IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2017 MTWCC 21

WCC No. 2017-3948

ALAN DAVIS

Petitioner

vs.

LIBERTY INSURANCE CORPORATION

Respondent/Insurer

EMPLOYMENT RELATIONS DIVISION, DEPARTMENT OF LABOR AND INDUSTRY

Intervenor.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Summary: Petitioner settled his indemnity benefits with insurer on a disputed liability basis, and reserved his future medical benefits. Thereafter, insurer declined to authorize a referral for Petitioner to see his surgeon, citing the five-year medical closure rule in § 39-71-704(1)(f)(i), MCA. Petitioner contends that he is entitled to ongoing medical benefits pursuant to § 39-71-704(1)(f)(ii), MCA, because he is permanently totally disabled.

Held: Where the vocational rehabilitation expert was unable to point to any suitable jobs for Petitioner, and given Petitioner's older age, modest education, limited transferable skills, near-constant and high levels of pain, poor prognosis, and co-existing health conditions, Petitioner has met his burden of proving that he does not have a reasonable prospect of physically performing regular employment. Because he is permanently totally disabled, Petitioner is entitled to ongoing medical benefits pursuant to § 39-71-704(1)(f)(ii), MCA.

¶ 1 The trial in this matter was held on August 18, 2017, in Great Falls, Montana. Petitioner Alan Davis was present and represented by Thomas J. Murphy and Thomas M. Murphy. Larry W. Jones represented Respondent Liberty Insurance Corporation

(Liberty). Quinlan L. O'Connor, represented Intervenor Employment Relations Division, Department of Labor and Industry.

¶ 2 Exhibits: This Court admitted Exhibits 1 through 23 without objection.

¶ 3 Witnesses and Depositions: This Court admitted Davis's deposition into evidence. Davis, LaDonna Maxwell, APRN, and Andy Fowler, CRC, were sworn and testified at trial.

¶ 4 Issues Presented: This Court addresses the following issues:[1]

> Issue One: Did this Court err in ruling that, for purposes of establishing his entitlement to ongoing medical benefits under § 39-71-704(1)(f)(ii), MCA (2011), Davis had the burden of proving that he is permanently totally disabled?
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> Issue Two: Did Davis meet his burden of proving that he is permanently totally disabled and therefore establish his entitlement to ongoing medical benefits under § 39-71-704(1)(f)(ii), MCA (2011)?

PROCEDURAL HISTORY

¶ 5 Davis's Petition for Hearing sets forth alternative claims. First, Davis contends that he is entitled to ongoing medical benefits pursuant to § 39-71-704(1)(f)(ii), MCA, because he is permanently totally disabled. In the alternative, Davis challenges the constitutionality of the five-year medical closure rule in § 39-71-704(1)(f)(i), MCA. This Court issued an Order ruling that the permanent total disability (PTD) issue would be bifurcated from the constitutional challenge, and tried first.

¶ 6 In ¶ 4 of its August 17, 2017, Order on Burden of Proof, this Court ruled that, for purposes of establishing his entitlement to ongoing medical benefits under § 39-71-704(1)(f)(ii), MCA, Davis bore the burden of proving that he is permanently totally disabled.[2] At the outset of trial, Davis moved this Court to reconsider this Order. This Court denied Davis's motion and indicated it would address its reasoning in its final decision.

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[1] Although the Pretrial Order lists, "Whether the Petitioner settled his indemnity claims, including any claim for PTD disability [sic] status" as an issue, this Court previously answered this question when it ruled, "although Davis settled the dispute over his claimed right to PTD benefits under § 39-71-702, MCA, this Court can determine if Davis 'is permanently totally disabled' under the definition in § 39-71-116(28), MCA." *Davis v. Liberty Ins. Corp.*, 2017 MTWCC 10, ¶ 16.

[2] *See also Dumont v. Wickens Bros. Constr. Co.*, 183 Mont. 190, 201, 598 P.2d 1099, 1105-06 (1979) (citations omitted).

FINDINGS OF FACT

¶ 7 This Court finds the following facts based on a preponderance of the evidence.

Davis's Background and Current Condition

¶ 8 Davis grew up in Montana and went to school in Great Falls. He dropped out of high school in eleventh grade because he had poor grades and wanted to work. He eventually obtained a GED.

¶ 9 His first job after high school was working as a gas station attendant, but his employer fired him after about a year because he could not keep track of the till. After that, he got jobs in vehicle maintenance — changing oil and air filters — and roofing.

¶ 10 It was at this later position that, in December 2004, Davis herniated his L4/L5 disk. He was 47 years old at the time. He underwent diskectomy surgery and was given permanent lifting restrictions as a result.

¶ 11 In early September 2006, Davis applied for a job at ProBuild Holdings, Inc. (ProBuild). On his job candidate profile tests, he scored 59% for "Dependability," 60% for "Working Safety," 68% for "Driving Safety," and 21% for "People Relations." ProBuild hired Davis into a full-time insulation installer position, and he began working later that month.

¶ 12 By late September 2011, five years later, his back pain was down to a level 1 or 2 on most days with flares between 8 and 10 only on occasion. He was taking pain, anti-inflammatory, and muscle-relaxing medications but working on a full-time basis. He did not require any further surgical intervention.

¶ 13 In October 2011, Davis was working 40-plus hours per week. He made $16 per hour.

¶ 14 On October 7, 2011, while in the course and scope of his employment at ProBuild, Davis suffered injuries to his back, shoulders, and head. He was 54 years old at the time. He sought treatment and continued working, but his back worsened over the next several years.

¶ 15 Just before Thanksgiving 2013, Davis suffered an acute flare-up of back pain, which his medical providers attribute to his October 2011 injury. His nurse practitioner, LaDonna Maxwell, APRN, took him off work indefinitely.

¶ 16 A December 27, 2013, MRI of Davis's lumbar spine showed a herniated disk at L5-S1, "causing mass effect on the descending R S1 nerve root."

¶ 17 On February 13, 2014, Davis underwent a right L5-S1 diskectomy and foraminotomy performed by Dale M. Schaefer, MD.

¶ 18 Although his medical providers initially sent Davis's bills and records to the wrong insurer, Liberty eventually received the supporting documentation. Liberty accepted the claim for his 2011 low-back injury and paid wage-loss and medical benefits.

¶ 19 In a follow-up exam on May 19, 2014, Dr. Schaefer determined that Davis was at maximum medical healing.

¶ 20 In late July 2014, Maxwell released Davis to full-time, modified duty, with the following restrictions: no bending, squatting, or climbing, and only occasional kneeling and lifting up to 10 pounds.

¶ 21 Davis underwent a Functional Capacity Evaluation with Michael J. Jensen, PT, OCS, on August 7, and an impairment evaluation with Mark T. Stoebe, DC, DABCO, on August 19, 2014. Jensen determined that Davis had made a reliable effort and assessed his abilities similarly to Maxwell. However, Jensen indicated that, "Based upon his overall performance, it is questionable that he could consistently tolerate working full time." Stoebe determined that Davis had a 12% whole person impairment, noted that Davis was capable of returning to work within the guidelines Jensen indicated, and concluded that "workability from this point forward would best be directed by his general medical provider LaDonna Maxwell, NP."

¶ 22 On September 22, 2014, Maxwell further restricted Davis to "[w]orking only 4 hours/shift." And on November 13, 2014, after noting that his right foot went numb after about 4 hours, and that, "[w]hen his foot becomes numb, he is unable to perceive where he is stepping and he begins to drag his leg," Maxwell updated Davis's restrictions and made them permanent. Although he could frequently lift up to 10 pounds, his restrictions included: no climbing ladders because it was a safety risk; no lifting more than 25 pounds; and only occasional pushing, pulling, reaching, bending, kneeling, squatting, and lifting between 11 and 25 pounds.

¶ 23 ProBuild brought Davis back to work as a retail sales representative for $11.50 per hour. He worked a four-hour shift, five days per week. After Davis worked his shift, he was "hurting" and "done." And his back pain worsened as the workweek progressed. He missed work on several occasions during the time he held the sales position because of flare-ups in pain.

¶ 24 Davis could not do all the essential functions of the retail sales job. He could not climb ladders to put items on shelves nor lift any heavy materials. Thus, he had to ask his co-workers for help.

¶ 25 Maxwell's January 19, 2015, treatment note indicates that Davis's "current condition is probably permanent and chances of improvement are slim to none."

¶ 26 Although Davis had planned to continue in the sales position, ProBuild determined that sales were insufficient to support the size of the sales team, and laid Davis off on January 13, 2016.

¶ 27 As a condition for receiving unemployment benefits, Davis was required to look for work. He applied for at least 10 jobs, including several sales positions, but never saw one that allowed for a 20-hour work week or received an offer.

¶ 28 Davis requested PTD benefits from Liberty on February 10, 2016. Liberty asserted that he did not qualify for PTD benefits.

¶ 29 On July 8, 2016, the parties settled their dispute over wage-loss benefits. However, their agreement states:

> Medical benefits are expressly reserved by Claimant for any medical condition causally related to the October 7, 2011 workers' compensation claim to the extent such benefits are allowed under the Workers' Compensation Act, and the Insurer reserves any and all defenses at law or equity to any claims for medical benefits.[3]

¶ 30 On October 3, 2016, Davis saw Maxwell. Her note indicates, "He states his pain is as bad as it was prior to surgery. I am formally requesting authorization for a repeat appointment with Dr. Schaefer for workup and evaluation."

¶ 31 Liberty declined to authorize a referral to Dr. Schafer by e-mail on October 17, 2016, citing the five-year medical closure rule in § 39-71-704(1)(f)(i), MCA.

¶ 32 Currently, Davis is in near-constant pain. As a result, he has trouble concentrating, and feels sad and miserable all the time. Although he already has pain at about a level 8 out of 10, at least once a month, Davis suffers a flare-up from sitting or standing too long, where his pain becomes even more severe. At those times, he walks around, takes a muscle relaxer, and sometimes lays down. He also takes pain and anti-inflammatory medications. Davis's foot drop, which occurs more frequently now than before, can affect his ability to walk across uneven surfaces and figure out where he is going to put his foot down. According to Maxwell, Davis's condition will only get worse.

Vocational Rehabilitation Evidence

¶ 33 In early December 2014, Mickey Marion, a certified rehabilitation counselor (CRC) for Liberty's vocational rehabilitation services provider, prepared two alternative job analyses (JA) for Davis: Housing Occupancy Inspector for Missoula Housing Authority in Missoula, and Automotive Service Advisor for Lithia Motors in Great Falls. Each position was full-time. Nevertheless, Maxwell approved both on December 17, 2014.

[3] Emphasis omitted.

¶ 34 In June 2017, Liberty hired Andy Fowler — who has a master's degree in rehabilitation counseling and is a CRC with approximately 7 ½ years' experience — "to develop statewide alternative job analyses for alternative jobs that were within Mr. Davis' abilities [and] work restrictions." Fowler "look[ed] everywhere [he] could" for jobs that Davis might be able to do in Montana. Fowler developed JAs for the five best positions he thought are potentially available to Davis: (1) Dispatcher for Valley Sand & Gravel in Helena; (2) Fuel Station Attendant for Safeway at its gas station in Helena; (3) Customer Service Representative for Direct TV/AT&T at its call center in Missoula; (4) Telephone Support Representative for All American Hearing Network at its call center in Great Falls; and (5) Parking Lot Cashier for Standard Parking at its location at the Billings airport. The parking lot cashier job for Standard Parking is the only one of these jobs that allows part-time employees, and the JA for this position states it required at least 25 hours per week.

¶ 35 Although Fowler had previously researched retail sales jobs in Montana for clothing, shoes, sporting goods, and hardware, he did not do an employability assessment to determine whether Davis could physically perform this type of work. Fowler testified that there are many retail sales jobs in Montana that are part-time, but he did not know if any were available for only 4-hour shifts, and only 20 hours per week.

¶ 36 At trial, Fowler acknowledged that the JAs Marion prepared were inapplicable since they were all full-time positions and Davis could work only 20 hours per week. Despite her previous approvals of those positions, Maxwell agreed at trial that these positions had essential functions that exceeded Davis's physical restrictions.

¶ 37 Regarding his own efforts, Fowler agreed that Davis could not physically perform the full-time positions and, therefore, agreed that the only job he could find on a state-wide basis that Davis could physically do was the cashier position for Standard Parking at the Billings airport. When asked if Davis would be competitive for this position, Fowler would only say "potentially." Fowler stated that Standard Parking employed people with disabilities, is accommodating, and had several employees who worked between 25 and 40 hours per week. However, he did not know if Standard Parking would hire someone who was limited to only 4 hours per day, and only 20 hours per week. Thus, he testified that the Parking Lot Cashier position was only "potentially" available to Davis. Fowler testified that parking lot cashier positions exist in several Montana cities, but he did not know if any of those employers would hire a person limited to only 4 hours per day, and only 20 hours per week.

¶ 38 Although Maxwell had not previously seen Fowler's JAs, when she was given the opportunity to review them at trial, she identified at least one reason why she would disapprove each; Maxwell noted that Davis could not perform some of the duties at all and could only perform others with modifications. Most importantly, however, she testified that the 4-hour limitation per day still applied, and that she would not approve any full-time positions.

Resolution

¶ 39 This Court finds that Davis carried his burden of proving that he does not have a reasonable prospect of physically performing regular employment in Montana. Although Fowler, who Liberty hired as its expert, testified that he believed Davis could work in Montana, after using his best efforts, Fowler was unable to find any job Davis could do without an accommodation. While Fowler was able to find one job Davis could do with an accommodation — Parking Lot Cashier — Maxwell testified that she would not approve the JA for that position as it was written, and Fowler acknowledged that there was no evidence that Standard Parking would actually provide the reduced-hours schedule Davis would need.

¶ 40 Liberty asks this Court to use its own "experience and common sense" to find that Davis has a reasonable prospect of performing some sort of retail sales job for a different employer since he could perform similar work at ProBuild. However, determining the essential functions of a job, which is not always performed in public view, and whether Davis 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,"[4] which it defines as "a rehabilitation counselor certified by the commission on rehabilitation counselor certification."[5] Thus, while this Court "is not bound by any expert's opinion and is free to adopt any reasonable conclusion supported by the evidence,"[6] under the facts of this case, it declines Liberty's invitation to substitute its judgment for that of Fowler, an experienced CRC.

¶ 41 Although Fowler had previously researched retail sales jobs in Montana, he did not prepare any JAs for such jobs, thereby demonstrating he did not think Davis was capable of physically performing this work in Montana, or that any other employer offering retail sales jobs in Montana would accommodate Davis as ProBuild did. Indeed, the evidence shows that Davis is at an older age; has a modest education, a history of work in a capacity he can no longer tolerate, limited transferable skills including limited computer skills, poor test scores in people relations, near-constant and high levels of pain, a poor prognosis, and co-existing health problems; and at least occasionally misses work because of his physical condition. These factors weigh against a finding that Davis could find regular employment in retail sales.[7]

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[4] *See* § 39-71-609(2)(c), MCA.

[5] § 39-71-1011(7), MCA.

[6] *Fellenberg v. Transp. Ins. Co*., 2004 MTWCC 29, ¶ 34 (citation omitted).

[7] *See, e.g.*, *Larson v. Cigna Ins. Co.*, 276 Mont. 283, 915 P.2d 863 (1996) (considering such factors as age, work history, pain, and other health problems in deciding whether substantial evidence supported Workers' Compensation Court's finding that claimant had a reasonable prospect of finding regular employment); *Wilson v. Uninsured Employers' Fund*, 2010 MTWCC 33 (pain); *Peterson v. Montana Sch. Grp. Ins. Auth.*, 2006 MTWCC 14 (other disabilities); *Winfield v. Montana State Fund*, 1999 MTWCC 41 (age, education, work history, skills and abilities,

CONCLUSIONS OF LAW

¶ 42 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 Davis's industrial accident.[8]

> **Issue One: Did this Court err in ruling that, for purposes of establishing his entitlement to ongoing medical benefits under § 39-71-704(1)(f)(ii), MCA (2011), Davis had the burden of proving that he is permanently totally disabled?**

¶ 43 Prior to trial, this Court ruled that Davis had the burden of proof. This Court explained:

> This Court has decided a handful of cases . . . in which this Court ruled that 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. This Court has reasoned that an insurer has the initial burden of proof because an insurer may not convert temporary disability benefits to permanent partial disability (PPD) benefits without complying with the requirements of § 39-71-609(2), MCA. 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.[9]

Because this case does not involve converting temporary disability benefits to permanent partial disability (PPD) benefits under § 39-71-609(2), MCA, this Court reasoned that the

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and pain); *Crowell v. State Comp. Ins. Fund*, 1999 MTWCC 27 ("Jobs for which he is theoretically qualified, but not competitive, do not argue against permanent, total disability status.").

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

[9] Order on Burden of Proof, ¶ 3 (citations omitted); *Kellegher v. MACO Workers' Comp. Trust*, 2015 MTWCC 16, ¶ 71 (citations omitted) (explaining that, "in determining whether an insurer may terminate temporary total disability benefits, § 39-71-609(2), MCA, provides that an insurer must first obtain a physician's approval of one or more jobs suitable for the claimant 'by age, education, work experience, and physical condition.' Thus, the insurer bears the initial burden to produce evidence showing that the claimant is not permanently totally disabled by submitting sufficient evidence that there are approved jobs."); *Holmes v. Safeway Inc.*, 2012 MTWCC 8, ¶ 59 (citation omitted) (ruling that in cases where claimant seeks PTD benefits, "the insurer bears the initial burden to produce evidence showing that an injured worker is not permanently totally disabled by obtaining a physician's approval of one or more jobs suitable for the injured worker."); *Drivdahl v. Zurich Am. Ins. Co.*, 2012 MTWCC 43, ¶ 24 (ruling, "under § 39-71-609(2), MCA, the insurer bears the initial burden to produce evidence showing that the injured worker is not permanently totally disabled."); *Weisgerber v. Am. Home Assurance Co.*, 2005 MTWCC 8, ¶ 32 (explaining that § 39-71-609(2), MCA, "puts the burden on the insurer to, in the first instance, obtain a physician's approval of one or more jobs suitable for the claimant. Thus, it bears the initial burden to produce evidence showing that the claimant is not permanently totally disabled.").

cases holding that the insurer has the initial burden of proof "have no application" to this case.[10]

¶ 44 At trial, Davis moved for reconsideration. Davis argued that this Court's Order on Burden of Proof could result in unequal treatment because "a permanent total disability claimant . . . receives the benefit of not having the burden of proof if he seeks indemnity benefits, but he does have the burden of proof if he seeks medical benefits." Davis also argued that while § 39-71-609, MCA, "codified much of *Coles* [*v. Seven Eleven Stores*,[11]] . . . it did not obviate the other part of the *Coles'* criteria, and the reason for the *Coles'* criteria, and the burden of proof shift."

¶ 45 This Court disagrees that its Order on Burden of Proof could result in unequal treatment of similarly-situated claimants. Even in cases subject to § 39-71-609(2), MCA, once the insurer produces evidence of an approved job, the burden shifts back to the claimant to prove he is permanently totally disabled notwithstanding the approved JA.[12] In short, the claimant has the ultimate burden of proof regardless of whether he is seeking PTD benefits under § 39-71-702, MCA, or medical benefits beyond five years under § 39-71-704(1)(f)(ii), MCA.

¶ 46 Moreover, *Coles* does not support Davis's argument because the law has since changed. At the time the Supreme Court decided *Coles*, the claimant had the initial burden of presenting evidence showing there was no reasonable prospect of employment; if the claimant met his burden, " 'the burden of proof shift[ed] to the employer to show that suitable work [wa]s available.' "[13]

¶ 47 This Court correctly determined that, for purposes of establishing his entitlement to ongoing medical benefits under § 39-71-704(1)(f)(ii), MCA, Davis had the burden of proving that he is permanently totally disabled.

Issue Two: Did Davis meet his burden of proving that he is permanently totally disabled and therefore establish his entitlement to ongoing medical benefits under § 39-71-704(1)(f)(ii), MCA (2011)?

¶ 48 Section 39-71-704(1)(a), MCA, provides that an insurer is liable for "primary medical services, including prescription drugs for conditions that are a direct result of the compensable injury or occupational disease . . . ." However, § 39-71-704(1)(f), MCA, provides:

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[10] Order on Burden of Proof, ¶ 4.

[11] 217 Mont. 343, 704 P.2d 1048 (1985).

[12] *E.g.*, *Holmes*, ¶¶ 59-61; *Drivdahl*, ¶¶ 26, 34.

[13] *Coles*, 217 Mont. at 347, 704 P.2d at 1051 (quoting *Metzger v. Chemetron Corp.*, 212 Mont. 351, 356, 687 P.2d 1033, 1036 (1984)).

> (i) The benefits provided for in this section terminate 60 months from the date of injury or diagnosis of an occupational disease. . . .
>
> (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 . . . .

¶ 49 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.

Under § 39-71-116(33), MCA, " '[r]egular employment' means work on a recurring basis performed for remuneration in a trade, business, profession, or other occupation in this state."

¶ 50 This Court has found Davis does not have a reasonable prospect of physically performing regular employment in Montana. Suffice it to say here there are no approved JAs for any job in Montana for Davis despite the efforts of a qualified and experienced CRC to find one, and there is insufficient evidence to otherwise conclude that Davis has a reasonable prospect of physically performing regular employment. Davis therefore has a PTD under § 39-71-116(28) and (33), MCA.

¶ 51 Liberty concedes there are no approved JAs for Davis, but makes two arguments in support of its claim that Davis is not permanently totally disabled. Neither holds water.

¶ 52 First, Liberty argues the reason Davis is not working is because of ProBuild's reduction in force, and not because of the physical restrictions resulting from his injury. Relying on *Carey v. American Home Assurance Co.*,[14] and *Chapman v. Twin City Fire Ins. Co.*,[15] Liberty contends, "When a person incurs a wage loss because of termination, that is not a wage loss entitling them to indemnity benefits." Under this reasoning, Liberty maintains that Davis is not permanently totally disabled.

¶ 53 Davis counters that under the Montana Supreme Court's decision in *Dilling v. Buttrey Foods*,[16] this Court may not consider his part-time retail sales position when determining whether he is permanently totally disabled because it was a modified position offered only by his time-of-injury employer, and is no longer available to him. Davis

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[14] 2010 MTWCC 3.

[15] 2010 MTWCC 30.

[16] 251 Mont. 286, 825 P.2d 1193 (1991).

argues that the cause of his inability to work is the physical restrictions as a result of his injury.

¶ 54 In *Carey*, Carey returned to her time-of-injury job as a store manager at Sam's Club without restrictions.[17] However, a few weeks after she returned to work, Sam's Club eliminated her position due to a nationwide restructuring.[18] She could have worked in another position, but she turned it down and subsequently took a severance package.[19] Carey argued she was terminated as store manager due to her industrial injury and, therefore, entitled to temporary total disability (TTD) and PPD benefits.[20] This Court found that Carey's employer terminated her employment due to a legitimate reduction in force/restructuring and not due to her industrial injury.[21] Thus, this Court explained, "Carey sustained no loss of wages due to her industrial injury."[22] As such, she did not qualify for either TTD or additional PPD benefits, both of which require that claimant's loss of wages be caused by the industrial injury.[23]

¶ 55 Although both Carey and Davis lost their jobs due to a reduction in force, their cases are distinguishable. Unlike the situation in *Carey*, the position Davis lost due to a reduction in force was not his time-of-injury job, nor a job he was able to work without modifications necessitated by the restrictions of his industrial injury. Rather, Davis had to rely on co-workers to perform some of the essential duties of his job, including climbing ladders and lifting heavy materials.

¶ 56 In *Dilling*, the Supreme Court held that in these circumstances — i.e., when the time-of-injury employer accommodates the claimant by having him work a modified job — the modified job is not to be included when determining the claimant's entitlement to benefits when the modified job is no longer available. Dilling injured her back while working as a grocery clerk.[24] After her injury, she worked a total of five additional weeks before determining she could no longer handle the physical demands of the position.[25] After reaching MMI, she was limited to light-duty work paying less than her time-of-injury job.[26] However, her employer brought her back to a modified job working at the camera

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[17] *Carey*, ¶¶ 5, 44.

[18] *Carey*, ¶ 10.

[19] *Carey*, ¶ 30.

[20] *Carey*, ¶ 4.

[21] *Carey*, ¶ 38.

[22] *Carey*, ¶ 41.

[23] *Carey*, ¶¶ 44, 47; *see Chapman*, ¶ 43 (ruling that claimant was not entitled to TTD benefits because she was discharged for insubordination and disregard for company policies or procedures and, therefore, did not suffer a wage loss as a result of her injury); *see also* §§ 39-71-116(27)(c) and -116(39), MCA.

[24] *Dilling*, 251 Mont. at 288, 825 P.2d at 1194.

[25] *Id.*

[26] *Dilling*, 251 Mont. at 289, 825 P.2d at 1194.

bar even though she could not meet the lifting requirements or the requirement for the number of hours to be worked in a week.[27] The employer paid Dilling her time-of-injury wage, even though it was higher than what the employer normally paid to a camera bar clerk.[28] After Dilling's employer terminated her, she demanded benefits under § 39-71-703 (1987).[29] This court ruled that since Dilling made the same hourly wage at the camera bar as she did at her time-of-injury job, she was not entitled to such benefits.[30] However, the Montana Supreme Court reversed, holding that this Court erred in considering the modified camera bar clerk job because, "The position should not be included in her job pool because the only employer providing the modified position is the defendant."[31] The court explained:

> Wages paid an injured employee out of sympathy, or in consideration of his long service with the employer, clearly do not reflect his actual earning capacity, and, for purposes of determining permanent disability are to be discounted accordingly. The same is true if the injured man's friends help him, or if he manages to continue only by delegating his more onerous tasks to a helper, or if the work for which claimant is paid is 'made work' or sheltered work.[32]

¶ 57 Under *Dilling*, Davis's sales job at ProBuild is to be "discounted" because it was a modified job; i.e., Davis could not do the essential functions of the job by himself and had to have co-workers help him with tasks requiring ladder work or heavy lifting. After ProBuild terminated Davis from his modified position, Fowler was unable to find any position on a statewide basis that Davis could physically do. Thus, contrary to Liberty's argument, Davis's physical restrictions from his industrial injury are the reasons he cannot now physically perform retail sales jobs in the Montana labor market.

¶ 58 Second, Liberty asserts that Davis's sales job at ProBuild is conclusive proof that he can work 20 hours per week and argues this is sufficient to prove that he can perform

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[27] *Dilling*, 251 Mont. at 288, 825 P.2d at 1194.

[28] *Id*.

[29] *See Dilling*, 251 Mont. at 289, 825 P.2d at 1195.

[30] *Id*.

[31] *Dilling*, 251 Mont. at 291, 825 P.2d at 1196.

[32] *Id.* (emphasis omitted) (quoting Larson's Workers' Compensation Desk Edition, Section 57.34 (1989)); *see also Walker v. State, Muscatatuck State Dev. Ctr.*, 694 N.E.2d 258, 267 (Ind. 1998) (explaining, "work that is highly accommodated to suit the needs and disabilities of a particular claimant cannot defeat a claim of total permanent disability where it is clear that the claimant could not find similar work under normally prevailing market conditions."); *Doles v. Indus. Comm'n*, 810 P.2d 602, 604-06 (Arizona App.1990) (citation omitted) (explaining that neither make work nor sheltered work can be considered in determining earning capacity because it "reflect[s] not the employee's earning capacity in a competitive situation, but rather a company policy which, if abrogated for any reason by the employer, will force an employee into a position where he will be unable, because of his injuries, to continue to earn such wages or secure equivalent employment.").

"regular employment" under *McFerran v. Consolidated Freightways*[33] and *VanVallis v. Liberty Northwest Ins. Corp.*[34] Liberty urges this Court to rule that 20 hours per week is regular employment. Therefore, Liberty asserts Davis is not permanently totally disabled.

¶ 59 Davis counters that a 20-hour per week job is insufficient to be "regular employment" under *McFerran* and *VanVallis*, and that without an approved JA, or evidence of what the part-time job pays, this Court cannot determine if 20 hours per week is "regular employment."

¶ 60 In *McFerran*, McFerran worked for approximately 26 years in heavy-duty labor for a freight service company.[35] Upon reaching MMI for an industrial injury, McFerran's doctor restricted him to light-duty work and approved a JA for a part-time pharmacy delivery driver position.[36] McFerran argued that the position was not regular employment because the work shift lasted only 1-4 hours each day.[37] The Montana Supreme Court held that "regular employment" encompasses part-time employments, "at least where that employment is substantial and significant."[38] However, because the pharmacy delivery driver position guaranteed only 1 hour per day and had a low wage, the result of which would have placed McFerran's income far below the Federal Poverty level, the court held that the pharmacy delivery driver position was not substantial and significant, and did not amount to regular employment.[39] Because there were no other JAs for regular employment approved for McFerran, the court held that he was permanently totally disabled.[40]

¶ 61 In *VanVallis*, VanVallis was injured while working full-time as a supervisor of a crew of developmentally disabled people for Opportunity Resources, which provides employment opportunities for people with disabilities.[41] After reaching MMI, she was restricted to 25 hours per week.[42] Opportunity Resources offered her a 25-hour per-week position to assist a particular client, which paid $8.40 per hour.[43] However, she petitioned this Court for a determination of whether this position constituted regular employment for

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[33] 2000 MT 365, 303 Mont. 393, 15 P.3d 935.

[34] 2008 MTWCC 25.

[35] *McFerran*, ¶¶ 4-6.

[36] *McFerran*, ¶¶ 6-7.

[37] *McFerran*, ¶ 15.

[38] *McFerran*, ¶ 13 (internal quotation marks omitted).

[39] *McFerran*, ¶¶ 15, 17.

[40] *McFerran*, ¶ 18.

[41] *VanVallis*, ¶¶ 12, 13.

[42] *VanVallis*, ¶¶ 20-21.

[43] *VanVallis*, ¶¶ 22, 42.

purposes of the statutory definition of PTD.[44] This Court pointed out that "While *McFerran* stands for the obvious proposition that a job which guarantees only one hour per day is not substantial and significant, and therefore does ***not*** constitute 'regular employment,' the Supreme Court did not establish an hourly threshold as to what ***does***."[45] This Court decided it was unnecessary to determine where that threshold lies, however, because it was "obvious that a job which guarantees nearly two-thirds the hours as Petitioner's time-of-injury employment is substantial and significant," and therefore regular employment.[46]

¶ 62 This Court cannot find that Davis could do regular employment because, unlike in *McFerran* and *VanVallis*, there is no actual job at issue in this case. It is well-established that for a claimant not to be permanently totally disabled, there must be a specific job in Montana for which the claimant is qualified and competitive.[47] Thus, before this Court rules on whether a part-time job is regular employment, there must be an approved JA for an actual part-time job. This Court would then determine if that job was regular employment under *McFerran* and *VanVallis*. This Court declines to create the bright line rule Liberty seeks in this case because this Court does not resolve hypothetical questions nor give advisory opinions.[48]

¶ 63 Davis is permanently totally disabled under § 39-71-116(28) and (33), MCA. He therefore has the right to ongoing medical benefits under § 39-71-704(1)(f)(ii), MCA.

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¶ 64 This Court did not err in ruling that, for purposes of establishing his entitlement to ongoing medical benefits under § 39-71-704(1)(f)(ii), MCA (2011), Davis had the burden of proving that he is permanently totally disabled.

¶ 65 Davis has met his burden of proving that he is permanently totally disabled and therefore established his entitlement to ongoing medical benefits under § 39-71-704(1)(f)(ii), MCA (2011).

¶ 66 Accordingly, the five-year medical closure rule in § 39-71-704(1)(f)(i), MCA (2011), does not apply to Davis, and his constitutional challenge is moot.

¶ 67 Pursuant to ARM 24.5.348(2), this Judgment is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

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[44] *VanVallis*, ¶ 40.

[45] *VanVallis*, ¶ 43 (emphasis in original).

[46] *Id*.

[47] *Crowell*, 1999 MTWCC 27.

[48] *In re Noonkester*, 2004 MTWCC 61, ¶ 14 (citation omitted).

DATED this 26th day of December, 2017.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: Thomas J. Murphy/Thomas M. Murphy
Larry W. Jones
Quinlan L. O'Connor

Submitted: August 18, 2017