

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2015 MTWCC 16

WCC No. 2014-3364

PATRICK KELLEGHER

Petitioner

vs.

MACO WORKERS' COMPENSATION TRUST

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Summary: Petitioner suffered several injuries from a work-related accident. He contends that the resultant conditions, particularly vertigo, frequent headaches, and left knee problems, have left him permanently totally disabled. Respondent disagrees, arguing that one member of an IME panel approved job analyses and therefore Petitioner does not meet the statutory requirements for PTD.

Held: The evidence demonstrates that Petitioner has no reasonable prospect of physically performing regular employment as a result of the work-related injuries he sustained and he is therefore permanently totally disabled.

Topics:

Physicians: Conflicting Evidence. Where an IME physician knowingly approved a job analysis for a position he knew Petitioner could not perform and offered no explanation as to why he disregarded modifications suggested by an FCE evaluator, the Court gave the IME physician's approvals of other job analyses no weight.

Vocational and Return to Work Matters: Job Analysis. Where an IME physician knowingly approved a job analysis for a position he knew Petitioner could not perform and offered no explanation as to why he disregarded modifications suggested by an FCE evaluator, the Court gave the IME physician's approvals of other job analyses no weight.

Evidence: Vocational. Where a psychologist testified during a deposition that Petitioner could perform certain jobs based on the psychologist's "general understanding" of what those positions entailed without reviewing the job analyses developed for those positions, the Court gave the psychologist's opinions no weight as Respondent established no foundation for his testimony.

Proof: Conflicting Evidence: Vocational. Although approved job analyses existed, the Court concluded that Petitioner did not have a reasonable prospect of performing any of those jobs. The Court gave no weight to approvals from an IME physician who approved a job analysis in spite of knowing that Petitioner had attempted and failed to successfully perform in that position. The Court further gave no weight to testimony from a neuropsychologist who opined that Petitioner could perform those jobs based on his "general understanding" of the job positions, but without review of any job analyses.

Physicians: Treating Physician: Weight of Opinions. Where the record indicated that the treating physician had significant interactions with Petitioner and had taken a strong interest in Petitioner's attempts to return to work, and where a neuropsychologist who saw Petitioner on referral specifically inquired into Petitioner's deficits, the Court assigned greater weight to those opinions than to those of an IME examiner who approved job analyses although he knew Petitioner was unable to perform one of the positions, and a neuropsychology IME examiner who observed that Petitioner's demeanor presented no bar to employment.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-609. The insurer bears the initial burden to produce evidence showing that the claimant is not permanently totally disabled by submitting sufficient evidence that approved jobs exist since § 39-71-609(2), MCA, requires the insurer to obtain a physician's approval of one or more jobs suitable for the claimant.

Proof: Burden of Proof: Permanent Total Disability. The insurer bears the initial burden to produce evidence showing that the claimant is not permanently totally disabled by submitting sufficient evidence that approved jobs exist since § 39-71-609(2), MCA, requires the insurer to obtain a physician's approval of one or more jobs suitable for the claimant.

Vocational and Return to Work Matters: Job Analysis. The Court concluded that Petitioner could not perform any of the jobs for which analyses were submitted where the requirements exceeded his pre-existing limitations and the restrictions noted in an FCE report, and where none of the jobs were vocationally appropriate for Petitioner because his condition left him unable to work on a computer for any length of time. Furthermore, the vocational rehabilitation counselor who developed the job analyses failed to investigate whether potential employers would consider the job modifications as approved reasonable, and conceded that if she had known of Petitioner's inability to use a computer, she would have developed different job analyses, which indicated she did not believe the jobs were vocationally appropriate for Petitioner.

Proof: Burden of Proof: Permanent Total Disability. The Court concluded that Petitioner could not perform any of the jobs for which analyses were submitted where the requirements exceeded his pre-existing limitations and the restrictions noted in an FCE report, and where none of the jobs were vocationally appropriate for Petitioner because his condition left him unable to work on a computer for any length of time. Furthermore, the vocational rehabilitation counselor who developed the job analyses failed to investigate whether potential employers would consider the job modifications as approved reasonable, and conceded that if she had known of Petitioner's inability to use a computer, she would have developed different job analyses, which indicated she did not believe the jobs were vocationally appropriate for Petitioner.

Physicians: Treating Physician: Generally. The Court rejected Respondent's argument that Petitioner was not permanently totally disabled because his treating physician opined he could possibly return to work where the treating physician did not approve a job analysis for an actual job and did not state unequivocally that Petitioner could return to work.

Proof: Burden of Proof: Generally. The Court rejected Respondent's argument that Petitioner was not permanently totally disabled because no physician had opined that Petitioner could not work. Respondent cannot shift the burden of proof onto Petitioner before it first meets its burden of proving that approved jobs exist, pursuant to § 39-71-609(2), MCA.

¶ 1 The trial in this matter occurred on December 2, 2014, at the Workers' Compensation Court in Helena, Montana. Petitioner Patrick Kellegher attended and was represented by Bernard J. "Ben" Everett. Norman H. Grosfield represented Respondent

MACo Workers' Compensation Trust (MACo). Chris Holling, claims examiner for MACo, also attended.

¶ 2 Exhibits: The Court admitted Exhibits 1 through 5, 7 through 10, 12, and 13 without objection. Kellegher objected to part of Exhibit 6. The Court overruled his objection and admitted Exhibit 6. The Court removed pages 28 through 30 of Exhibit 11 at the parties' request. Kellegher withdrew his objection to a portion of Exhibit 11. The Court overruled Kellegher's objection to the remainder of Exhibit 11 and admitted it into evidence.

¶ 3 Witnesses and Depositions: The Court admitted the depositions of Kellegher and Joseph K. McElhinny, PsyD, and considers them part of the record. Janet Schroeder, MS, CRC, LCPC, Kellegher, Rob Kellegher, and Bonnie Kellegher were sworn and testified at trial.

¶ 4 Issues Presented: The Pre-Trial Order sets forth two issues which the Court restates as follows:

Issue One: Whether Kellegher is permanently totally disabled as a result of his June 3, 2011, industrial accident; and

Issue Two: Whether Kellegher is permanently partially disabled as a result of his June 3, 2011, industrial accident.

FINDINGS OF FACT¹

¶ 5 Kellegher testified at trial. The Court found him to be a credible witness.

¶ 6 Kellegher graduated from high school in 1982.² He served on active duty in the U.S. Army from 1982 to 1986 and in the Army Reserve from 1987 through 1989.³ In the Army, Kellegher worked as a mechanic.⁴ After he left active duty, Kellegher worked as a chair lift operator at a ski resort and then as a correctional officer at the Montana State

¹ All findings herein are taken from trial testimony except where otherwise noted.

² Kellegher Dep. 6:5-7.

³ Kellegher Dep. 6:13-19.

⁴ Kellegher Dep. 6:20-22.

Prison.⁵ In 1989, Kellegher accepted a position as a Toole County Deputy Sheriff.⁶ He held that position through the time of his industrial accident.⁷

¶ 7 Prior to the June 3, 2011, industrial accident, Kellegher received medical treatment for diabetes, hearing impairment, high cholesterol, and high blood pressure.⁸ He had also undergone surgeries on his back, including a fusion, due to an earlier work-related injury.⁹

¶ 8 On June 3, 2011, Kellegher fell out of the back of a moving pickup truck while pursuing an escaped inmate.¹⁰ He suffered injuries to his right shoulder and right elbow. He also hit his head and lost consciousness.¹¹ Kellegher's injuries included a traumatic brain injury with a small area of subdural bleeding, vestibular disturbance with vertigo, and headaches.¹²

¶ 9 MACo accepted liability for Kellegher's condition and paid medical and indemnity benefits.¹³

¶ 10 Kellegher testified that his entire body was affected by the June 3, 2011, industrial accident.¹⁴ He stated:

I ended up with a traumatic brain injury; a messed-up neck; they had to do surgery on my right shoulder; they were giving me shots in the right elbow; my lower back and legs have been bothering me. Since the accident, from the knees down to my feet, I don't feel them like a normal person would. And just a lot of pain, you know, up and down that leg and that hip and the neck area that's continuous, along with headaches and all the drugs and that stuff.¹⁵

⁵ Kellegher Dep. 8:11-23.

⁶ Kellegher Dep. 8:24 – 9:1.

⁷ Kellegher Dep. 9:19-23.

⁸ Kellegher Dep. 11:25 – 12:8.

⁹ Kellegher Dep. 13:1-21.

¹⁰ Pre-Trial Order at 2, Docket Item No. 22.

¹¹ See, e.g., Ex. 1 at 27.

¹² Pre-Trial Order at 2.

¹³ *Id.*

¹⁴ Kellegher Dep. 14:6-8.

¹⁵ Kellegher Dep. 14:11-19.

¶ 11 After the industrial accident Kellegher treated with Bill J. Tacke, MD.¹⁶ Dr. Tacke's records are detailed and comprehensive and show that Dr. Tacke was concerned about Kellegher's condition and care, and that he understood that his opinions were relevant to Kellegher's workers' compensation claim.¹⁷ Kellegher also saw Keith D. Bortnem, DO, for his right shoulder injury and Eliad Culcea, MD, for his migraine headaches.¹⁸

¶ 12 Dr. Tacke's records reflect that Kellegher had vertigo and headaches immediately after the accident.¹⁹ Kellegher also had trouble with his balance when he looked down.²⁰ Dr. Tacke's initial assessment was that Kellegher suffered a traumatic brain injury.²¹ Dr. Tacke noted, "Impaired self-care, particularly as it relates to his balance and being able to still perform safe, functional self-care activities, impaired mobility related to vestibular dysfunction."²² Dr. Tacke also noted that Kellegher had "[p]ossible impairment of cognition."²³ On June 8, 2011, Dr. Tacke noted that despite his injuries, Kellegher "does want to get back to work but he also wants to recover from his injuries. He is very motivated."²⁴

¶ 13 In the month following the industrial accident, Kellegher underwent a course of inpatient rehabilitation.²⁵ During this time, Kellegher had headaches and "very significant problems with vestibular disturbance."²⁶ However, Kellegher was "very motivated and does try to participate in his therapies as much as he can."²⁷ At his discharge on June 30, 2011, he continued to suffer from vertigo and headaches.²⁸ Kellegher moved in with his parents in Anaconda, as Dr. Tacke did not think Kellegher could walk down the stairs to his apartment in Shelby by himself.²⁹

¹⁶ Ex. 3.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Ex. 1 at 11-12.

²⁰ Ex. 1 at 12.

²¹ Ex. 1 at 14.

²² *Id.*

²³ *Id.*

²⁴ Ex. 1 at 13.

²⁵ Ex. 1 at 39-41, 52-53.

²⁶ Ex. 1 at 39.

²⁷ Ex. 1 at 42.

²⁸ Ex. 1 at 56.

²⁹ Ex. 1 at 40, 46; Ex. 3 at 1.

¶ 14 Kellegher began seeing Dr. Tacke at Dr. Tacke's outpatient clinic.³⁰ Dr. Tacke oversaw Kellegher's treatments and various therapies.³¹ MACo had a nurse case manager attend nearly all of Kellegher's appointments with Dr. Tacke.³²

¶ 15 On August 18, 2011, Dr. Tacke noted that Kellegher's headaches and vertigo were improving.³³ Kellegher had started driving again.³⁴ Kellegher reported problems with his left leg.³⁵ Dr. Tacke noted that Kellegher "has always had some feelings that the strength wasn't quite as good in that leg compared to the right side but his headaches bothered so much when he was first up and getting mobile that he wasn't tuned into that too much."³⁶ Dr. Tacke noted that Kellegher had problems when he turned to his left, as his foot would not move and would throw him off balance.³⁷ When Kellegher was walking down an incline or going downstairs, his knee would give way.³⁸ Dr. Tacke referred Kellegher to an orthopedist.³⁹

¶ 16 On September 14, 2011, Kellegher returned to Dr. Tacke.⁴⁰ Dr. Tacke thought Kellegher was gradually improving.⁴¹ Dr. Tacke's assessment was that Kellegher suffered a traumatic brain injury which contributed to limited control of his left leg and related balance impairment; post-concussion headaches; vestibular disturbance secondary to head trauma; right-shoulder pain secondary to trauma; left-knee pain; and balance impairment secondary to trauma.⁴² Kellegher reported problems with his short-term memory.⁴³ Dr. Tacke recommended that Kellegher undergo a neuropsychological examination.⁴⁴ With regard to work, Dr. Tacke stated:

³⁰ Ex. 3.

³¹ See generally Ex. 3.

³² Ex. 3 at 1, 5, 8, 11, 15, 18, 20, 25, 31 & 34.

³³ Ex. 3 at 4-5.

³⁴ Ex. 3 at 6.

³⁵ Ex. 3 at 3.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ Ex. 3 at 3-6.

⁴⁰ Ex. 3 at 7-9.

⁴¹ Ex. 3 at 8.

⁴² *Id.*

⁴³ Ex. 3 at 7.

⁴⁴ Ex. 3 at 8-9.

I do have some paperwork from the Sheriff's Office in Toole County regarding employees returning to work. At the present time, Patrick is not ready for return to work. He is quite involved, yet, in his medical program. The next time I see him, though, there is a consideration that he might be at or near the point of a trial return to some work activities. He has a lot of concerns that as a deputy sheriff he would have to be pretty much ready to do everything if you start back to work. In this regard he is concerned about how the short term memory could [a]ffect him but also how he could be doing from a physical standpoint. He doesn't want to put anybody in jeopardy, including himself. I think that is a valid concern. At his next visit we will plan to have time to review the information that would go into the form to his employer about a return to work program. He, of course, would need to have orthopedic clearance in regard to his knee and shoulder or at least guidelines as far as what restrictions he would have when it comes to returning to work. I will definitely want to see how the neuropsych test comes out as well.⁴⁵

¶ 17 On October 13, 2011, Kellegher attended a follow-up appointment with Dr. Tacke.⁴⁶ Dr. Tacke noted that Kellegher had received a steroid injection in his right shoulder, which worsened his migraine headaches and vertigo.⁴⁷ Dr. Tacke thought that Kellegher's balance was gradually improving with physical therapy.⁴⁸ Dr. Tacke noted that Dr. Bortnem had decided that Kellegher needed surgery on his right shoulder.⁴⁹ Dr. Tacke also noted that Dr. Bortnem and Dr. Culcea did not think Kellegher was ready to return to work.⁵⁰ Dr. Tacke again recommended a neuropsychological evaluation "to see if he has residua from the brain injury that affects his ability for cognitive tasks and communication skills."⁵¹ Dr. Tacke further stated:

In regard to Patrick's work, I do have the Toole County Office of the Sheriff information about a return to work program. . . . They are viewed as being temporary in nature. They are to ease the employee back to regular duty. . . . If work restrictions are changed by an attending physician then adjustments are made. They are not asked to exceed the restrictions given. . . . The transitional job ends in one of three ways. This is if the worker goes

⁴⁵ Ex. 3 at 9.

⁴⁶ Ex. 3 at 10-12.

⁴⁷ Ex. 3 at 10.

⁴⁸ Ex. 3 at 10-11.

⁴⁹ Ex. 3 at 10.

⁵⁰ Ex. 3 at 11.

⁵¹ Ex. 3 at 12.

back to full-time regular employment, if the transitional job is no longer available and is not extended under the terms of the program, or if under Workers' Comp the claim has been closed. Since he is having the shoulder surgery and with his other issues right now, he is not cleared to do a transitional job. There is an exception. On a very selective basis he is released to work when he goes back to give trial testimony.⁵²

¶ 18 On December 19, 2011, Kellegher again saw Dr. Tacke.⁵³ Dr. Tacke summarized Kellegher's condition as follows:

1. Traumatic brain injury – residual from this includes the vertigo which is the vestibular disturbance due to his head trauma that can be triggered by certain movements and sound as well as positioning down into more of a reclining position. Also part of his residual from the traumatic brain injury is the “disconnect” when it comes to good control and good awareness of the left lower extremity and how he is or isn't able to keep it under control.
2. Post concussion headaches – fortunately this aspect of his problems is continuing to decrease. Unfortunately, though, there is still myofascial pain issues in the neck, upper back and posterior shoulder areas that can trigger the headache when they are more flared. The massage therapy helps reduce this some. Getting the shoulder problem addressed on the right side should be helpful in this regard as well.
3. Right shoulder pain – he definitely has an isolated shoulder joint problem from his Work Comp injury, which Dr. Bortnem is addressing with the surgery tomorrow. The shoulder has then occasional “locking up” and that is where the pain really gets out of hand. I don't think it is realistic to think all his shoulder pain will be gone after the surgery but at least if the stimulus for pain is reduced then it gives him much better chance to work with therapy and to regain good function there.
4. Left knee pain and weakness – overall this seems to be more of a neurological problem related to the brain injury rather than a localized orthopedic problem. He is at risk, of course, to traumatize the left

⁵² *Id.*

⁵³ Ex. 3 at 13-16.

knee and left lower extremity further with any falls or near falls that may involve that limb. The question is if bracing in addition to what Dr. Pine had suggested would be of benefit.⁵⁴

Although Kellegher believed that he would likely return to work as a sheriff's deputy, Dr. Tacke thought Kellegher should start considering a "plan B."⁵⁵

¶ 19 On January 16, 2012, Kellegher underwent a neuropsychological evaluation with James V. English, PsyD, ABN, ABPP-CI.⁵⁶ Dr. English noted that the "small bleed/hematoma was repeatedly discussed by specialists in his records as indicative of an intracranial injury involving an acute small right subdural hematoma. The constellations of symptoms reported by the patient are consistent with acquired brain injury."⁵⁷ Dr. English also noted that neuropsychological testing showed "clear evidence" of impaired attention and concentration, impaired processing speed, and impaired visual memory.⁵⁸

¶ 20 On March 21, 2012, Kellegher returned to Dr. Tacke.⁵⁹ Dr. Tacke's record reflects that Kellegher's condition remained unchanged and consequently, Dr. Tacke thought it was time to wrap up "formal therapy."⁶⁰ Dr. Tacke noted, "I don't . . . see him going back to work any time real soon, particularly as a deputy sheriff."⁶¹ Dr. Tacke told Kellegher that he needed to "face the fact" that he was not going to return to work as a sheriff's deputy.⁶²

¶ 21 On May 24, 2012, Kellegher returned to Dr. Tacke.⁶³ Kellegher had completed physical therapy for his right shoulder, but he was still improving from the physical therapy that was "geared toward residual from his traumatic brain injury which includes his balance problem."⁶⁴ Dr. Tacke noted that Kellegher was having difficulty with vertigo and

⁵⁴ Ex. 3 at 14-15.

⁵⁵ Ex. 3 at 16.

⁵⁶ Ex. 13.

⁵⁷ Ex. 13 at 9.

⁵⁸ *Id.*

⁵⁹ Ex. 3 at 17-19.

⁶⁰ Ex. 3 at 18.

⁶¹ *Id.*

⁶² *Id.*

⁶³ Ex. 3 at 20-21.

⁶⁴ Ex. 3 at 20.

with walking downhill.⁶⁵ Dr. Tacke thought that Kellegher could return to work on a trial basis, with his hours gradually increasing.⁶⁶

¶ 22 In the late spring/early summer of 2012, Kellegher attempted to return to work as a dispatcher. However, Toole County and Kellegher agreed that he could not perform this job. Kellegher testified that he was unsuccessful in the dispatcher position because he had a difficult time hearing and he also suffered from headaches from the computer usage. He stated that he was afraid he was going to hurt someone by missing information and not adequately performing the job in an emergency situation. Kellegher testified that he also had vertigo incidents while performing the dispatcher position which may have been set off by sound or light.

¶ 23 Kellegher testified that he has had ongoing difficulties with vertigo, including a spinning sensation and nausea.⁶⁷ This has occurred on a daily basis since his industrial accident. The symptoms worsen from activities such as standing from a sitting position or bending over.⁶⁸ Using a computer often triggers severe vertigo and headaches.⁶⁹ Once his vertigo is triggered, the symptoms can last from a few minutes to over ten hours.⁷⁰

¶ 24 MACo retained Schroeder to provide vocational services on Kellegher's case. When MACo retained Schroeder, MACo asked her to develop job analyses for Kellegher's time-of-injury position and for the alternate position of Dispatcher. On June 27, 2012, Schroeder sent these job analyses to Dr. Tacke for consideration.⁷¹

¶ 25 Schroeder testified at trial. The Court found her to be a credible witness insofar as she told the truth while testifying. However, Schroeder's demeanor while testifying and, as discussed below, her actions and inactions while performing her vocational rehabilitation services made it clear to this Court that her main goal in providing her services was to get a physician to approve a job analysis and not to assess Kellegher's realistic and reasonable prospects for obtaining employment.

⁶⁵ *Id.*

⁶⁶ Ex. 3 at 21.

⁶⁷ Kellegher Dep. 36:5-10.

⁶⁸ Kellegher Dep. 36:13-15.

⁶⁹ Kellegher Dep. 35:13-22.

⁷⁰ Kellegher Dep. 36:25 – 37:7.

⁷¹ Ex. 11 at 1-8.

¶ 26 On July 25, 2012, Kellegher returned to Dr. Tacke.⁷² Dr. Tacke reported that Kellegher's attempt to work as a dispatcher was unsuccessful.⁷³ Dr. Tacke also noted that Kellegher and another officer accepted a "special job" providing security at the fair for two days.⁷⁴ Dr. Tacke described the job as "a lot of walking for about eight hours."⁷⁵ The assignment caused Kellegher to suffer a flare-up of his symptoms and he sought emergency treatment in Cut Bank.⁷⁶ Dr. Tacke noted:

Since he has not been successful at two limited activity positions for two very different reasons, it is clear to me he is not anywhere close to being able to return to work as a deputy sheriff. The problems that showed up in the two limited activity positions would not be avoided in the work as a deputy sheriff and, in fact, not only would he perhaps have to do quite a bit of walking at times that might lead to flare-up but also he would need to be a very good listener and be able to communicate very effectively, which apparently wasn't working out in the dispatch position.⁷⁷

Dr. Tacke disapproved the job analyses for Deputy Sheriff and Dispatcher.⁷⁸ Although he did not have a job analysis for the security officer job, Dr. Tacke stated that the job required too much walking for Kellegher.⁷⁹ Although Dr. Tacke expressed hope that Kellegher would be able to return to alternative work, he noted: "The hearing deficit and the vertigo potentially could be problems interfering with his ability to work in most of the alternative positions."⁸⁰

¶ 27 On July 30, 2012, Schroeder noted that Dr. Tacke had disapproved Kellegher's time-of-injury position and also disapproved the Dispatcher job analysis because Kellegher's hearing ability was too limited for him to effectively perform the job.⁸¹ Schroeder testified that she knew that Kellegher returned to work as a dispatcher for a time and he was not successful in that position.

⁷² Ex. 3 at 22-24.

⁷³ Ex. 3 at 22.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Ex. 3 at 23-24.

⁷⁸ Ex. 3 at 24.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Ex. 11 at 31.

¶ 28 On September 27, 2012, Kellegher saw Dr. Tacke.⁸² MACo's nurse case manager provided Dr. Tacke with Schroeder's initial employability assessment.⁸³ Dr. Tacke noted that Schroeder intended to develop alternative job analyses and provide them for his review.⁸⁴ Dr. Tacke further explained:

Pat was last seen on 7/25/12. At that time it was clear he wasn't going to be able to return to his job of injury as a Deputy Sheriff. He had been in a couple modified positions where only certain aspects of what he had to [do] as a full deputy were required. One was actually doing the dispatch and there were some new skills he needed there in some ways but skills that would also be important as a deputy. He just had difficulty multitasking and also had some difficulty remembering things that he just heard called in. With the other modified position he was walking around checking things at the fair grounds at night during the fair. He was basically functioning as a temporary security. That didn't work out as he flared up his headaches, including the migraine headaches. There was quite a bit of walking for an eight hour interval. I am not sure just why it flared the headaches but he wasn't able to continue that.

. . . .

After the last visit, essentially Pat was not cleared to continue with any kind of work activity. That means he was back on time loss. He continues in that status and I am estimating that he might be able to return to alternative work by 12/3/12. I will see him back just the week before that at the end of November, which is in two months. He currently is not able to be doing full duty type work although he does have some tolerance for sitting activities, standing activities, and walking. He needs to pace those activities. Right now his physical abilities would be quite restricted to infrequent pushing and pulling, reaching, bending, kneeling, squatting, or climbing. Lifting is restricted to not more than 20 pounds. He is doing physical therapy. We will get the orthopedic evaluation to get a better assessment of what might be expected of the left knee and if he is going to need bracing there. He occasionally uses a walking stick as a walking aid mostly on uneven ground or if he is on a decline for incline. He commented about using it in his left hand and I encouraged that he consider using it more as a cane in the right

⁸² Ex. 3 at 25-28.

⁸³ Ex. 3 at 26.

⁸⁴ *Id.*

hand in a sense that if his left knee is starting to give way, being able to lean away from that onto the walking stick would be best.⁸⁵

¶ 29 On November 26, 2012, Schroeder developed alternative job analyses for Administrative Assistant – Front Desk at the Montana State Hospital; Alarm Monitor at Kenco Security & Technology; Client Service Technician at the Montana Department of Public Assistance; Hotel/Motel Desk Clerk at Super 8; Fraud Investigator at Montana State Fund; and Security Guard at Mining Merchant Police.⁸⁶ Schroeder testified that in preparing these job analyses as well as an initial employability assessment, she interviewed Kellegher to obtain information about his work history, education, training, abilities, interests, and limitations. However, she did not review the job analyses with Kellegher to see if he thought he could do these jobs.

¶ 30 Both in his deposition, and at trial, Kellegher testified that he has difficulty using a computer for any sustained length of time because of sequelae from his industrial accident. He testified that moving images on a computer screen or flickering lights trigger his dizziness. Kellegher testified that he has a laptop computer at home which he uses on rare occasions to look up information or make hotel reservations.⁸⁷ Kellegher explained that when he spends time looking at a computer screen, his vertigo worsens and he develops headaches.⁸⁸ Kellegher testified that he can tolerate using a computer for less than 20 minutes before he begins to experience vertigo and headache.⁸⁹ Kellegher testified that he does not use his computer on a daily basis because he becomes more sensitive to it with frequent use.

¶ 31 However, Schroeder was inexplicably unaware that Kellegher has difficulty working with computers. Schroeder testified that Kellegher's difficulty working with computers just "did not come up" during her interview. She acknowledged that the job analyses for Administrative Assistant, Alarm Monitor, Client Service Technician, Hotel/Motel Desk Clerk, and Fraud Investigator all require the use of a computer. She stated that she does not know if the Security Guard position requires the use of a computer or if the reports are handwritten. Schroeder conceded that if she had known that Kellegher had difficulty using a computer, she would have developed different job analyses.

⁸⁵ Ex. 3 at 25, 27.

⁸⁶ Ex. 11 at 9-27.

⁸⁷ Kellegher Dep. 30:3-12.

⁸⁸ Kellegher Dep. 35:13-22.

⁸⁹ Kellegher Dep. 35:16-24.

¶ 32 Schroeder testified that after she prepared the additional job analyses, she sent them to Dr. Tacke, but Dr. Tacke did not respond. However, Schroeder did not say if she made any efforts to follow up with Dr. Tacke nor did she explain why she did not have the nurse case manager provide the job analyses to Dr. Tacke, as she had done with the initial employability assessment.

¶ 33 On February 5, 2013, Kellegher again saw Dr. Tacke, who noted that vertigo continued to be a problem.⁹⁰ Dr. Tacke also noted that David Kluge, MD, saw Kellegher and concluded that Kellegher's vertigo would not improve with additional physical therapy and that Kellegher would likely experience vertigo "over the long term."⁹¹ Dr. Tacke stated:

He has residual vertigo but if he avoids movements and activities that tend to precipitate the vertigo he is able to go on and function quite well. If he is having to do activities where he is getting into different positions, particularly with his head down and turning then the vertigo tends to trigger more. It would be best that he avoid those activities.⁹²

Dr. Tacke also stated:

In looking at functional ability, I can get a good feel for how consistent Pat's functional abilities would be for tasks such as sitting, standing, and walking. Clearly, if he is not having a day that is too bad he can pretty much pace the activities he is doing between those three. My impression was that if he is having "a real bad day" then even switching around his activities doesn't necessarily give him much resolution of the discomfort.⁹³

Dr. Tacke and the nurse case manager discussed having Kellegher undergo a functional capacities evaluation (FCE).⁹⁴

¶ 34 On April 18, 2013, Kellegher returned to Dr. Tacke. Dr. Tacke reported that Kellegher's "overall clinical status is getting quite stable" but he has "some chronic problems he will likely have to deal with long term."⁹⁵ Dr. Tacke noted:

⁹⁰ Ex. 3 at 29-32.

⁹¹ Ex. 3 at 29.

⁹² Ex. 3 at 31.

⁹³ Ex. 3 at 30.

⁹⁴ Ex. 3 at 31.

⁹⁵ Ex. 3 at 34.

Pat does identify functional abilities. We talked about how he matches up to work activity. He is able to sit for intervals of up to 40 minutes. We determined that he could probably do at least six hours of sitting through the course of an eight hour day. His standing tolerance is a little bit less at about 20 minutes per interval and he can stand more frequently early in the day than later in the day. We targeted four hours of standing maximum total for an eight hour day. Walking is his main variable. Sometimes he could walk for up to an hour and not have too much problem and then other times if his knee pops he is not able to do much walking at all. We kept him at the two hour of walking activity in the course of an eight hour day knowing that sometimes the walking intervals would need to be very short. I pointed out that in looking at any type of work activity that is the one thing he needs to be conscious about that could make it possible to do a job or not. He needs to look at a job from a standpoint that if walking is involved it needs to be something he can choose to do when he is not having a lot of knee problems rather than something he would have to do on a consistent basis no matter what his knee is doing.⁹⁶

¶ 35 Dr. Tacke also noted:

I do think Patrick is ready to look at trying to get back to some type of alternative work. We will target 5/20/2013. . . . He needs to be looking at alternative work. I did encourage him to think in terms of what his strengths are when it comes to jobs he might go out and pursue. He mainly starting talking about what he couldn't do like work at night. I tried to get him redirected to thinking what he can do. We talked about security work. That, of course, tends to be more of a night time job but there are many security jobs to do during the day time as well. He did bring up the possibility of working in a business where they sell guns. He hasn't had retail experience but he has a good knowledge base and he feels he is good with the public. I did point out that those jobs can mean quite a bit of standing.⁹⁷

¶ 36 On May 1 and 2, 2013, Kellegher attended an FCE conducted by Gary Lusin, PT, MS, LAT, CSCS.⁹⁸ Lusin opined that Kellegher "participated well in the exam and worked to his best ability."⁹⁹ Lusin noted that several "significant deficits" limit Kellegher's

⁹⁶ Ex. 3 at 33.

⁹⁷ Ex. 3 at 34.

⁹⁸ Ex. 4 at 1.

⁹⁹ *Id.*

functional capabilities.¹⁰⁰ Many of the deficits involved Kellegher's loss of balance.¹⁰¹ Lusin noted that Kellegher had some limitations in his cervical spine range of motion due to dizziness and loss of balance.¹⁰² During trunk rotation, Kellegher also lost his balance on flexion and extension.¹⁰³ Kellegher was unable to squat down and touch the floor in front of him with both hands, although he could pick up an object off the floor if he held onto something to stabilize himself.¹⁰⁴ He also had balance difficulties during one of the walking exercises.¹⁰⁵ A certified vestibular therapist, who assessed Kellegher at Lusin's request, found Kellegher's balance difficulties to be consistent with post-concussion or cervicogenic origin.¹⁰⁶ Lusin opined that Kellegher can safely work within the middle portion of the medium physical demand level as long as the job allows him to control positions and movement speeds to maintain his balance and control dizziness.¹⁰⁷

¶ 37 Lusin considered several job analyses MACo provided.¹⁰⁸ He disapproved Deputy Sheriff.¹⁰⁹ He approved Security Guard, Fraud Investigator, Hotel/Motel Desk Clerk, Alarm Monitor, and Administrative Assistant with modifications.¹¹⁰ In the case of the Security Guard job analysis, Lusin indicated that it would need to be modified to allow "balance protection" on uneven ground at night and to allow Kellegher to regulate his walking duration as needed.¹¹¹ He stated, "If modifications cannot be made then job is disapproved."¹¹² Lusin noted, "These may or may not be reasonable modifications."¹¹³ For Fraud Investigator, Alarm Monitor, and Administrative Assistant, Lusin recommended modifications to eliminate the need to lift below knee level, or to allow Kellegher to use hand support for this activity.¹¹⁴ For the Hotel/Motel Desk Clerk position, Lusin approved the job analysis with the modification that Kellegher be permitted to work at his own pace, avoiding quick movements and change in direction, and to allow support for any activity

¹⁰⁰ Ex. 4 at 4-5.

¹⁰¹ *Id.*

¹⁰² Ex. 4 at 2.

¹⁰³ *Id.*

¹⁰⁴ Ex. 4 at 3.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Ex. 4 at 7.

¹⁰⁸ Ex. 4 at 5-6.

¹⁰⁹ Ex. 4 at 5, 11.

¹¹⁰ Ex. 4 at 5-6, 10, 12-15.

¹¹¹ Ex. 4 at 5.

¹¹² Ex. 4 at 12 (emphasis in original).

¹¹³ Ex. 4 at 5.

¹¹⁴ Ex. 4 at 5-6.

requiring reaching below knee level.¹¹⁵ Lusin approved only the Client Service Technician job analysis as written.¹¹⁶

¶ 38 Kellegher testified that he reviewed the job analyses Schroeder prepared and he did not believe he would be able to perform any of the jobs. In particular, he did not think he could tolerate the computer work required. He was also concerned that for the Security Guard job analysis, he would have difficulty patrolling at night because of problems with his depth perception, and that the standing and moving required according to the Hotel/Motel Desk Clerk job analysis would be problematic. Kellegher testified that if he stands up too quickly, he gets dizzy and needs to hold onto something until he can orient himself.

¶ 39 Kellegher testified that he was unfamiliar with the job duties for the Client Service Technician and Administrative Assistant job analyses, but he believed he could not perform either job because they would likely require telephone work, computer work, and office duties which would involve being able to move safely about the office.¹¹⁷

¶ 40 In June 2013, Kellegher underwent a panel independent medical examination (IME) with Dale M. Peterson, MD, Joseph Erpelding, MD, Lawrence Splitter, MD, and Dr. McElhinny.¹¹⁸

¶ 41 Dr. Peterson interviewed and examined Kellegher, and reviewed his medical records.¹¹⁹ In his report, Dr. Peterson noted that Kellegher returned to light-duty work as a police dispatcher while he was healing from his injuries, and that Kellegher was terminated from that position because he was unable to hear telephone reports.¹²⁰ Dr. Peterson reported that Kellegher found that he had some restriction in how far he could turn his head side to side, and that Kellegher suffered from spasms and cramps in his neck which worsen throughout the day and lead to headaches.¹²¹ Kellegher had recently undergone Botox injections which helped alleviate the spasms and headaches.¹²² Kellegher also reported a slight worsening in his hearing and continued pain in his left knee, which had a tendency to give way, particularly when walking downhill.¹²³ Kellegher

¹¹⁵ *Id.*

¹¹⁶ Ex. 4 at 6.

¹¹⁷ Kellegher Dep. 31:2-14.

¹¹⁸ Ex. 6.

¹¹⁹ Ex. 6 at 1-17.

¹²⁰ Ex. 6 at 2-3.

¹²¹ Ex. 6 at 3.

¹²² *Id.*

¹²³ Ex. 6 at 4.

stated that he had intermittent numbness in his feet and legs and that he was unable to sense heat or cold in his lower legs and feet.¹²⁴ Dr. Peterson noted:

[Kellegher] described two types of headaches. With the neck spasm the pain will radiate up the right side of his head into the right side of the forehead and right eye over about two hours, become associated with sensitivity to light, nausea, increased vertigo, and sensitivity to sound. He has to stay in the dark and has used simple over-the-counter migraine medications without too much benefit. He did use injectable Imitrex with good relief, but since the Botox injections he has not needed to do that. Another type of headache comes on with exposure to bright lights or flash of windows or snow. These occur in the frontal region behind both eyes, build and in [sic] last up to a couple of hours and respond to simple over-the-counter migraine medications. He can prevent these with the use of sunglasses and a bill on his cap.¹²⁵

¶ 42 Kellegher testified that for a time, he received Botox injections which helped control his headaches. However, he did not like the side effects of the injections. He testified that the injections also triggered vertigo and nausea. He stated that although his headaches have worsened since discontinuing the Botox, he would prefer not to resume the injections because of the side effects.

¶ 43 Dr. Peterson further noted that Kellegher had suffered from vertigo since the accident and its severity had not improved since approximately six months post-accident.¹²⁶ Kellegher reported that he did not experience vertigo if he sat quietly, but that he usually experienced vertigo when rising from a sitting position and that he had to hold onto something to prevent falling.¹²⁷ This vertigo usually cleared after a minute or two and he could then walk.¹²⁸ Kellegher reported that he needed to lay on one side while sleeping and rolling over triggered vertigo.¹²⁹ He also experienced vertigo from bending over.¹³⁰

¶ 44 On examination, Dr. Peterson found that Kellegher had limited range of motion in his neck, particularly to the right, with a slight restriction of extension.¹³¹ Dr. Peterson

¹²⁴ *Id.*

¹²⁵ Ex. 6 at 3.

¹²⁶ Ex. 6 at 4.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Ex. 6 at 6.

observed that Kellegher favored his left leg and that he recently began using a knee brace.¹³² Dr. Peterson further found:

When standing at attention he is stable, but when his eyes are closed he immediately falls backwards. He cannot tandem walk. I did not ask him to try to stand on one foot. His reflexes are absent in the lower extremities at the knees and ankles with reinforcement. There was no response to plantar stimulation. There is no weakness in distal or proximal muscles of the lower extremities.¹³³

Dr. Peterson also found that Kellegher's thigh muscles were smaller on his left leg than right.¹³⁴ Dr. Peterson further found decreased sensation in the left foot and ankle and a bilateral inability to sense pinprick or temperature from the knees down.¹³⁵

¶ 45 In answer to questions posed by MACo, Dr. Peterson opined that Kellegher's diagnoses secondary to his June 3, 2011, industrial accident include: post-traumatic encephalopathy and subdural hemorrhage, resolved; post-traumatic labyrinthine disorder, improving; post-traumatic cervical strain with muscle spasms and post-traumatic migraine, resolving; post-traumatic impingement of the right shoulder, resolved; and post-traumatic elbow pain with ulnar neuropathy, resolved.¹³⁶ Dr. Peterson opined that Kellegher was at maximum medical improvement (MMI) for his industrial injury.¹³⁷ He assigned him a 5% whole person impairment rating for the vestibular dysfunction, and no impairment rating for any of his remaining conditions.¹³⁸ Dr. Peterson opined that the only treatments available to Kellegher are Botox injections, and gentle stretching and range of motion therapy at home for his cervical strain and migraines.¹³⁹

¶ 46 After finding Kellegher at MMI, Dr. Peterson disapproved the job analysis for Kellegher's time-of-injury position of Deputy Sheriff.¹⁴⁰ Dr. Peterson approved the job analyses for Security Guard, Fraud Investigator, Hotel/Motel Desk Clerk, Alarm Monitor position, Client Service Technician, Administrative Assistant, and Dispatcher.¹⁴¹ He

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ Ex. 6 at 6-7.

¹³⁶ Ex. 6 at 26.

¹³⁷ Ex. 6 at 28.

¹³⁸ Ex. 6 at 28-29.

¹³⁹ Ex. 6 at 27.

¹⁴⁰ Ex. 6 at 18.

¹⁴¹ Ex. 6 at 19-25.

offered no further explanation or comments either in his report or on the job analyses' signature sheets as to whether he agreed with Lusin that modifications needed to be made to the Security Guard, Fraud Investigator, Hotel/Motel Desk Clerk, Alarm Monitor, and Administrative Assistant job analyses.¹⁴² However, from reviewing Dr. Peterson's IME report, this Court knows that Dr. Peterson was aware that Kellegher tried, but failed to satisfactorily perform, as a dispatcher.¹⁴³ This Court does not understand why Dr. Peterson nonetheless approved the Dispatcher job analysis. Since Dr. Peterson knowingly approved a job which he knew Kellegher could not perform, the Court questions the criteria Dr. Peterson used in evaluating and approving the other submitted job analyses. Moreover, Dr. Peterson offered no explanation as to why he apparently did not agree with the modifications that Lusin recommended for the Security Guard, Fraud Investigator, Hotel/Motel Desk Clerk, Alarm Monitor, and Administrative Assistant jobs. The Court therefore gives Dr. Peterson's approvals no weight.

¶ 47 In his IME report, Dr. Erpelding agreed with Lusin's findings and further stated that he agreed with the comments Lusin made on the various job analyses.¹⁴⁴ Dr. Erpelding found Kellegher to be at MMI for his right shoulder and elbow with no impairment rating.¹⁴⁵ He further stated that from an orthopedic standpoint, Kellegher "should avoid lifting and/or carrying more than a quarter of his ideal [body] weight and then only on a rare occasion."¹⁴⁶

¶ 48 Dr. Splitter did not offer an opinion regarding the job analyses in his IME report.¹⁴⁷

¶ 49 Dr. McElhinny is a clinical psychologist specializing in neuropsychology.¹⁴⁸ He also saw Kellegher as part of the panel IME.¹⁴⁹ Dr. McElhinny diagnosed Kellegher as having suffered a mild traumatic brain injury as a result of the June 3, 2011, industrial accident.¹⁵⁰ Dr. McElhinny found Kellegher to have a variety of medical problems which could adversely affect his neuropsychological and psychological functioning.¹⁵¹ However, Dr. McElhinny opined that it was unlikely that any of Kellegher's present deficits or

¹⁴² See Ex. 6 at 19-22, 24.

¹⁴³ Ex. 6 at 2-3.

¹⁴⁴ Ex. 7 at 4-5.

¹⁴⁵ Ex. 7 at 6.

¹⁴⁶ *Id.*

¹⁴⁷ Ex. 9.

¹⁴⁸ McElhinny Dep. 5:3-4.

¹⁴⁹ McElhinny Dep. 6:25 – 7:6.

¹⁵⁰ Ex. 8 at 6.

¹⁵¹ *Id.*

weaknesses could be attributed to the industrial accident.¹⁵² Dr. McElhinny opined that it would be in Kellegher's best interests to return to work within the scope of his physical restrictions.¹⁵³

¶ 50 Dr. McElhinny testified that he saw no sign of an acquired brain injury in Kellegher based on Kellegher's presentation during the interview.¹⁵⁴ He opined that this would bode well for future employment as Kellegher "would not be perceived as an individual who is odd or impaired."¹⁵⁵ Dr. McElhinny concluded that Kellegher was at MMI for his June 3, 2011, traumatic brain injury with no noteworthy neuropsychological impairments that Dr. McElhinny could attribute to the industrial accident.¹⁵⁶

¶ 51 Dr. McElhinny testified that severe headaches could impair a person's ability to work, but he would defer to a neurologist's opinion on that matter.¹⁵⁷ Dr. McElhinny testified that he does not know if Kellegher's lower-leg problems interfere with his ability to walk.¹⁵⁸ He further testified that he does not know the cause of Kellegher's vertigo or how frequently Kellegher suffers from it.¹⁵⁹ Dr. McElhinny testified that he had no reason to disagree with Dr. Peterson's opinion that Kellegher could return to work.¹⁶⁰ Dr. McElhinny testified that he did not assess Kellegher's condition from a physical point of view.¹⁶¹ He does not know what physical problems Kellegher currently experiences from his industrial accident.¹⁶²

¶ 52 During Dr. McElhinny's deposition, Dr. McElhinny gave his opinion as to whether Kellegher could perform the jobs of Security Guard, Fraud Investigator, Hotel/Motel Desk Clerk, Alarm Monitor, Client Service Technician, and Administrative Assistant. However, Dr. McElhinny based his opinions solely on his "general understanding" of what those jobs entailed and not on a review of the job analyses created for Kellegher. Therefore,

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ McElhinny Dep. 17:8-10.

¹⁵⁵ McElhinny Dep. 17:14-16.

¹⁵⁶ McElhinny Dep. 18:21 – 19:4.

¹⁵⁷ McElhinny Dep. 34:16-19.

¹⁵⁸ McElhinny Dep. 35:1-9.

¹⁵⁹ McElhinny Dep. 35:12-19.

¹⁶⁰ McElhinny Dep. 24:16-24; 25:2-6.

¹⁶¹ McElhinny Dep. 36:1-3.

¹⁶² McElhinny Dep. 36:24 – 37:2.

the Court gives these opinions no weight as MACo did not establish any foundation for Dr. McElhinny's testimony in this regard.¹⁶³

¶ 53 Moreover, the Court must weigh Dr. McElhinny's opinion against the opinion of Dr. English, who found "clear evidence" of deficits after neuropsychological testing,¹⁶⁴ and the opinions of Dr. Tacke. As noted in these findings, Dr. Tacke had significant interactions with Kellegher and evidenced a strong interest in Kellegher's attempts to return to work. Dr. Tacke made note of situations in which Kellegher's traumatic brain injury affected his ability to return to work, including the dispatcher attempt: "He just had difficulty multitasking and also had some difficulty remembering things that he just heard called in."¹⁶⁵ The Court finds this type of specific inquiry into Kellegher's deficits more indicative of his potential success in the workplace than a general observation that he "would not be perceived as . . . odd or impaired."¹⁶⁶ Since Dr. Tacke is Kellegher's treating physician, his opinion is entitled to greater weight.¹⁶⁷ The Court finds the opinions of Drs. Tacke and English more persuasive than Dr. McElhinny's opinion.¹⁶⁸

¶ 54 Kellegher testified that none of the doctors involved with the panel IME asked him about the job analyses or whether he believed he could perform those job duties. He further testified that none of them asked him if he had difficulty using a computer.

¶ 55 On August 2, 2013, Schroeder reported that she had received Lusin's FCE report, and the IME reports from Drs. Peterson, Erpelding, Splitter, and McElhinny.¹⁶⁹ Schroeder noted that Dr. Peterson had approved job analyses for Dispatcher, Administrative Assistant, Alarm Monitor, Client Service Technician, Fraud Investigator, Hotel/Motel Desk Clerk, and Security Guard, and that he had disapproved the job analysis for Kellegher's time-of-injury position.¹⁷⁰ Schroeder noted that she intended to send the job analyses to Dr. Tacke and ask if he concurred with the IME panel.¹⁷¹ Schroeder testified she did not

¹⁶³ McElhinny Dep. 25:12 – 28:19.

¹⁶⁴ See ¶ 19, above.

¹⁶⁵ See ¶ 28, above.

¹⁶⁶ See ¶ 50, above.

¹⁶⁷ *EBI/Orion Group v. Blythe*, 1998 MT 90, ¶¶ 12-13, 288 Mont. 356, 957 P.2d 1134 (citation omitted) ("[A]s a general rule, the opinion of a treating physician is accorded greater weight than the opinions of other expert witnesses. . . . However, . . . a treating physician's opinion is not conclusive. To presume otherwise would quash the role of the fact finder in questions of an alleged injury.").

¹⁶⁸ See *Durham v. State Comp. Ins. Fund*, 1998 MTWCC 87, ¶¶ 19, 44. (In determining whether the weight of conflicting medical opinions outweighs the opinion of a treating physician, this Court has considered such factors as the quality of evidence upon which the physicians based their respective opinions.)

¹⁶⁹ Ex. 11 at 46.

¹⁷⁰ *Id.*

¹⁷¹ Ex. 11 at 47.

develop job analyses which incorporated any of the modifications Lusin indicated were necessary for approval even though Dr. Erpelding endorsed the necessity of these modifications in his IME report.

¶ 56 In Schroeder's next two Progress Reports, dated November 13, 2013, and December 31, 2013, she does not mention following through on her intention to send the post-IME panel job analyses to Dr. Tacke.¹⁷² Also, while Schroeder's file as submitted into evidence contains a copy of the November 2012 correspondence she sent to Dr. Tacke along with the job analyses at that time, it does not contain a copy of any correspondence Schroeder wrote to Dr. Tacke after August 2, 2013. However, Schroeder testified at trial that after Dr. Peterson approved the job analyses, she did send the job analyses to Dr. Tacke again, along with Dr. Peterson's approvals, but she received no response from Dr. Tacke. Given Dr. Tacke's interest in Kellegher's condition and care, as demonstrated in his detailed and lengthy records, this Court does not believe that Dr. Tacke intentionally ignored Schroeder's questions. Schroeder's apparent lack of follow-up suggests that neither she nor MACo were interested in knowing Dr. Tacke's thoughts on whether Kellegher could perform these jobs.

¶ 57 In light of the problematic and conditional approvals of the job analyses by various medical providers as set forth above, the Court finds that the only approved job analysis with any credible weight is that of Client Service Technician, as approved by Lusin, whose approval was endorsed by Dr. Erpelding.¹⁷³ However, from Lusin's FCE report, it does not appear that Lusin's examination revealed Kellegher's inability to use a computer for any significant period of time without a significant exacerbation of his vertigo. Although the job analysis for Client Service Technician is silent as to the extent of computer usage required,¹⁷⁴ Schroeder testified that the position involves using a computer. Therefore, the Court finds that approved job analysis notwithstanding, Kellegher would be unlikely to be able to successfully perform this job.

¶ 58 On March 3, 2014, relying entirely on Dr. Peterson's opinion that Kellegher could perform alternative employment, MACo terminated Kellegher's temporary total disability (TTD) benefits and stated it would begin paying permanent partial disability benefits.¹⁷⁵

¹⁷² Ex. 11 at 48-51.

¹⁷³ Ex. 7 at 5.

¹⁷⁴ See Ex. 11 at 16-18.

¹⁷⁵ Ex. 12. Although this letter indicates that MACo terminated Kellegher's "permanent total disability benefits," MACo sent this letter because of the IME panel report, which included a finding of MMI. Therefore, it is clear that Kellegher was receiving TTD benefits at the time and MACo's reference to "permanent" total disability benefits was in error.

¶ 59 On March 24, 2014, Kellegher again saw Dr. Tacke, who noted that Kellegher still suffered from vertigo and headaches.¹⁷⁶

¶ 60 The most recent medical record submitted into evidence is from a September 10, 2014, appointment with Dr. Tacke.¹⁷⁷ Dr. Tacke noted:

[Kellegher] still experiences periodic episodes of vertigo. A recent event was triggered by entering a room with a ceiling fan that then was causing variable shadows. If he wears dark glasses he is not as sensitive to a trigger. That helps him avoid the fluctuating dark and light conditions. Also, he does not lay flat. He bought a mechanical bed that can allow him to sleep somewhat upright.¹⁷⁸

Dr. Tacke noted that walking downhill could trigger Kellegher's vertigo.¹⁷⁹ Dr. Tacke's recommendation for vertigo was to "[c]ontinue to pace your activities, avoiding movement and situations that may trigger your vertigo or headaches."¹⁸⁰ Dr. Tacke noted that Kellegher no longer experienced significant migraine headaches, but suffered from headaches which were manageable with over-the-counter medication.¹⁸¹ Dr. Tacke further noted that Kellegher was having difficulty turning his head side to side, which made driving difficult.¹⁸² Dr. Tacke reported that Kellegher continued to experience pain in his lower back down into his legs, and that he recently reported numbness in his hands and fingers which Kellegher believes may be caused by cervical disc bulges.¹⁸³ Dr. Tacke reported that Kellegher was unwilling to try epidural injections in his neck because of the possibility of migraine headaches as a side effect.¹⁸⁴ Dr. Tacke further noted that Kellegher reported sleeping two to three hours at night, awakening to use the bathroom and stretch, and then returning to sleep another two to four hours.¹⁸⁵ Dr. Tacke noted that Kellegher was achieving some relief of his neck and back pain from massage therapy,

¹⁷⁶ Ex. 5 at 1-5.

¹⁷⁷ Ex. 5 at 6-11.

¹⁷⁸ Ex. 5 at 6.

¹⁷⁹ *Id.*

¹⁸⁰ Ex. 5 at 9.

¹⁸¹ Ex. 5 at 6.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

which Kellegher paid for himself because MACo was no longer authorizing the treatment.¹⁸⁶

¶ 61 Kellegher testified during his deposition that his ongoing symptoms from his industrial injury are:

The constant vertigo that I deal with daily. Pain in my neck, my arms, my legs. Last night was a horrible night for me; I got like two hours' sleep. And that's a daily battle for me. And as the day goes on . . . the vertigo stuff gets worse . . . so I have to limit my activities towards the end of the day.

. . . .

. . . I usually get up between the hours of 4:00 and 6:00 because I can't sleep no more because I'm hurting. I battle vertigo the first thing in the morning until I get that kind of under control. . . . I take my nephews to school a couple times a week. . . . I try to keep active and doing different things, but nothing on a constant basis as far as every day. I just try to stay as active as possible.¹⁸⁷

¶ 62 Kellegher also testified that he suffers from severe, disabling headaches approximately twice a week.¹⁸⁸ When his symptoms begin, he must either take steps to mitigate the condition or he suffers severe pain for days.¹⁸⁹ He testified that if he catches a headache in the early stages, he will take an over-the-counter pain reliever and lie down for half a day and that will usually keep the headache from getting worse. If he does not take these measures, his headache can last for two days. Kellegher further testified that he cannot lie flat and he sleeps in an adjustable bed to prevent vertigo.¹⁹⁰

¶ 63 Kellegher testified that at the present time, he does not intend to try to return to work. However, he also testified that he would like to return to work and he does not enjoy being unemployed.

¶ 64 Kellegher currently spends his time with family and participates in some recreational activities. He testified that on weekdays, he drives his nephews to school, and he usually drives them home for lunch. He also tries to attend their sports activities

¹⁸⁶ Ex. 5 at 6-7.

¹⁸⁷ Kellegher Dep. 19:13 – 20:6.

¹⁸⁸ Kellegher Dep. 14:20-23.

¹⁸⁹ Kellegher Dep. 14:23 – 15:2.

¹⁹⁰ Kellegher Dep. 37:8-11.

in the evenings.¹⁹¹ Kellegher testified that he went fishing once in 2014.¹⁹² Kellegher testified that he owns an ATV and uses it to plow snow.¹⁹³ He has tried to hunt elk and deer,¹⁹⁴ but was unable to hike.¹⁹⁵ Kellegher testified that usually plays nine holes of golf each week, using a cart. After golfing, he rests for the rest of the day.

¶ 65 Rob Kellegher testified at trial. The Court found him to be a credible witness. Rob is Kellegher's brother and he resides in Anaconda. He and Kellegher see each other almost daily. Rob golfs with Kellegher and he has observed that over time, Kellegher has reached a point where he can comfortably play nine holes, but when he has played 18, he gets fatigued. Rob testified that they use a golf cart when they play and he does not believe Kellegher would be able to walk the course without it.

¶ 66 Rob testified that on weekdays, Kellegher picks up Rob's sons from school at lunchtime and they come home to eat together. Kellegher then drives them back to school. Rob testified that he has seen Kellegher have difficulty in social situations and he becomes frustrated and angry. Rob further testified that he has witnessed Kellegher's memory difficulties and Kellegher will often repeat the same story without realizing he had already told it.

¶ 67 Bonnie Kellegher testified at trial. The Court found her to be a credible witness. Bonnie is Kellegher's mother. She resides in Anaconda and sees him on an almost-daily basis. She testified that she usually eats lunch with Kellegher, Rob, and Rob's children. A few times each week, Kellegher also eats dinner with her. She testified that after dinner, they occasionally play short board games, but Kellegher is not able to tolerate games which last more than 15 or 20 minutes.

¶ 68 Bonnie testified that she frequently witnesses Kellegher have to grab onto something to steady himself when he stands up. She testified that at her home, Kellegher usually sits in a recliner because it is easier for him to get out of. She has seen Kellegher have difficulty attempting to play computer games with his nephews. Bonnie testified that on some days, Kellegher does well and on other days he does not have much energy. Sometimes he has more difficulty walking than others. She further testified that she has noticed that when he gets headaches, one of his eyes will close. Bonnie testified that she

¹⁹¹ Kellegher Dep. 20:10-14.

¹⁹² Kellegher Dep. 20:20-23.

¹⁹³ Kellegher Dep. 23:8-17.

¹⁹⁴ Kellegher Dep. 23:20-25.

¹⁹⁵ Kellegher Dep. 24:5-9.

finds Kellegher's memory to be good overall, although he does occasionally repeat himself.

CONCLUSIONS OF LAW

¶ 69 This case is governed by the 2009 version of the WCA since that was the law in effect at the time of Kellegher's industrial accident.¹⁹⁶

Issue One: Whether Kellegher is permanently totally disabled as a result of his June 3, 2011, industrial accident.

¶ 70 Section 39-71-116(25), MCA, defines "permanent total disability" as a physical condition resulting from an injury in which a worker, after reaching MMI, does not have a reasonable prospect of physically performing regular employment. A determination of PTD must be based upon objective medical evidence.¹⁹⁷

¶ 71 Ordinarily, an injured worker bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.¹⁹⁸ However, 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."¹⁹⁹ 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.²⁰⁰ If the insurer meets its burden, the burden shifts to the claimant to prove that he is permanently totally disabled notwithstanding the approved job analyses.²⁰¹

¶ 72 In support of its position, MACo points to the approved job analyses and argues that these approvals are sufficient to prove that Kellegher is not permanently totally disabled.²⁰² "However, merely obtaining a physician's approval of an alternative job analysis is not dispositive of the issue of PTD."²⁰³ This Court, which weighs the credibility

¹⁹⁶ *Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶ 32, 365 Mont. 405, 282 P.3d 687 (citation omitted); § 1-2-201, MCA.

¹⁹⁷ § 39-71-702(2), MCA.

¹⁹⁸ *Ricks v. Teslow Consol.*, 162 Mont. 469, 483-84, 512 P.2d 1304, 1312-13 (1973); *Dumont v. Wickens Bros. Constr. Co.*, 183 Mont. 190, 201, 598 P.2d 1099, 1105-06 (1979).

¹⁹⁹ § 39-71-609(2)(c), MCA.

²⁰⁰ *Weisgerber v. American Home Assurance Co.*, 2005 MTWCC 8, ¶ 32.; see also *Drivdahl v. Zurich American Ins. Co.*, 2012 MTWCC 43, ¶ 24 and *Holmes v. Safeway Inc.*, 2012 MTWCC 8, ¶ 59 (citation omitted).

²⁰¹ *Drivdahl*, ¶ 26.

²⁰² Respondent's Trial Brief at 2-3, Docket Item No. 20.

²⁰³ *Thompson v. Montana State Fund*, 2013 MTWCC 25, ¶ 66; see also *Holmes*, ¶ 60.

of both medical and non-medical evidence,²⁰⁴ has rejected a physician's approval of job analyses when the weight of the evidence shows that the approvals are inconsistent with the claimant's actual physical limitations and when the claimant has no realistic chance that he can perform the jobs for which he was approved.²⁰⁵

¶ 73 In *Weisgerber v. American Home Assurance Co.*, the medical provider who reviewed job descriptions prepared on behalf of the insurer approved three jobs without qualification and approved two others with modifications.²⁰⁶ The doctor took into consideration only the physical restrictions which arose from the claimant's occupational disease and did not take pre-existing limitations into account.²⁰⁷ The Court considered the claimant's pre-existing conditions and commented that it was "skeptical" that she could perform the job duties associated with the approved job descriptions.²⁰⁸ The Court further found insufficient evidence to conclude that an employer could accommodate the modifications required for two of the job descriptions.²⁰⁹ From its consideration of the job descriptions, the claimant's testimony, and the medical evidence regarding the claimant's conditions, the Court found that no job had been medically approved which took into consideration the claimant's pre-existing conditions and disability as they existed at the time of diagnosis for her occupational disease.²¹⁰ Thus, this Court ruled that she was entitled to PTD benefits.²¹¹

¶ 74 In *Thompson v. Montana State Fund*, this Court concluded that the claimant did not have a reasonable prospect of physically performing regular employment and was therefore permanently totally disabled even though an approved job analysis existed.²¹² This Court found that physicians who each considered only specific limitations of the claimant within their respective areas of expertise approved only one job analysis in common.²¹³ However, one of the physicians initially approved the job analysis, later rescinded his approval, and ultimately stated that he did not know whether the claimant could perform the job position in light of her physical limitations, leading the Court to find

²⁰⁴ *EBI/Orion Grp.*, ¶ 13 (citations omitted).

²⁰⁵ See, e.g., *Thompson*, ¶¶ 71, 72; *Peterson v. Montana Sch. Grp. Ins. Auth.*, 2006 MTWCC 14, ¶¶ 75-78 (citations omitted).

²⁰⁶ *Weisgerber*, ¶ 25.

²⁰⁷ *Weisgerber*, ¶ 27.

²⁰⁸ *Weisgerber*, ¶ 28.

²⁰⁹ *Id.*

²¹⁰ *Weisgerber*, ¶ 29.

²¹¹ *Weisgerber*, ¶ 34.

²¹² *Thompson*, ¶ 70.

²¹³ *Thompson*, ¶ 65.

his opinion equivocal at best.²¹⁴ The other physician who approved this job analysis, which was for a light-duty position, approved it in spite of otherwise opining that the claimant could work in a sedentary position only.²¹⁵ The problematic approvals of the job analyses, along with witness testimony and other exhibits, led the Court to conclude that the claimant was permanently totally disabled within the meaning of the applicable statutes.²¹⁶

¶ 75 The present situation is similar to *Weisgerber and Thompson*. Although approved job analyses exist, this Court is convinced that Kellegher does not have a reasonable prospect of performing these jobs. This Court gives no weight to Dr. Peterson's approvals of the job analyses for the reasons set forth in the findings above.²¹⁷ The objective medical evidence indicates that Kellegher suffered significant injuries in his industrial accident and that he has ongoing limitations due to those injuries. MACo neither disputes Kellegher's pre-existing limitations, including his hearing impairment, nor challenges Kellegher's description as to how the sequelae from his industrial accident affect his daily activities. This Court is persuaded that Kellegher could not perform any of the approved jobs due to his vertigo, balance difficulties, headaches, memory problems, and hearing loss.

¶ 76 Moreover, the requirements of most of the jobs for which Schroeder prepared analyses in November 2012 would also exceed Kellegher's pre-existing limitations and the restrictions Lusin noted in his FCE report.²¹⁸ The Security Guard job analysis requires excess walking.²¹⁹ The Alarm Monitor and Fraud Investigator job analyses require lifting and reaching lower than knee level.²²⁰ Furthermore, the Court notes that the Alarm Monitor job analysis is similar to the dispatcher position that Kellegher could not perform because of his hearing problems.²²¹ MACo argues that this Court should consider the jobs approved on the condition of modifications as approved because, under the Americans with Disabilities Act,²²² an employer has a duty to make a reasonable accommodation for a qualified individual with a disability. However, MACo did not have Schroeder investigate whether those modifications could be made and introduced no evidence that employers would consider the modifications reasonable.²²³ Although MACo

²¹⁴ *Thompson*, ¶¶ 67, 70.

²¹⁵ *Thompson*, ¶ 68.

²¹⁶ *Thompson*, ¶ 70.

²¹⁷ See ¶ 46, above.

²¹⁸ Ex. 4 at 1-9.

²¹⁹ Ex. 4 at 5, 9.

²²⁰ Ex. 4 at 5-6, 8-9.

²²¹ See ¶ 22, above.

²²² 42 U.S.C. § 12112(a).

²²³ *Lujan v. Pac. Mar. Ass'n*, 165 F.3d 738, 743 (9th Cir.1999) ("The reasonableness of an accommodation is ordinarily a question of fact."); see also *Reeves v. Dairy Queen, Inc.*, 1998 MT 13, ¶¶ 40-43, 287 Mont. 196, 953 P.2d

attempts to make much of the fact that Kellegher occasionally plays nine holes of golf, fishes, went hunting with friends on one occasion, drives his nephews to school, and attends their athletic events, these activities do not establish that Kellegher has the ability to perform any of the positions described in these job analyses on a full-time basis.

¶ 77 This Court is also convinced that none of the jobs are vocationally appropriate for Kellegher because of the difficulties he has working on a computer. The job analyses for Administrative Assistant, Alarm Monitor, and Fraud Investigator each state that these positions require sustained computer work. While the job analysis for Client Service Technician is silent as to computer usage, Schroeder acknowledged that the job position required the use of a computer. For the position described in the Security Guard job analysis, Schroeder did not know if the security guards wrote their reports on a computer or by hand and therefore, her testimony did not establish that the job analysis was vocationally appropriate for Kellegher. Schroeder's concession that she would have developed different job analyses for jobs that did not involve a computer had she known about Kellegher's difficulties using a computer demonstrates that she does not think these jobs are vocationally appropriate for him.

¶ 78 MACo argues that Kellegher is not permanently totally disabled because it alleges that Dr. Tacke opined Kellegher can work. However, MACo did not obtain Dr. Tacke's opinion whether Kellegher could work in a particular job. Dr. Tacke did not unequivocally state that Kellegher could return to work. In fact, Dr. Tacke expressed concerns that Kellegher's hearing deficit and his vertigo could preclude him from successfully returning to the workforce.²²⁴ Although Dr. Tacke indicated in some of his records that Kellegher could possibly return to alternative employment, he has not approved a job analysis for an actual job.²²⁵

¶ 79 Finally, MACo argues, "There is no contrary opinion by any medical provider that Petitioner cannot work."²²⁶ MACo, however, cannot shift the burden of proof onto Kellegher before it first meets its burden of proof.²²⁷ In addition, from the record in this case, this Court is persuaded that Kellegher does not have a reasonable prospect of

703 (holding that conflicting evidence as to whether an employee's condition could be adequately controlled with medication and as to what the essential functions of Plaintiff's job were created issues of material fact as to whether a reasonable accommodation was available).

²²⁴ Ex. 3 at 22-24.

²²⁵ See *Crowell v. State Comp. Ins. Fund*, 1999 MTWCC 27 (For a claimant not to be permanently totally disabled, the statutes require the existence of specific jobs for which the claimant is qualified and competitive.).

²²⁶ Respondent's Trial Brief at 3.

²²⁷ See, e.g., *Christensen v. Rosauer's Supermarkets, Inc.*, 2003 MTWCC 62, ¶ 26 (explaining that the party with the burden of proof must meet it and cannot shift it onto the other party).

physically performing regular employment. Therefore, Kellegher is permanently totally disabled under § 39-71-116(25), MCA.

¶ 80 The Court concludes that MACo has not carried its burden of proving that specific jobs exist which Kellegher can perform. Therefore, the Court concludes that Kellegher is presently permanently totally disabled as a result of his June 3, 2011, industrial accident.

Issue Two: Whether Kellegher is permanently partially disabled as a result of his June 3, 2011, industrial accident.

¶ 81 Since the Court has concluded that Kellegher is permanently totally disabled, this issue is moot.

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¶ 82 Petitioner is presently permanently totally disabled.

¶ 83 The issue of whether Petitioner is permanently partially disabled is moot.

¶ 84 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 this 12th day of August, 2015.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: Bernard J. "Ben" Everett
Norman H. Grosfield

Submitted: December 2, 2014