there may be other jobs he can perform. I also recognize that the vocational consultant's efforts were directed at identifying the most appropriate and highest paying position for which claimant is qualified. But neither I nor the hearing examiner can go beyond the evidence presented in a case. The only evidence presented in support of option (c) was for the single position of Street Maintenance Supervisor. The consultant and insurer put their eggs into a single basket and failed to prove their case.

The Court has no alternative but to find that the option (c) determination was unsupported and remand for a determination of the next most appropriate option. *Robert Kramlich v. State Compensation Ins. Fund,* WCC No. 9304-6773, Order on Appeal (March 10, 1994). As held in *Kramlich:*

> Section 39-71-1017(2)(a) requires the Rehabilitation Panel to "identify the first appropriate option." (Emphasis added.) To do so, it must consider each of the options, serially, until it arrives at an appropriate one. If option (c) is not appropriate, then the statutes mandate that it consider option (d), and so on. By implication, the Panel and the DLI, and ultimately this Court, must have the power to assure compliance with that mandate. Since the DLI and the Rehabilitation Panel never reached option (d) and below, and information relating to those options was never developed, they must now do so. Upon remand the DLI shall enter such orders as necessary to develop

> the information needed for the Panel to fulfill its duty to consider option (d) and below. Insofar as ***George*** and ***Russell*** are inconsistent with this decision, they are overruled.

Id. at 13.

Since the decision below is **reversed** on non-constitutional grounds it is unnecessary to address claimant's constitutional challenges.

This decision is certified as final for purposes of appeal.

Dated in Helena, Montana, 2nd day of November, 1995.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Tom L. Lewis
Mr. Leo S. Ward
Ms. Christine L. Noland
Mr. Brian McCullough - Notified
Attorney General Joseph P. Mazurek
Submitted: August 7, 1995