

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2012 MTWCC 8

WCC No. 2011-2716

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JERRY HOLMES

Petitioner

vs.

SAFEWAY INC.

Respondent/Insurer.

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FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

**Summary:** Petitioner, who suffers from a pre-existing back condition, injured his low back in an industrial accident soon after starting to work for Respondent. Petitioner alleges he was hired to work full-time and that he suffered a permanent aggravation to his low back which precludes him from returning to work in any capacity. Respondent contends that Petitioner's industrial injury caused a temporary aggravation of his underlying condition, and that it did not hire Petitioner as a full-time employee.

**Held:** Petitioner has not met his burden of proof regarding his claim that he is permanently totally disabled. Petitioner has not proven his entitlement to additional temporary total disability benefits. Respondent correctly calculated Petitioner's average weekly wage under § 39-71-123(3)(a), MCA. Petitioner has not proven that he is entitled to additional temporary partial disability benefits.

**Topics:**

**Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated. 39-71-116.** After the insurer meets its initial burden of producing evidence 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, the burden then shifts to the injured worker to dispute the approved job analyses. The mere testimony of the injured worker that he does not believe he can work in any capacity is insufficient to overcome evidence to the contrary.

**Proof: Burden of Proof: Generally.** After the insurer meets its initial burden of producing evidence 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, the burden then shifts to the injured worker to dispute the approved job analyses. The mere testimony of the injured worker that he does not believe he can work in any capacity is insufficient to overcome evidence to the contrary.

**Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated. 39-71-701.** Petitioner is not entitled to temporary total disability benefits until he is retrained to return to the labor market because: 1) he does not meet the definition of a disabled worker under § 39-71-1011, MCA, since alternative jobs were approved for him in which he would suffer no actual wage loss; 2) he testified his back pain precludes even part-time, sedentary jobs; and 3) he put forth no evidence to indicate he even had an interest in vocational rehabilitation.

**Benefits: Temporary Total Disability Benefits.** Petitioner is not entitled to temporary total disability benefits until he is retrained to return to the labor market because: 1) he does not meet the definition of a disabled worker under § 39-71-1011, MCA, since alternative jobs were approved for him in which he would suffer no actual wage loss; 2) he testified his back pain precludes even part-time, sedentary jobs; and 3) he put forth no evidence to indicate he even had an interest in vocational rehabilitation.

**Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated. 39-71-123.** Where a Petitioner was injured his second week of work and worked 28 hours his first week; he was scheduled to work 28 hours his second week; the position was typically a 24- to 30-hour-per-week position; and Petitioner put down on his application that he could work 30 hours a week, the Petitioner's average weekly wage was correctly computed by the insurer under § 39-71-123(3)(a), MCA, based on the Petitioner being hired to work a 28 hour work week, not a full-time position as Petitioner claimed.

**Wages: Average Weekly Wage.** Where a Petitioner was injured his second week of work and worked 28 hours his first week; he was scheduled to work 28 hours his second week; the position was typically a 24- to 30-hour-per-week position; and Petitioner put down on his application that he could work 30 hours a week, the Petitioner's average weekly wage was correctly computed by the insurer under § 39-71-

123(3)(a), MCA, based on the Petitioner being hired to work a 28 hour work week, not a full-time position as Petitioner claimed.

¶ 1 The trial in this matter occurred on October 24, 2011, at the Workers' Compensation Court. Petitioner Jerry Holmes was present and was represented by John C. Doubek. G. Andrew Adamek represented Respondent Safeway Inc. (Safeway). Senior claims adjuster Laura Steinhoff also attended on behalf of Safeway's third-party administrator, Brentwood Services Administrators.

¶ 2 Exhibits: I admitted Exhibits 1 through 6 without objection. I added supplemental pages 44 through 50 to Exhibit 6 with the parties' stipulation. I admitted Exhibit 7 after Safeway withdrew its objection.

¶ 3 Witnesses and Depositions: The depositions of Holmes and Philip Steele, M.D., were submitted to the Court and are considered part of the record. Holmes, Vicky Holmes (Vicky), Stephanie Kennedy, Laura Steinhoff, and Mickey Marion, MA, CRC, were sworn and testified.

¶ 4 Issues Presented: The Pretrial Order sets forth the following issues:<sup>1</sup>

Issue One: Whether Petitioner is permanently totally disabled.

Issue Two: Whether Petitioner is entitled to additional temporary total disability benefits until such time as he is retrained to properly enter the job market.

Issue Three: What the exact amount of Petitioner's indemnity rate should be.

Issue Four: Whether Petitioner is entitled to payment of additional temporary partial disability benefits.

#### FINDINGS OF FACT

¶ 5 Holmes testified at trial. I did not find Holmes to be a credible witness. The discrepancies I found in his testimony are set forth more fully below.

¶ 6 Holmes' work history pertinent to the present case begins in 1988, when he herniated a disk in his back while working for Hall Transit. Holmes testified that he spent approximately two years off work after that industrial injury. When he was

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<sup>1</sup> Pretrial Order at 5, Docket Item No. 19.

released to work, he believed he could not return to his time-of-injury job. Holmes then went to work for an equipment rental company. Eventually, he had difficulty performing some of his more strenuous job duties. Holmes testified that he left his job at the rental company in 1994 after Catherine C. Capps, M.D., recommended that he reduce his work hours to six hours per day.<sup>2</sup>

¶ 7 Dr. Capps' records indicate that Holmes did not see her until after he left his job at the rental company. Dr. Capps performed an orthopedic evaluation of Holmes on May 24, 1994. Dr. Capps noted that on January 7, 1994, Holmes reported increased low-back pain with repetitive heavy lifting and he resigned his job at Sun Rental Center because of back pain. Holmes reported that he initially injured his low back in July 1988 while lifting a transmission as part of his job duties as a school bus mechanic and after he was released to return to work, he changed jobs because his back pain precluded his ability to return to his time-of-injury employment. Dr. Capps noted that since Holmes' January 1994 report of injury, he had not sought any medical treatment until this appointment and that he was "self-treating by just tolerating it."<sup>3</sup>

¶ 8 Dr. Capps noted that Holmes reported low-back pain which varied with activity. He reported that on average, his pain was a 5 out of 10, but it increased to a 10 out of 10 when he engaged in lifting activities. X-rays revealed a slightly decreased disk space at L5-S1. Dr. Capps diagnosed Holmes with low-back pain secondary to a combination of mechanical and discogenic factors without evidence of current radiculopathy.<sup>4</sup> Dr. Capps opined that Holmes' symptoms were a continuation of his July 1988 industrial injury and that his job duties at Sun Rental aggravated the pre-existing condition. Dr. Capps stated that she would consider Holmes' low-back condition to be an occupational disease although she considered his 1988 injury to be the "primary culprit." Dr. Capps opined that Holmes could return to work with restrictions consistent with those which he had been given after a 1990 functional capacity examination: frequently lift in the 20-pound range and occasionally lift in the 30-pound range, and no repetitive bending, twisting, and stooping. Dr. Capps' records do not indicate that she recommended that he reduce his work hours.<sup>5</sup>

¶ 9 Holmes was unemployed until 2000, when he went to work for Wal-Mart on the "slide team," which was a group of workers who moved shelving units. Holmes testified that he lifted more than 50 pounds on occasion.<sup>6</sup> Holmes worked at Wal-Mart for

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<sup>2</sup> Trial Test.

<sup>3</sup> Ex. 5 at 60-61.

<sup>4</sup> Ex. 5 at 61-62.

<sup>5</sup> Ex. 5 at 62-63.

<sup>6</sup> Trial Test.

approximately six months. He then worked as a truck driver for the state nursery for three or four months and was laid off.<sup>7</sup>

¶ 10 In approximately 2002, Holmes went back to work at Wal-Mart. His new job duties required him to move from department to department as needed. Holmes testified that the job required constant, but light, lifting. After six months, Holmes was assigned to the paper goods and chemicals section.<sup>8</sup>

¶ 11 Holmes testified that he went to see B. Max Iverson, M.D., because he felt a twinge in his back while lifting a box at work.<sup>9</sup> On July 11, 2002, Dr. Iverson diagnosed Holmes with chronic low-back pain, degenerative disk disease at L5-S1 and possible lumbar disk herniation versus spinal stenosis at L5-S1. Dr. Iverson recommended a repeat lumbar MRI and reduced Holmes' work hours from eight to six hours per day pending the MRI.<sup>10</sup> Dr. Iverson saw Holmes for a follow-up visit on October 28, 2002, and he noted that the MRI results were essentially normal although Holmes had ongoing low-back symptoms.<sup>11</sup>

¶ 12 Holmes reduced his work hours to six hours per day. He testified that from 2002 through 2008, he had no problems with his back. Holmes testified that he felt physically capable of working more than six hours per day, but he was satisfied with his income and decided not to increase his hours. In approximately 2008, Holmes quit his job at Wal-Mart because he did not get along with a new assistant manager.<sup>12</sup>

¶ 13 After Holmes left his job at Wal-Mart in 2008, he searched for new employment but had difficulty finding anything until August 2010 when he was hired by Safeway. Holmes testified that when he applied at Safeway, he felt like he was capable of working full-time.<sup>13</sup> Holmes testified that prior to working for Safeway, he had daily back pain, but on most days it was minimal.<sup>14</sup> Holmes' back pain was usually a 3 out of 10.<sup>15</sup> About ten percent of the time, he slept wrong and woke up in the morning with back

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<sup>7</sup> Trial Test.

<sup>8</sup> Trial Test.

<sup>9</sup> Trial Test.

<sup>10</sup> Ex. 5 at 58.

<sup>11</sup> Ex. 5 at 59.

<sup>12</sup> Trial Test.

<sup>13</sup> Trial Test.

<sup>14</sup> Trial Test.

<sup>15</sup> Holmes Dep. 95:16 – 96:3.

pain he described as a “10 out of 10” on the pain scale.<sup>16</sup>

¶ 14 Holmes testified that he indicated on his Safeway job application that he was available to work 30 hours per week because he thought asking for fewer than 40 hours per week might make him a more attractive job candidate. However, Holmes testified that when he attended a job interview at Safeway, Stephanie Kennedy promised him a full-time position as dairy manager and 40 hours per week of work. Holmes testified that he was not concerned about working 40 hours per week even though he had not done so since 2000 or 2001 because he knew he was able to work eight-hour shifts: he simply had chosen not to in the past.<sup>17</sup>

¶ 15 Although Holmes believed Safeway hired him to fill the dairy manager position, he understood that initially, Safeway would classify him as a dairy clerk. Holmes testified that Kennedy explained that he would work side-by-side with the present dairy manager for four months to be trained to do the dairy manager job. Then he would take over the position.<sup>18</sup>

¶ 16 Safeway’s job description for the dairy clerk position indicates that the job requires constant lifting of one to ten pounds and frequent lifting of 11 to 50 pounds. Carrying requirements are constantly one to ten pounds, frequently 11 to 20 pounds, and occasionally 21 to 50 pounds.<sup>19</sup> Holmes did not request any accommodation for the position.<sup>20</sup> Holmes testified that if he had been told about the requirements, he would not have told Kennedy that he had lifting restrictions because he did not have any problems with his back at that point.<sup>21</sup>

¶ 17 Holmes was scheduled to work 28 hours per week in his first and second weeks of employment at Safeway. Holmes stated that he did not know why Safeway had only scheduled him to work 28 hours and he was disappointed about it.<sup>22</sup>

¶ 18 Holmes suffered an industrial accident during his second week at Safeway.<sup>23</sup> Holmes signed the First Report of Injury or Occupational Disease (FROI) on September 13, 2010. On the FROI, he indicated that he was a full-time employee and that he

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<sup>16</sup> Trial Test.

<sup>17</sup> Trial Test.

<sup>18</sup> Trial Test.

<sup>19</sup> Ex. 3 at 15-16.

<sup>20</sup> Ex. 3 at 19.

<sup>21</sup> Trial Test.

<sup>22</sup> Trial Test.

<sup>23</sup> Trial Test.

tripped over a box while carrying another box on August 9, 2010, injuring multiple body parts.<sup>24</sup>

¶ 19 Holmes initially sought treatment following his industrial accident at Helena Urgent Care on August 10, 2010. Earl E. Book, M.D., took a history from Holmes, noting that Holmes had previously suffered low-back problems, but reported an increase in pain and stiffness after his industrial accident. Dr. Book assessed Holmes with an acute cervical sprain with mild left-sided radiculopathy and acute lumbar sprain superimposed on chronic degenerative disk disease and lumbar pain.<sup>25</sup> Holmes also had a radiograph taken of his lumbar spine which revealed mild to moderate degenerative change, most evident at L5-S1, with no evidence of a compression fracture.<sup>26</sup>

¶ 20 After Holmes' industrial injury, Safeway assigned him modified job duties such as cleaning glass freezer doors, removing outdated tags, and "facing," or pulling product forward to make shelves look full.<sup>27</sup> Holmes testified that Safeway tried to accommodate Dr. Steele's restrictions. Holmes testified that he was never assigned tasks that he was unable to perform. However, no matter what task he was assigned, he could only work for an hour or two until he was in too much pain to continue.<sup>28</sup> Holmes testified that after his industrial injury, he was typically scheduled for four-hour shifts, but he was not physically capable of completing those shifts and usually left after two hours. On some occasions, he only worked an hour of his four-hour shift before asking to leave. Holmes worked on this schedule until April 20, 2011 – approximately eight months – when he was terminated from his employment.<sup>29</sup>

¶ 21 Holmes testified that when he was terminated from Safeway, he met with Kennedy and a representative from the human resources department. Kennedy told him that no more light-duty work was available, but that he could finish out his shift. Holmes tried to finish his shift, but soon left because he was in pain. He later received a letter stating that he had been terminated.<sup>30</sup>

¶ 22 Holmes' wife Vicky Holmes (Vicky) testified at trial. Vicky testified that she filled out the Safeway job application on Holmes' behalf. After consulting with Holmes, she

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<sup>24</sup> Ex. 1.

<sup>25</sup> Ex. 5 at 2-4.

<sup>26</sup> Ex. 5 at 56.

<sup>27</sup> Holmes Dep. 98:2-10.

<sup>28</sup> Trial Test.

<sup>29</sup> Trial Test.

<sup>30</sup> Holmes Dep. 105:5 – 106:2.

indicated that he wanted to work 30 hours per week. Vicky explained that they wanted Holmes to work close to full-time and 30 hours per week was what he had worked at his previous job at Wal-Mart. Vicky testified that when Holmes worked at Wal-Mart, his only work limitation was that he could not lift more than 20 pounds. Vicky also understood Holmes' Wal-Mart work hours were reduced to six hours per shift because he was having back pain from working eight-hour shifts. Vicky testified that Holmes continued to have back problems after his hours were reduced.<sup>31</sup>

¶ 23 Vicky testified that Holmes has always been very limited as to what he felt he could do at home. Prior to working for Safeway, he could only stand to do dishes for approximately ten minutes at a time and he had a very difficult time mowing the grass. Vicky testified that Holmes had not increased his activity around the house in the two and a half years since leaving Wal-Mart, and he felt he could return to full-time work because he had rested since leaving Wal-Mart.<sup>32</sup>

¶ 24 Vicky testified that she attended Holmes' job interview with Safeway and she asked if the position was full-time and she was told that it was. When Holmes began working at Safeway, he was scheduled to work 28 hours per week during his first week of work and she was surprised that he was not scheduled for more hours.<sup>33</sup> Vicky testified that Holmes' back problems increased after his industrial accident at Safeway.<sup>34</sup>

¶ 25 Although I found Vicky's testimony to be largely credible, I do not believe that Holmes' position at Safeway was represented to Holmes and Vicky as being full-time. As the findings below indicate, Safeway classifies very few of its employees as full-time employees and I have no reason to believe Holmes would have been an exception to Safeway's usual policy.

¶ 26 Stephanie Kennedy testified at trial. I found her to be a credible witness. Since June 2011, Kennedy has been the director of retail support for Safeway. Prior to then, she was the store manager at the Helena Safeway. Kennedy testified that as store manager she did most of the interviewing, hiring, and scheduling for new employees.<sup>35</sup>

¶ 27 Kennedy testified that in August 2010, her second assistant store manager was temporarily running the dairy department. Kennedy wanted to hire a dairy clerk who could potentially move into the dairy manager position. Kennedy testified that typically,

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<sup>31</sup> Trial Test.

<sup>32</sup> Trial Test.

<sup>33</sup> Trial Test.

<sup>34</sup> Trial Test.

<sup>35</sup> Trial Test.



she would hire a candidate as a clerk and at the end of the candidate's 90-day probationary period, she would post the department manager job and encourage the clerk to apply for the position if she believed the new clerk could successfully fill the manager position. However, the position would be internally posted; other employees could also apply for it and the promotion was not guaranteed.<sup>36</sup>

¶ 28 Kennedy interviewed, and ultimately hired, Holmes for the dairy clerk position. She denied telling Holmes and Vicky that the position would be 40 hours per week. She testified that she informed them that Holmes' hours would vary and would likely be between 24 and 30 hours per week, although they could be more on occasion. Kennedy testified that, except for the store manager and assistant manager at each store, all Safeway job positions are classified as part-time positions. Neither the dairy clerk nor dairy manager positions were full-time positions.<sup>37</sup>

¶ 29 Philip Steele, M.D, testified by deposition taken August 16, 2011. Dr. Steele currently practices at Helena Orthopaedic Prompt Care.<sup>38</sup> He is board-certified in sports medicine.<sup>39</sup>

¶ 30 On August 23, 2010, Dr. Steele saw Holmes for the first time. Holmes reported the details of his industrial accident and complained of neck, shoulder, and elbow pain, and pain down his right leg into his foot. After examination, Dr. Steele found Holmes' lumbar spine to be mildly tender to palpation with mild diffuse soreness with rotation and side bend and stiffness. Dr. Steele also noted a mildly positive straight leg test on both legs with hamstring tightness. Dr. Steele's overall impression was mild radiculopathy and facet degenerative disease. His review of radiographs from Helena Urgent Care revealed L5-S1 degenerative disk disease with mild to moderate degeneration at S1 and mild degeneration at L4-L5. Dr. Steele recommended a Medrol Dosepak and restricted Holmes to light duty.<sup>40</sup>

¶ 31 Kennedy testified that Safeway accommodated the restrictions Dr. Steele placed upon Holmes. Kennedy testified that Holmes never refused to do any of the tasks assigned to him and he never complained that any of the tasks were something he could not do; however, he consistently asked to leave approximately one and a half to two hours into his shifts. Kennedy testified that she always allowed Holmes to leave early if he requested it. Holmes also called in sick approximately 35 to 40 percent of the

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<sup>36</sup> Trial Test.

<sup>37</sup> Trial Test.

<sup>38</sup> Steele Dep. 9:8-9.

<sup>39</sup> Steele Dep. 9:22 – 10:1.

<sup>40</sup> Ex. 5 at 30-32.

time. Kennedy testified that she cannot recall Holmes completing a single shift after his industrial injury.<sup>41</sup>

¶ 32 On September 7, 2010, Dr. Steele saw Holmes for follow-up. Holmes reported that his light-duty job assignments aggravated his back and that his pain worsened throughout the day. Dr. Steele noted that Holmes had “a long history” of back injuries. He stated, “He’s not tolerating light duty work with restrictions and seems to believe that he would be best served if completely held out from work. I’m not completely convinced that all his pain is consistent and recommend light duty with restrictions . . . .” Dr. Steele recommended some prescription medication and physical therapy.<sup>42</sup>

¶ 33 On November 8, 2010, Holmes reported to Dr. Steele that his pain increased if he was on his feet for too long. Holmes reported that he was working up to two hours per day, two to three days per week. Holmes also reported that after physical therapy, he was in too much pain to work the following day and he had cancelled his last four physical therapy sessions because he felt worse after them. Dr. Steele assessed Holmes as having lumbar back pain with no improvement. He further noted that Holmes’ symptoms appeared to be an exacerbation of his previous low-back condition. Dr. Steele recommended an MRI.<sup>43</sup>

¶ 34 On November 15, 2010, Holmes received an MRI of his lumbar spine. The radiologist reported an unremarkable lower cord with normal vertebral marrow character and alignment and normal vertebral height. The radiologist further noted a degenerative narrowed L5-S1 disk with possible microlaminotomy defect, but with very minimal atrophy of the musculature and minimal epidural scarring.<sup>44</sup>

¶ 35 On November 19, 2010, Holmes visited Dr. Steele for a follow-up appointment. Holmes reported that his pain started at about a 2 out of 10 and escalated throughout the day. He described his pain as a 12 out of 10 by the end of each day. Dr. Steele noted that Holmes was “easily distractible” throughout his examination. Dr. Steele found Holmes to have a clearly abnormal perception of pain and noted that Holmes did not seem to understand that his pain could be controllable with medication and that he could enjoy a higher quality of life with proper use of medication.<sup>45</sup>

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<sup>41</sup> Trial Test.

<sup>42</sup> Ex. 5 at 28-29.

<sup>43</sup> Ex. 5 at 22-23.

<sup>44</sup> Ex. 5 at 57.

<sup>45</sup> Ex. 5 at 19-20.

¶ 36 Holmes testified that he decided to discontinue the medications Dr. Steele prescribed because they made him nauseous and light-headed. Holmes testified that every medication has made him feel this way. Holmes further testified that Dr. Steele recommended that he try injections, and Holmes reluctantly agreed to do so. However, Safeway initially denied the request for authorization. By the time Safeway reconsidered its denial, Holmes had decided that he did not want the injection. Holmes further testified that he discontinued physical therapy because it caused too much pain.<sup>46</sup>

¶ 37 Dr. Steele acknowledged that, in Holmes' office visits through November 19, 2010, his subjective pain complaints seemed disproportionate to Dr. Steele's objective medical findings.<sup>47</sup>

¶ 38 Laura Steinhoff testified at trial. I found her to be a credible witness. Steinhoff is a claims adjuster for Brentwood Services Administrators (Brentwood), which is a third-party administrator for Safeway. Steinhoff was assigned to Holmes' claim when it was first reported.<sup>48</sup> Steinhoff testified that a Brentwood employee drafted the FROI based upon information he received from Holmes, and the FROI draft was then sent to Holmes to review and sign. Steinhoff testified that the FROI would have indicated that Holmes was a full-time employee if that was what Holmes reported to the representative.<sup>49</sup>

¶ 39 Steinhoff calculated Holmes' average weekly wage based upon an assumption that he worked 28 hours per week at Safeway. She explained that he had been scheduled to work 28 hours in the week preceding his industrial accident – which was his first week of work at Safeway – and that he had also been scheduled to work 28 hours in the week in which his industrial accident occurred.<sup>50</sup>

¶ 40 Steinhoff testified that “multiple red flags” in the claim – such as Holmes' short work history with Safeway, the existence of a previous back injury, and a lack of progress in improving Holmes' condition after several months of medical treatment – caused her to seek an independent medical examination (IME).<sup>51</sup>

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<sup>46</sup> Trial Test.

<sup>47</sup> Steele Dep. 63:1-5.

<sup>48</sup> Trial Test.

<sup>49</sup> Trial Test.

<sup>50</sup> Trial Test.

<sup>51</sup> Trial Test.

¶ 41 On December 8, 2010, Gregg Singer, M.D., issued an IME report following his review of Holmes' medical records and a history and physical examination of Holmes.<sup>52</sup> Dr. Singer opined that Holmes' August 9, 2010, industrial injury was a temporary aggravation of a pre-existing condition. For treatment recommendations, Dr. Singer noted:

Self-directed exercise is the treatment of choice for strain injuries. He has chosen not to comply with physical therapy and medication recommendations thus far. Injection therapy is not likely to be successful in this case and he is not interested in pursuing injection therapy.

His treating physician could make attempts to educate him regarding the need to perform specific stretching and strengthening exercises. This is the only treatment recommendation that is appropriate. These recommendations are for a self-directed home exercise program.

His condition and quality of life are expected to remain the same or deteriorate if he chooses not to be treated. In this case it is anticipated that his pain complaints will continue regardless of the treatment that is offered him.<sup>53</sup>

Dr. Singer further opined that Holmes was at maximum medical improvement (MMI) for his August 9, 2010, industrial injury and that he had a 0% whole person impairment rating.<sup>54</sup>

¶ 42 Steinhoff testified that Holmes was never eligible for temporary total disability (TTD) benefits because Dr. Steele released him to return to work prior to the end of the waiting period for those benefits. When Dr. Steele reduced Holmes' hours to four hours per day, Steinhoff determined that he was not eligible for temporary partial disability (TPD) benefits because he was a part-time employee. However, after Holmes' counsel questioned her determination, she re-evaluated the situation and concluded that since Holmes had been scheduled to work 28 hours per week and that he was now restricted to 20 hours per week, he would be eligible for TPD benefits for eight hours per week. Steinhoff then paid Holmes TPD benefits from the end of August 2010 until December 11, 2010.<sup>55</sup>

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<sup>52</sup> Ex. 5 at 43-52.

<sup>53</sup> Ex. 5 at 51.

<sup>54</sup> Ex. 5 at 51-52.

<sup>55</sup> Trial Test.

¶ 43 On January 4, 2011, Steinhoff sent Dr. Steele a copy of Dr. Singer's IME report. Steinhoff asked Dr. Steele, "Do you concur with the findings of the exam?" and "If not, please explain." Dr. Steele indicated that he concurred with Dr. Singer's findings and signed the letter on January 6, 2011.<sup>56</sup>

¶ 44 Dr. Steele confirmed that he "would in generality agree" with the findings Dr. Singer noted in his IME report.<sup>57</sup> Dr. Steele stated that he did not agree with Dr. Singer's characterization of Holmes' back injury as a "strain," but he agreed it was a temporary aggravation of a pre-existing condition.<sup>58</sup>

¶ 45 On January 28, 2011, Steinhoff wrote to Holmes and stated that Dr. Singer had reported that Holmes was at MMI without any permanent impairment. Therefore, she was closing his claim.<sup>59</sup> Steinhoff testified that she ceased paying TPD benefits after Dr. Singer determined that Holmes was at MMI and that his condition had been a temporary aggravation. Steinhoff acknowledged that at this time, Holmes still remained under the four-hour-per-day work restriction set by Dr. Steele. However, Dr. Steele had agreed with Dr. Singer's assessment that Holmes had suffered a temporary aggravation and was now at MMI. Therefore, Steinhoff believed that Holmes' work restrictions were not related to the industrial injury he suffered at Safeway. Steinhoff testified that after Dr. Steele further reduced Holmes' hours, she did not re-initiate TPD benefits because she believed the restrictions were not related to Holmes' industrial injury at Safeway.<sup>60</sup>

¶ 46 Dr. Steele's last appointment with Holmes occurred on March 21, 2011.<sup>61</sup> Dr. Steele noted that Holmes wanted to discuss his work restrictions. Holmes told Dr. Steele that he was unable to work more than two or two and a half hours per day and that he was experiencing significant back pain. Dr. Steele assessed Holmes as having lumbar back pain secondary to facet syndrome and lumbar back pain appearing more mechanical in nature. Dr. Steele noted that Holmes had failed to improve with conservative management and that Holmes "is comfortable with where his pain is with no additional treatment." Dr. Steele noted that without facet injections or the use of medication, Holmes had probably reached MMI. Dr. Steele found Holmes to have a 2% whole person impairment rating.<sup>62</sup>

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<sup>56</sup> Ex. 5 at 14.

<sup>57</sup> Steele Dep. 65:14-17.

<sup>58</sup> Steele Dep. 67:1 – 68:2.

<sup>59</sup> Ex. 2 at 6.

<sup>60</sup> Trial Test.

<sup>61</sup> Steele Dep. 7:8-14.

<sup>62</sup> Ex. 5 at 6-8.

¶ 47 During his deposition, Dr. Steele stated that Dr. Singer and he approached Holmes' impairment evaluation differently and therefore reached different results. Dr. Steele explained:

I wasn't privy to all of the details that he had, A; B, there is two separate categories for this, one, he did this impairment rating off a strain/sprain and I did the impairment off of facet arthritis and it's a difference of what you believe was the major cause of his pain. I believe that he has facet arthritis as the major part of his pain, that it's an occupational disease that's been *ongoing since his initial injury*.

So I'm rating -- I didn't necessarily state in my impairment rating that it was 100 percent related to this work injury or other, you know, two years prior or Walmart or all the way back to the initial injury. I'm basically saying that he should have a 2 percent impairment from occupational disease is essentially what I'm saying according to the sixth edition guideline who's responsible for that rating is for you guys to find out.<sup>63</sup>

¶ 48 Dr. Steele also admitted that he had no objective medical findings on which to base his decision to restrict Holmes to two to three hours of work per day. He explained that none of the treatments he had tried had improved Holmes' condition, Holmes was unwilling to take medication or try injections, and the MRI did not reveal a clear pain generator to account for Holmes' complaints, so he believed reducing Holmes' work hours was the only thing left to try.<sup>64</sup>

¶ 49 After Dr. Steele restricted Holmes to two hours per shift, Kennedy and other management staff met with Holmes to discuss job positions in the store which they believed might be able to accommodate his restrictions. The managers described the job duties of several positions which they believed might be modified to fit Holmes' restrictions. Kennedy testified that Holmes was not receptive to attempting to perform any of the positions with modification. Holmes informed the managers that he believed his restrictions were permanent and that he did not believe he could perform any position at Safeway within these restrictions.<sup>65</sup>

¶ 50 On April 21, 2011, Steve Brezenski, Safeway Human Resources, wrote a letter to Holmes terminating his employment with Safeway. In the letter, Brezenski noted that he, Kennedy, and another Safeway employee met with Holmes on April 20, 2011, to

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<sup>63</sup> Steele Dep. 69:10 – 70:3. (Emphasis added.)

<sup>64</sup> Steele Dep. 75:1 – 76:8.

<sup>65</sup> Trial Test.

discuss his work restrictions. Brezenski noted that they reviewed several job descriptions with Holmes to determine if there was a job he could perform at Safeway with or without reasonable accommodation. Brezenski stated that Holmes had rejected the possibility of the following positions: deli clerk, frozen food clerk, produce clerk, night stocker, GM/HBC clerk, dairy clerk, and courtesy clerk. Brezenski further stated that Holmes also stated that his restrictions were permanent and that there were no accommodations that Safeway could make which would allow him to perform the essential functions of any job in the store.<sup>66</sup>

¶ 51 Mickey Marion testified at trial. I found her to be a credible witness. Marion, a certified rehabilitation counselor, currently works for Genex. Marion was retained to provide rehabilitation services in Holmes' case. Marion testified that she was initially asked to identify Holmes' employability after his industrial injury. Marion met with Holmes, researched his work history, and analyzed his transferable skills. She noted that Holmes believed he could only work three hours per day although at the time Dr. Steele had released him to four hours per day.<sup>67</sup>

¶ 52 Dr. Steele confirmed that he had ruled out Holmes' time-of-injury position at Safeway as outside his permanent work restrictions. He stated, however, that the job was outside Holmes' previously established work restrictions at the time he began the job.<sup>68</sup>

¶ 53 When Marion learned that Safeway had terminated Holmes' employment, she began investigating alternate employment options. She believed Holmes would need a sedentary job position. She developed job analyses for membership coordinator, appointment setter, and warehouse administrative support assistant. She submitted the job analyses to Dr. Singer. Dr. Singer approved the membership coordinator and warehouse administrative support assistant positions, and indicated that he would approve the appointment setter position if the employer could accommodate a lifting restriction of 10 pounds.<sup>69</sup>

¶ 54 Marion opined that Holmes would not experience a wage loss in the alternative employment identified in the approved job analyses.<sup>70</sup> Marion further testified that she contacted Helena businesses regarding the job positions which she analyzed and determined that part-time jobs which met Holmes' restrictions existed. Marion testified

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<sup>66</sup> Ex. 7.

<sup>67</sup> Trial Test.

<sup>68</sup> Steele Dep. 77:1-17.

<sup>69</sup> Trial Test.

<sup>70</sup> Ex. 6 at 49.

that with Holmes' skills and his work experience, she anticipated that he could find work in those job positions in the Helena area. Marion further testified that the shifts for these positions varied between four and six hours per shift.<sup>71</sup>

¶ 55 On June 21, 2011, Dr. Singer wrote to Steinhoff after Steinhoff sent him additional medical records and posed more questions. Dr. Singer responded that the additional records did not change his opinion regarding his diagnosis of Holmes' condition as a lumbar strain. He further opined that, based on a comparison of the 2002 and 2010 MRI reports as well as some CT scans, the August 9, 2010, industrial accident did not cause any lumbar spine pathology. Dr. Singer further stated that he disagreed with Dr. Steele's assessment of a 2% whole person impairment rating. He explained that Dr. Steele had based this rating on the findings of facet joint disease and in Dr. Singer's opinion, the August 9, 2010, industrial accident did not cause the facet joint disease. Dr. Singer further noted that the additional records provided indicated that Holmes had had a lifting limit of 20 pounds frequently and 30 pounds occasionally; Dr. Singer suggested that Holmes be given a lifting limit of 10 pounds.<sup>72</sup>

¶ 56 Holmes testified that he has not looked for work since his termination from Safeway, but has focused on taking care of himself.<sup>73</sup> Holmes testified that he does not think he would now be capable of working four hours per day in a job in which he could alternately stand and sit. Alternating standing and sitting gives him a headache and his back pain makes him unable to focus. Holmes testified that when his back pain flares up, he only wants to soak in the tub, get a massage, or sleep.<sup>74</sup>

### CONCLUSIONS OF LAW

¶ 57 This case is governed by the 2009 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Holmes' industrial accident.<sup>75</sup> Holmes bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.<sup>76</sup>

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<sup>71</sup> Trial Test.

<sup>72</sup> Ex. 5 at 53-54.

<sup>73</sup> Holmes Dep. 122:6-12.

<sup>74</sup> Trial Test.

<sup>75</sup> *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

<sup>76</sup> *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).



## **ISSUE ONE: Whether Petitioner is permanently totally disabled.**

¶ 58 Section 39-71-116(25), MCA, defines permanent total disability, in pertinent part, as: “a physical condition resulting from [an] injury . . . after a worker reaches maximum medical healing, in which a worker does not have a reasonable prospect of physically performing regular employment.”

¶ 59 While an injured worker bears the initial burden of proof, 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.<sup>77</sup> In the present case, Safeway has met this initial burden, having obtained Dr. Singer’s approval for the jobs of membership coordinator and warehouse administrative support assistant.

¶ 60 Merely obtaining physician approval of job analyses is not, however, dispositive. Injured workers have successfully challenged such conclusions on various grounds. For example, in *Peterson v. Montana Schools Group Ins. Authority*, this Court determined that the claimant was permanently totally disabled in spite of the existence of five approved job analyses where the signing physician later disavowed his approval of those job analyses.<sup>78</sup> In *McFerran v. Consolidated Freightways*, the Montana Supreme Court reversed a decision of this Court and concluded that an injured worker was permanently totally disabled where the approved job was a position which guaranteed only an hour of work per day: the Court determined that this was not substantial and significant and therefore did not constitute “regular employment.”<sup>79</sup>

¶ 61 In the present case, the only evidence Holmes has put forth to dispute the approved job analyses is his own testimony that he does not believe he can work in any capacity. This is not sufficient evidence to overcome the evidence to the contrary and I conclude that Holmes has not met his burden of proof regarding his alleged permanent total disability status.

## **ISSUE TWO: Whether Petitioner is entitled to additional temporary total disability benefits until such time as he is retrained to properly enter the job market.**

¶ 62 Holmes contends that if he is not permanently totally disabled, then he is temporarily totally disabled until he is “adequately retrained to enter a job market.”<sup>80</sup>

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<sup>77</sup> *Weisgerber v. American Home Assurance Co.*, 2005 MTWCC 8, ¶ 32.

<sup>78</sup> *Peterson*, 2006 MTWCC 14, ¶ 73.

<sup>79</sup> *McFerran*, 2000 MT 365, ¶ 17, 303 Mont. 393, 15 P.3d 935.

<sup>80</sup> Pretrial Order at 2.

Section 39-71-1006, MCA, provides, in pertinent part, that a worker is eligible for rehabilitation benefits if the worker meets the definition of a “disabled worker,” as defined in § 39-71-1011, MCA. Section 39-71-1011(2), MCA, defines “disabled worker,” in pertinent part as a worker who has a permanent impairment and who has an actual wage loss as a result of the injury.

¶ 63 In the present case, although Holmes alleges he is physically incapable of any work, he has not disputed that Marion identified job positions which fit within his present vocational skills and in which he would not suffer a wage loss. Holmes has put no evidence before this Court to indicate that he has any interest in vocational rehabilitation. To the contrary, Holmes has testified that his back pain precludes him from working even a sedentary, part-time position. In light of this testimony – and in light of the complete absence of any evidence to suggest that Holmes desires vocational rehabilitation, I find no grounds to order Safeway to pay Holmes TTD benefits.

**ISSUE THREE: What the exact amount of Petitioner’s indemnity rate should be.**

¶ 64 Although the parties frame this issue as the “exact amount of [Holmes’] indemnity rate,” the evidence presented by the parties goes solely to the more specific issue of whether Steinhoff correctly calculated Holmes’ average weekly wage by determining that he was hired to work 28 hours per week. Therefore, I address only that issue since the rate calculation – aside from the underlying determination of Holmes’ average weekly wage – does not appear to be in dispute.

¶ 65 Holmes contends that his indemnity rate “should be based on full-time employment.”<sup>81</sup> Under § 39-71-123(3), MCA:

(a) Except as provided in subsection (3)(b), for compensation benefit purposes, the average actual earnings for the four pay periods immediately preceding the injury are the employee’s wages, except that if the term of employment for the same employer is less than four pay periods, the employee’s wages are the hourly rate times the number of hours in a week for which the employee was hired to work.

(b) For good cause shown, if the use of the last four pay periods does not accurately reflect the claimant’s employment history with the employer, the wage may be calculated by dividing the total earnings for an additional period of time, not to exceed 1 year prior to the date of injury, by the number of weeks in that period, including periods of idleness or

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<sup>81</sup> Pretrial Order at 2.

seasonal fluctuations.

¶ 66 Steinhoff testified that she calculated Holmes' average weekly wage based on the assumption that he was hired to work 28 hours per week. Steinhoff noted that although Holmes was injured during only his second week working for Safeway, he worked 28 hours during his first week of employment at Safeway and he was scheduled to work 28 hours during the week he was injured. Other evidence before the Court regarding Holmes' work hours includes: Kennedy's testimony that his position as dairy clerk was typically a 24- to 30-hour-per-week position; the fact that Holmes worked 30 hours per week for approximately six years in his previous job position; the fact that Holmes indicated on his Safeway job application that he was available to work 30 hours per week; Holmes' testimony that Kennedy told him the job was a full-time position; and Vicky's testimony that Kennedy stated that the job was a full-time position. As set forth in the findings above, I did not find Holmes' testimony entirely credible, nor did I find Vicky's testimony credible regarding whether Holmes was hired by Safeway as a full-time employee. Under § 39-71-123(3)(a), MCA, the average weekly wage of an employee who worked less than four pay periods for his time-of-injury employer is calculated by multiplying the employee's wages by the number of hours in a week for which the employee was hired to work. From the evidence before the Court, I conclude that Holmes was hired to work 28 hours per week. Therefore, Steinhoff correctly calculated Holmes' indemnity rate by using this figure in her calculations.

**ISSUE FOUR: Whether Petitioner is entitled to payment of additional temporary partial disability benefits.**

¶ 67 Although Holmes has alleged he is entitled to additional TPD benefits, he has not put forth any arguments in that regard – neither in his contentions in the Pretrial Order, nor in his arguments at trial. I do not know whether Holmes believes he is entitled to additional weeks of TPD benefits, or if Holmes believes he is entitled to additional hours of TPD benefits during the weeks in which he received them. As noted above, the burden of proof is Holmes'. Since Holmes has set forth no argument regarding this issue, I conclude that he has not met his burden of proof and he therefore is not entitled to the payment of additional TPD benefits.

**JUDGMENT**

¶ 68 Petitioner is not permanently totally disabled.

¶ 69 Petitioner is not entitled to additional temporary total disability benefits until such time as he is retrained to properly enter the job market.

¶ 70 Respondent correctly calculated Petitioner's average weekly wage under § 39-

71-123(3)(a), MCA.

¶ 71 Petitioner is not entitled to payment of additional temporary partial disability benefits.

¶ 72 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.

DATED in Helena, Montana, this 6<sup>th</sup> day of March, 2012.

(SEAL)

/s/ JAMES JEREMIAH SHEA  
JUDGE

c: John C. Doubek  
G. Andrew Adamek  
Submitted: November 14, 2011