IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2006 MTWCC 45

WCC No. 2005-1465

GENE COPELAND

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Three years after a head injury, Petitioner continues to exhibit symptoms and has not returned to work. Petitioner alleges he is not at MMI and that he has not received proper treatment for his industrial injury, including treatment for a preexisting depression that was exacerbated by his injury, and his TTD benefits should be reinstated. Respondent alleges that Petitioner is at MMI, has received an impairment rating, has been released to work at approved jobs, and is therefore not eligible for TTD benefits.

Held: Petitioner has not reached MMI and is entitled to reinstatement of his TTD benefits.

¶ 1 The trial in this matter was held on August 31, 2006, in the Workers' Compensation Court, Helena, Montana. Petitioner Gene Copeland was present and represented by James G. Hunt and Michael L. Fanning. Respondent Montana State Fund was represented by Daniel B. McGregor.

¶ 2 Exhibits: Exhibits 1 through 23 were admitted without objection. Exhibit 24 was withdrawn by Respondent.

¶ 3 Witnesses and Depositions: The depositions of Michael D. Nolan, M.D., James English, Psy.D., Gene Copeland, and Bill S. Rosen, M.D., were taken and submitted to the Court. Petitioner Gene Copeland and James English, Psy.D., were sworn and testified at trial.

¶ 4 Issues Presented: The Court restates the following contested issues of law found in the Pretrial Order:

> ¶ 4a Whether Petitioner has reached maximum medical improvement because of depression and other conditions related to the subject accident; and
>
> ¶ 4b Whether Petitioner should have his temporary total disability benefits reinstated under § 39-71-701, MCA.[1]

FINDINGS OF FACT

¶ 5 On June 5, 2003, Petitioner sustained an injury in Turner, Blaine County, Montana, caused by an accident arising out of and in the course of his employment with Tyler C. Haider of TCH Construction.[2]

¶ 6 Respondent has accepted liability for the industrial accident.[3]

¶ 7 Petitioner has a GED and spent six years in the Army, after which he held numerous jobs in several states. Petitioner eventually moved to Malta, Montana, where he has resided for approximately 15 years. When he first moved to Malta, he worked in a motel as a housekeeper. He later worked for Northern Ag Service until he was involved in an industrial accident. Petitioner was off work for approximately two and a half years, and then returned to the workforce as a mechanic. He later worked as a water truck driver and school bus driver, and most recently did directional drilling, which he was performing at the time of the injury which is the subject of this claim.[4]

¶ 8 On the day of the accident, Petitioner was taken to the emergency room at Northern Montana Hospital, where he presented with a laceration between his right forehead and right temple. According to the emergency room history, Petitioner was hit on the right side of the head with plastic tubing that came uncoiled from a large spool. Petitioner was thrown several feet backward and knocked down, but did not lose consciousness.[5]

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[1] Pretrial Order at 2.

[2] *Id*.

[3] *Id*.

[4] Trial Test.

[5] Exhibit 1 at 1; Trial Test.

¶ 9 Petitioner testified that he can no longer do his time-of-injury job because he does not believe he can perform the mathematical calculations which were a necessary part of his employment. He is no longer able to concentrate on tasks for extended periods of time and has lost confidence in his abilities.[6] Petitioner does not think he can return to work at any job because he does not trust himself to do his job correctly, and he feels like he has to double-check his work.[7] Petitioner cannot lift as much as he used to and experiences daily headaches.[8] Petitioner also suffers from blurred vision, sleeplessness, discomfort in crowds, and drowsiness, although he believes the latter is not due to the injury itself but to his medications.[9]

¶ 10 Petitioner sought follow-up treatment with Michael D. Nolan, M.D., on June 9, 2003. Dr. Nolan is a board certified family doctor who practices in Havre.[10] Petitioner reported headaches and dizziness, visual impairment in his right eye, and pain in his right shoulder.[11] When he first saw Petitioner after his industrial accident, Dr. Nolan ordered a CT scan and an ophthalmologic evaluation to make sure Petitioner had not suffered serious intracranial or cervical damage, and because Petitioner complained of vision problems.[12] The CT scan results ruled out serious intracranial injury.[13] Dr. Nolan diagnosed Petitioner with a mild concussion.[14] He was taken off work until June 13, 2003.[15]

¶ 11 Petitioner was seen again on June 13, 2003, and while improved, he was still having some difficulties, and Dr. Nolan did not release him to work.[16] Petitioner was released to

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[6] Trial Test.

[7] Copeland Dep. 50:23 - 51:5.

[8] Copeland Dep. 51:22 - 52:5.

[9] Trial Test.

[10] Nolan Dep. 3:6-16.

[11] Exhibit 2 at 3.

[12] Nolan Dep. 7:7-16.

[13] Nolan Dep. 10:12-14.

[14] Exhibit 2 at 3.

[15] *Id*. at 2.

[16] *Id*. at 6.

work on June 20, 2003,[17] but was taken off work on June 27 because he was still experiencing vision problems, headaches, neck pain, and other symptoms.[18]

¶ 12 Ophthalmologist Allen N. Beardsley, M.D., examined Petitioner on July 1, 2003. Dr. Beardsley noted that Petitioner has astigmatism which had been corrected to 20/20 vision with an eyeglass prescription. Dr. Beardsley opined that with an updated prescription, Petitioner's vision could be corrected to 20/20, and that Petitioner's eye exam was otherwise unremarkable.[19]

¶ 13 When Petitioner still complained of symptoms on July 14, 2003, Dr. Nolan believed these symptoms were becoming inconsistent with a mild concussion.[20] Petitioner remained off work.[21] Dr. Nolan referred Petitioner to neurologist Patrick J. Cahill, M.D., who ordered MRI scans.[22] Dr. Cahill reported that Petitioner's MRI was normal, which was consistent with Dr. Nolan's findings.[23]

¶ 14 On September 18, 2003, Dr. Nolan noted that Petitioner continued to have dizziness and headaches, as well as other symptoms. Dr. Nolan opined that he did not believe Petitioner would be able to return to his time-of-injury job.[24] On December 12, 2003, Dr. Nolan noted that Petitioner continued to have periodic headaches, blurred vision, pain in his shoulders, cervical spine and thoracic spine, and some balance difficulties. Dr. Nolan opined that Petitioner had reached maximum medical improvement (MMI), and recommended that Petitioner see another doctor to have an impairment rating performed, as that was outside Dr. Nolan's area of expertise.[25]

¶ 15 Ronald M. Peterson, M.D., performed a physical evaluation and records review on February 25, 2004. Dr. Peterson concluded that Petitioner's "post concussive syndrome"

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[17] *Id*. at 7.

[18] *Id*. at 9.

[19] Exhibit 3 to Dr. Nolan's Dep. at 1.

[20] Nolan Dep. 15:3-11.

[21] Exhibit 2 at 12.

[22] Exhibit 4 at 7.

[23] Nolan Dep. 18:14-20; Exhibit 4 at 7.

[24] Exhibit 2 at 15.

[25] *Id*. at 18.

could not be rated until Petitioner received a thorough neuropsychological evaluation. Dr. Peterson further concluded that Petitioner's cervical symptoms could be rated, and he assigned Petitioner a 6% whole person permanent partial impairment rating for the cervical injury.[26] At that time, Dr. Peterson also reviewed some job analyses Respondent had submitted. Dr. Peterson approved Petitioner for the positions of Cashier Self-Serv Gas Station/Convenience Store and Front Desk Clerk (Motel).[27]

¶ 16 Petitioner underwent a neuropsychological examination with James English, Psy.D., on June 3, 2004.[28] Dr. English is board certified in clinical psychology and neuropsychology.[29] Dr. English conducted a number of tests and evaluations, took a patient history, and reviewed Petitioner's medical records.[30] Dr. English testified that the test results showed a pattern of impairment that would be unusual to have been caused by a brain injury, but are more likely lifelong learning difficulties, as demonstrated by Petitioner's academic record and his IQ score.[31] Dr. English concluded that Petitioner's intellectual abilities fall within the low-average range and that the tests performed did not indicate that Petitioner suffered any brain impairment, although he did demonstrate impaired "tapping speed" and some slowing which Dr. English attributed to Petitioner's medications.[32] Dr. English further noted that although Petitioner complained of memory difficulties, he found Petitioner's memory function to be intact and above his intellectual level.[33] Petitioner's verbal memory scored above his IQ level, and his visual memory ability tested normal.[34] Dr. English attributed the impairment he noted on some tests to factors other than a brain injury, including a verbally based learning disability, a history of alcohol use, cervical injuries, and prescription medication.[35]

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[26] Exhibit 7 at 5.

[27] Exhibit 8.

[28] English Dep. 6:9-11.

[29] Trial Test.

[30] Exhibit 9.

[31] Trial Test.

[32] Exhibit 9.

[33] Trial Test.

[34] *Id*.

[35] *Id*.

¶ 17 Dr. English suggested that Petitioner would need a nonpharmacological approach to managing his headaches to alleviate his self-perceived memory difficulties.[36] Dr. English further recommended antidepressant medication to address Petitioner's depression, which Dr. English believed likely predated his injury.[37] Dr. English opined that Petitioner has not received a dosage of antidepressant medication significant enough to address Petitioner's depression, while Petitioner's narcotic prescriptions further impair his ability to be motivated to return to work.[38] Dr. English also identified Petitioner's alcohol consumption as a concern, particularly in conjunction with his prescription medication.[39]

¶ 18 On November 10, 2004, Dr. Peterson wrote a letter to Respondent, opining that in light of Dr. English's report, he did not believe Petitioner had any ratable condition for his closed head injury or concussion, and therefore his impairment rating remained at 6%.[40] However, on March 21, 2005, Dr. Peterson wrote a letter to Petitioner's counsel, in which he opined that Petitioner is not at MMI from a psychological standpoint, and that although Petitioner apparently had depression and related issues predating his industrial injury, the injury "caused significant exacerbation of these factors." Dr. Peterson recommended that Petitioner be started on antidepressants and psychotherapy. Dr. Peterson further withdrew his approval of the cashier and motel clerk job analyses.[41]

¶ 19 Respondent inquired why Dr. Peterson had changed his mind regarding Petitioner's condition and Dr. Peterson replied that it was because of information he had gained through Dr. English's report.[42] However, as Respondent later pointed out, Dr. Peterson had acknowledged receiving and reading Dr. English's report in his letter of November 10, 2004, in which he asserted that he had read the report of Dr. English's neuropsychological evaluation of June 3, 2004.[43]

¶ 20 Respondent wrote to Dr. Nolan on December 6, 2005, inquiring whether, in light of Dr. Peterson's March 21, 2005, letter, he still believed Petitioner to be at MMI, and whether

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[36] Exhibit 9.

[37] *Id*.

[38] English Dep. 24:1-8.

[39] English Dep. 16:2-16.

[40] Exhibit 10.

[41] Exhibit 11.

[42] Exhibit 12.

[43] *See* Exhibit 10.

he still believed Petitioner could perform the two jobs Dr. Peterson had initially approved.[44] Dr. Nolan replied that he could not make this determination because he had not seen Petitioner in a year and a half.[45]

¶ 21 Respondent then sent Dr. Nolan a letter in which it asked several questions regarding Petitioner's medical condition, and noted that it would compensate Dr. Nolan for seeing Petitioner.[46] Dr. Nolan responded to Respondent's letter by asserting that he was unable to determine whether Petitioner had any psychological issues prior to his accident and that he would defer to Dr. English's evaluation for the related questions asked by Respondent. Dr. Nolan further asserted that since Petitioner had not noted any change in his condition in the year and a half since his last appointment with Dr. Nolan, Dr. Nolan would conclude that Petitioner had reached MMI.[47] Dr. Nolan testified that he does not know what changed Dr. Peterson's mind about approving Petitioner for the cashier and motel desk clerk job analyses, and Dr. Nolan believes Petitioner is capable of functioning in those jobs.[48]

¶ 22 Dr. English later explained that although at the time of Petitioner's June 3, 2004, evaluation, he initially concluded that Petitioner's chronic depression and anxiety were unrelated to his industrial injury, he later amended his position and now believes Petitioner's chronic depression and anxiety preexisted the injury, but were exacerbated by it.[49] He explained that the injury increased Petitioner's pain and decreased his coping abilities.[50] He opined that Petitioner's depression has not been properly treated since Petitioner's injury, and that Petitioner should have been given antidepressant medication for pain management rather than narcotics.[51] Dr. English further opined that Petitioner may not be at MMI with respect to his pain syndromes and other factors.[52]

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[44] Exhibit 14.

[45] Exhibit 15.

[46] Exhibit 16.

[47] Exhibit 17.

[48] Nolan Dep. 36:11-18.

[49] Trial Test.

[50] *Id*.

[51] *Id*.

[52] English Dep. 46:18-21.

¶ 23 Dr. English last saw Petitioner on November 2, 2005.[53] He explained that by this time Petitioner was two years post-injury, and he could no longer state that Petitioner's depression is causally related to the industrial accident because of its remoteness in time.[54] He further opined that as of November 2, 2005, Petitioner had probably not reached psychological MMI, and that with proper treatment, he would expect Petitioner's condition to improve.[55]

¶ 24 Dr. Nolan stated that he would defer to Dr. English's report for all neuropsychological aspects of Petitioner's case.[56] Dr. Nolan is aware that Dr. English recommended that Petitioner receive treatment for depression. Dr. Nolan has prescribed amitriptyline, which is an antidepressant, but the prescription is a low dosage intended as a sleep aid rather than as a therapeutic dosage for depression.[57] Dr. Nolan testified that Petitioner was reluctant to take more medication as he already believed he was overmedicated.[58]

¶ 25 Dr. Nolan stated that he has not seen Petitioner frequently enough to form an opinion as to whether Petitioner's depression had worsened since his industrial accident. Dr. Nolan opined that Petitioner's depression has not been adequately treated.[59] Dr. Nolan opined that Petitioner's complaints of physical impairments are psychosomatic, and that these difficulties are not physiological in nature.[60] Dr. Nolan stated that he found no objective medical findings to support Petitioner's complaints.[61] Dr. Nolan further found no objective medical findings to support a conclusion that Petitioner was suffering from long-term effects of his concussion.[62]

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[53] English Dep. 6:12-14.

[54] English Dep. 25:11-24.

[55] Trial Test.

[56] Nolan Dep. 30:20-23.

[57] Nolan Dep. 46:2-16.

[58] Nolan Dep. 47:8-12.

[59] Nolan Dep. 51:3-11.

[60] Nolan Dep. 41:2-9.

[61] Nolan Dep. 41:2-9.

[62] Nolan Dep. 43:23 - 44:3.

¶ 26 Physiatrist Bill Shawn Rosen, M.D., examined Petitioner on March 7, 2006.[63] After examining Petitioner, taking a history, and reviewing Petitioner's medical records, Dr. Rosen's impression was that Petitioner suffered a concussive injury on June 5, 2003,with ongoing symptoms including dizziness, visual disturbance, tinnitus, balance impairment, and cognitive dysfunction.[64] Dr. Rosen opined that Petitioner needs further evaluation and treatment to be sure that a correct diagnosis has been rendered in light of Petitioner's functional decline since his industrial accident.[65]

¶ 27 Dr. Rosen disagreed with Dr. Cahill's interpretation of Petitioner's spinal MRI. Dr. Rosen stated that Petitioner's MRI was not normal, but rather showed a broad-based left-sided disk herniation contributing to mild cord deformity.[66] Dr. Rosen opined that this deformity could account for some of Petitioner's symptoms.[67]

¶ 28 Dr. Rosen doubted that Petitioner is at MMI and further questioned whether his impairment rating could be accurate in light of his uncertain diagnosis. Dr. Rosen opined that Petitioner has been "grossly undertreated" for depression, his muscular pain, and findings related to his cervical spine.[68]

¶ 29 Dr. Rosen's findings suggest that Petitioner may not be at MMI either physically or psychologically. Both Dr. English and Dr. Rosen raised concerns that Petitioner may have been undertreated for the industrial injury and Petitioner's treating physician, Dr. Nolan, opined that his depression has not been adequately treated.[69]

¶ 30 It was apparent to the Court that Petitioner may be suffering from other treatable medical conditions which may not be related to his industrial injury, and which have also gone untreated. Petitioner testified that he has had blurred vision since the time of the industrial accident which Petitioner attributes to his head injury, and yet Petitioner had an ophthamologic examination which showed that he has a correctable age-related vision problem. Petitioner has not obtained the necessary corrective lenses and, at trial, appeared to be unaware that his medical records indicate his vision problem is

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[63] Rosen Dep. 12:6-7.

[64] Rosen Dep. 19:19-24.

[65] Rosen Dep. 21:16-20.

[66] Rosen Dep. 25:9 - 26:12.

[67] Rosen Dep. 27:3-25.

[68] Rosen Dep. 32:1-25.

[69] *See* ¶ 25, above.

correctable.[70] Dr. English's testing and evaluation indicated that Petitioner has a low I.Q., learning disabilities, depression and anxiety, a lack of coping mechanisms, and, in light of these issues, is having difficulty functioning. Although ancillary to the issue before this Court, it is apparent that some of Petitioner's ongoing health issues, such as his correctable blurred vision, should be rectifiable with proper care.

Resolution

¶ 31 An injured worker is eligible for TTD benefits when he suffers a total loss of wages as a result of an injury and until he reaches MMI, or until the worker has been released to return to the employment in which he was engaged at the time of the injury or to employment with similar physical requirements.[71] Since Petitioner has not been released to return to his time-of-injury employment nor employment with similar physical requirements, the Court must determine whether Petitioner has reached MMI.

¶ 32 Dr. Nolan first opined that Petitioner had reached MMI on December 12, 2003.[72] However, this predates Dr. English's examination of Petitioner. Dr. English diagnosed Petitioner as suffering from untreated depression and anxiety. Dr. English initially opined that these conditions were unrelated to Petitioner's industrial accident. However, he later reconsidered this opinion and concluded that, although the conditions predated the industrial accident, Petitioner's injury exacerbated them. In any case, Dr. English concluded that Petitioner was not at MMI because these psychological issues remained untreated and could improve with proper treatment, which Petitioner had not received.[73] Dr. Nolan has stated that he would defer to Dr. English's opinion on these matters.[74]

¶ 33 On March 21, 2005, Dr. Peterson also concluded that Petitioner was not at MMI, and further concluded that Petitioner's industrial accident exacerbated his preexisting depression.[75] At that time, Dr. Peterson also withdrew his approval of the job analyses he had previously approved.[76] Dr. Peterson asserted that Dr. English's report was the basis for his reconsideration of Petitioner's condition. However, Dr. Peterson possessed Dr.

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[70] Trial Test.

[71] § 39-71-701(1), MCA.

[72] Exhibit 2 at 18.

[73] Trial Test.

[74] Nolan Dep. 30:20-23.

[75] Exhibit 11.

[76] *Id*.

English's report as far back as November 10, 2004, when he concluded that Petitioner's head injury did not warrant an additional impairment rating beyond the 6% rating he had already allowed for Petitioner's cervical injury.[77] Notwithstanding this discrepancy, Dr. Peterson stands by his revised opinion of March 21, 2005.

¶ 34 Dr. English last saw Petitioner on November 11, 2005. Dr. English opined that Petitioner was likely still not at MMI. Dr. English believed that by that point in time, Petitioner's industrial accident was so far remote in time that he could no longer attribute Petitioner's ongoing depression to the injury.[78] However, the Court notes that Petitioner at that time, and to this day, ***still*** has not received adequate treatment for his depression.

¶ 35 On December 6, 2005, Dr. Nolan refused to endorse his earlier opinions as to Petitioner's condition because he had not seen Petitioner in a year and a half. Dr. Nolan stated that due to the fact that Petitioner's condition had not changed in a year and a half, Petitioner was likely at MMI. Dr. Nolan further stated that he still believes the job analyses which were approved for Petitioner are appropriate.[79]

¶ 36 At his deposition in January 2006, Dr. English revised his previous opinions regarding Petitioner's condition and asserted that Petitioner's preexisting depression was exacerbated by his industrial accident. Dr. English reasserted that he does not believe Petitioner is at MMI.[80] Finally, on March 7, 2006, Dr. Rosen reviewed Petitioner's medical records and examined Petitioner and concluded he is not at MMI.[81]

¶ 37 Although he has apparently not seen Petitioner in quite some time, Dr. Nolan remains Petitioner's treating physician. As a rule, the opinions of treating physicians are entitled to greater weight in this Court. However, as this Court and the Montana Supreme Court have further held, the treating physician's opinion is not conclusive and this Court remains the finder of fact.[82] Although Dr. Nolan has opined that Petitioner is at MMI, he also stated that he would defer to Dr. English's opinion and Dr. English has concluded otherwise. Furthermore, Dr. Nolan based his opinion that Petitioner is at MMI on the assumption that Petitioner's condition had not changed in the year and a half since Dr.

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[77] *See* ¶ 18, above.

[78] Trial Test.

[79] *See* ¶ 21, above.

[80] Trial Test.

[81] Rosen Dep. 32:1-25.

[82] *Kloepfer v. Lumbermen's Mut. Casualty Co.*, 276 Mont. 495, 916 P.2d 1310 (1996).

Nolan last saw Petitioner, and that if Petitioner's condition had not changed in a year and a half, he must be at MMI. Although Dr. Nolan's opinion is entitled to greater weight, the Court does not find his assumption that Petitioner must be at MMI because of the passage of time to be persuasive.

CONCLUSIONS OF LAW

¶ 38 This case is governed by the 2003 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Petitioner's industrial accident.[83]

¶ 39 Petitioner bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.[84]

¶ 40 Maximum healing occurs at the point of time when further treatment cannot be reasonably expected to materially improve the injured worker's condition.[85] In *Thompson*, this Court explained,

> A determination of MMI requires, in the first instance, an accurate evaluation and diagnosis of the medical conditions caused by the industrial injury. Without a definitive determination of the claimant's condition, how can proper treatment be prescribed? Lacking evaluation and diagnosis, and at least an opportunity to pursue further treatment, how can it be said that "further material improvement would not be reasonably expected from primary medical treatment?"[86]

¶ 41 In the current case, while evaluation and diagnosis were undertaken, Petitioner was given no opportunity to pursue further treatment. Both Dr. English and Dr. Rosen opined that Petitioner's depression has not been addressed. Dr. Nolan acknowledged that Petitioner's depression has not been addressed adequately. Dr. English and Dr. Peterson have both stated that Petitioner's depression, while predating the industrial injury, was exacerbated by it. Dr. Rosen opined that Petitioner's injury has been "grossly undertreated." As in *Thompson*, it cannot be said in the present case that further material improvement would not be reasonably expected from primary medical treatment where

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[83] *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

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

[85] *Boster v. Liberty Mutual Fire Ins. Co.*, 2002 MTWCC 64, ¶ 72 (citing §§ 39-71-116(14), -701, MCA (1993)).

[86] *Thompson v. Liberty Northwest Ins. Corp.*, 2002 MTWCC 34, ¶ 48.

Petitioner has not been given the opportunity to pursue further treatment. Therefore, the Court concludes that Petitioner is not at MMI from his industrial accident.

¶ 42 Since Petitioner is not at MMI, nor has he been released to return to the employment in which he was engaged at the time of injury, he is entitled to reinstatement of his TTD benefits, pursuant to § 39-71-701, MCA.

¶ 43 As the prevailing party, Petitioner is entitled to his costs.[87]

JUDGMENT

¶ 44 Petitioner has not reached maximum medical improvement.

¶ 45 Petitioner is entitled to reinstatement of his temporary total disability benefits, pursuant to § 39-71-701, MCA.

¶ 46 Petitioner is entitled to his costs.

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

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

DATED in Helena, Montana, this 28th day of December, 2006.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: James G. Hunt
Michael L. Fanning
Daniel B. McGregor
Submitted: 08/31/06

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