

**IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA**

**2020 MTWCC 6**

**WCC No. 2019-4582**

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**PATTI J. MALDONADO**

**Petitioner**

**vs.**

**CONTINENTAL CASUALTY CO.**

**Respondent/Insurer.**

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**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT**

**Summary:** The parties dispute whether Petitioner is permanently totally disabled and, therefore, entitled to additional medical benefits notwithstanding the passage of 60 months since the diagnosis of her OD. Petitioner contends that she is permanently totally disabled because her difficulty breathing and fatigue, which are the result of a workplace exposure to allergens, prevent her from physically performing regular work. Respondent contends that her subjective complaints are not credible because they cannot be explained by the objective measures of Petitioner's condition. Her treating physician deferred to the IME physician, the IME physician approved 12 JAs based on Petitioner's restrictions, and the CRC testified that Petitioner is qualified and competitive for each one.

**Held:** Petitioner is not permanently totally disabled and is, therefore, not entitled to additional medical benefits under § 39-71-704(1)(f)(ii), MCA. Petitioner is physically capable of performing at least two of the approved JAs based on the objective measures of her condition.

¶ 1 The trial in this matter was held on July 16, 2019, in Helena, Montana. Petitioner Patti J. Maldonado (Patti) was present and represented by Bernard J. Everett. Thomas A. Hollo and Todd A. Hammer represented Respondent Continental Casualty Co. (CNA).

¶ 2 Exhibits: This Court admitted Exhibits 101, 105 through 114, and 116 through 127 without objection. CNA withdrew Exhibits 103-1, 103-2, and 103-3. This Court overruled Patti's hearsay objections to Exhibits 102 and 103-4 through 103-20 and admitted those Exhibits. This Court overruled Patti's relevancy objection to Exhibits 104 and 128 and admitted those Exhibits. This Court sustained Patti's objection under M.R.Evid. 704 as to any statements in Exhibit 115 made by Dana Headapohl, MD, MPH, regarding Patti's disability status and will not consider those statements. This Court did, however, admit Exhibit 115 subject to that exception.

¶ 3 Witnesses and Depositions: This Court admitted Patti's two depositions, as well as the depositions of Raymond Maldonado (Ray), Michael DiCello, MD, and claims adjuster Teri Bohnsack into evidence. Patti, Ray, Dr. Headapohl, and Bonnie Hale, CRC, were sworn and testified at trial.

¶ 4 Issues Presented: The Pretrial Order sets forth the following issue:

Is Patti Maldonado permanently totally disabled as defined by the Montana Workers' Compensation Act as the result of her occupational disease and therefore, entitled to continued medical benefits?

#### FINDINGS OF FACT

¶ 5 This Court finds the following facts by a preponderance of the evidence.

¶ 6 Patti is 58 years old. She and her husband Ray have been married for 37 years. For most of their marriage, Patti did around 90% of the household cooking, washing, and cleaning. She also enjoyed caring for the flowers in her garden.

¶ 7 Patti is a high school graduate with no further education or vocational training.

¶ 8 Following graduation in 1979, she began working for Downey Drug, which was later bought by Horizon Pharmacy, in Butte. Her positions, including clerk, cashier, and manager, had her ordering, buying, reviewing, and pricing merchandise, stocking shelves, providing customer service, ringing up purchases, answering phones, and assisting the pharmacists. She estimated that she spent 20% of each work day as a cashier and 20% answering phones. The pharmacy went out of business in 2000.

¶ 9 Patti went to work for Brenda's Florist in Butte in October of the same year. There, her responsibilities included arranging flowers, taking care of plants, placing wholesale orders, processing and pricing merchandise, taking inventory, providing customer service, ringing up purchases, using a computer to enter orders, and answering the phone. She spent a couple hours on the cash register and computer, and around several hours on the phone each day she worked.

¶ 10 Her hours at Brenda's Florist fluctuated with the seasons. She worked part-time for most of the year, i.e., nine hours a day for around four days a week, and full-time for about two months a year around the holidays, i.e., nine hours a day for between five and seven days a week.

¶ 11 She joined Fuel Fitness in 2011 and, for several years, went to the gym about four or five times a week. Each session, she regularly spent 20 minutes walking on the treadmill and 20 minutes lifting weights.

¶ 12 At some point in the latter half of 2013, Patti developed breathing problems at Brenda's Florist and stopped working as a result.

¶ 13 In early November of 2013, Patti was evaluated by Michael C. DiCello, MD, at Allergy & Asthma Consultants of Montana for difficulty breathing. He determined that Patti was allergic to multiple airborne substances, including molds and pollens, and treated her with inhaled bronchodilators for extrinsic asthma and an antibiotic for bronchitis.

¶ 14 In late November of 2013, Patti saw Frederick W. Kahn, MD, at St. Vincent Sleep and Respiratory Center. Rather than classic asthma, Dr. Kahn suspected bronchiolitis. He prescribed a different antibiotic with anti-inflammatory effects and ordered serologic tests for autoimmune and hypersensitivity lung disorders.

¶ 15 Around this time, Patti filed an occupational disease (OD) claim for her respiratory problems. CNA, which insured Brenda's Florist, accepted liability for aggravation of sinusitis and rhinitis.

¶ 16 By the end of 2014, Dr. Kahn theorized that Patti's floral shop exposure to antigens had set off an allergic reaction, which caused her lung and sinus disorders.

¶ 17 In early 2015, Dr. DiCello started Patti on a trial of an injectable asthma medication. Within a few months, Patti told Dr. Kahn she had seen improvement in her wheezing, coughing, and shortness of breath, requiring less frequent use of her inhalers. He documented that her pulmonary function tests (PFTs) were normal and stable and encouraged Patti to increase her activity as she was able. Patti told Dr. DiCello that she was doing better but was not yet at 100%.

¶ 18 On September 16, 2015, Dr. Kahn declared Patti to be at maximum medical improvement (MMI).

¶ 19 On November 4, 2015, Dr. Headapohl conducted an independent medical examination (IME). She diagnosed Patti with the following work-related conditions: allergic bronchopulmonary aspergillosis; probable hypersensitivity pneumonitis (and history of same) secondary to aspergillus exposure; and chronic pansinusitis. Dr. Headapohl determined that for each of her work-related conditions, Patti had reached

MMI. In addition to having to avoid the provoking allergens, Dr. Headapohl opined that Patti would likely require ongoing treatment with asthma medications and Prednisone during periods of exacerbation.

¶ 20 Dr. Headapohl assessed Patti as having an 8% whole person impairment under the 6<sup>th</sup> Edition of the AMA Guides and gave her permanent work restrictions to avoid work environments with airborne irritants or sensitizers, excessive cold or humid conditions, and jobs requiring aerobic activities. With those restrictions in mind, Dr. Headapohl approved three job analyses (JAs).

¶ 21 In early 2016, Patti started complaining of fatigue and muscle and joint pain. Under Dr. Kahn's direction and Dr. DiCello's agreement, she discontinued her injectable asthma medication in the hopes that these were just side effects. Nevertheless, these symptoms persisted.

¶ 22 Meanwhile, although her PFTs were stable, Patti's lower airway symptoms — triggered by exposure to aeroallergens, cold air, high relative humidity, temperature changes, and tobacco and wildfire smoke, as well as sinus disease, uncontrolled acid reflux, respiratory illness, physical exertion, laughing, and crying — continued to bother her.

¶ 23 On July 27, 2016, Patti filed a Petition for Hearing in this Court, contending she is permanently totally disabled as a result of her OD.

¶ 24 On August 26, 2016, Patti gave a deposition. She testified that she had looked for jobs since she left Brenda's Florist, but she did not really feel she was able to work. She specifically testified that she did not think she could work at any job, whether full- or part-time. Patti explained that since 2013, she had gone from doing 90% of the household tasks to about 60%, although she still did most of the cooking, laundry, cleaning, and grocery shopping. She had difficulty going up and down the stairs and had tried to limit the number of times she did so to twice a week. She could still do her ADLs, like fixing her hair and making the bed, independently but not as well as she used to, and could only manage to take a six-block walk once a week with frequent breaks. She had maintained her driver's license and was still capable of driving. For enjoyment, she watched her infant grandchild on occasion and had visited her sister in Arizona in 2015.

¶ 25 On October 24, 2016, having reviewed Patti's and Ray's depositions, Dr. Headapohl produced a supplemental report in which she approved three additional JAs.

¶ 26 In December of 2016, the parties entered into a Joint Stipulation for Entry of Judgment and Dismissal with Prejudice, resolving all indemnity claims. The agreement further provided that if CNA could obtain a \$0 Medicare Set-Aside (MSA) or one it was willing to fund, it would pay Patti a lump sum to resolve her future medical benefit

entitlement. However, the agreement stated that if the parties could not resolve the issue, this provision would be null and void and the parties reserved all medical benefits and defenses.

¶ 27 In 2017, Patti reported to Dr. DiCello that she saw improvement in her condition and in 2018, she stated that her respiratory status was stable.

¶ 28 On September 25, 2018, CNA informed counsel for Patti that it was unable to obtain an MSA that it was willing to fund and, thus, that it was not going to settle Patti's future medical benefit entitlement.

¶ 29 On November 1, 2018, Patti's medical benefits closed pursuant to the 60-month statutory limit in § 39-71-704(1)(f)(i), MCA.

¶ 30 In approximately January 2019, Patti got the urge to go to the gym. She tried the treadmill but ended up coughing and wheezing and could not continue.

¶ 31 Patti filed a Second Petition for Trial on March 7, 2019, claiming that she is entitled to medical benefits beyond the 60-month statutory limit imposed by § 39-71-704(1)(f), MCA, because she is permanently totally disabled.

¶ 32 Shortly thereafter, Patti told Dr. DiCello that she was having increased lower respiratory symptoms, which she attributed to an exacerbation of her asthma. Although Dr. DiCello interpreted her spirometry results as stable compared to prior visits, he tweaked her medication regimen and scheduled more complete pulmonary function testing.

¶ 33 From 2016 to April of 2019, in conjunction with Dr. DiCello's treatment, Patti answered questions about her asthma symptoms as part of the Asthma Control Test (ACT). Her recent answers show that while her objective testing remains constant, she subjectively complains of significant worsening:

How much of the time did your asthma keep you from completing your daily activities?

|             |                   |
|-------------|-------------------|
| July 2016   | Most of the time. |
| August 2017 | Some of the time. |
| August 2018 | Some of the time. |
| April 2019  | All of the time.  |

How often have you had shortness of breath?

|             |                            |
|-------------|----------------------------|
| July 2016   | Once a day.                |
| August 2017 | Once a day.                |
| August 2018 | Three to six times a week. |
| April 2019  | More than once a day.      |

How often did your asthma symptoms (wheezing, coughing, shortness of breath, chest tightness or pain) wake you up at night or earlier than the usual in the morning?

|             |                             |
|-------------|-----------------------------|
| July 2016   | Not at all.                 |
| August 2017 | Not at all.                 |
| August 2018 | Not at all.                 |
| April 2019  | Two to three nights a week. |

How often have you used your rescue inhaler or nebulizer medication?

|             |                           |
|-------------|---------------------------|
| July 2016   | Once a week or less.      |
| August 2017 | Once a week or less.      |
| August 2018 | Once a week or less.      |
| April 2019  | One to two times per day. |

How would you rate your asthma control overall?

|             |                      |
|-------------|----------------------|
| July 2016   | Somewhat controlled. |
| August 2017 | Well controlled.     |
| August 2018 | Well controlled.     |
| April 2019  | Poorly controlled.   |

ACT score out of 25?

|             |    |
|-------------|----|
| July 2016   | 16 |
| August 2017 | 18 |
| August 2018 | 19 |
| April 2019  | 8  |

¶ 34 On April 30, 2019, Patti gave a second deposition. She testified that she still did not believe she could work, even part-time, due to her breathing problems and fatigue. She explained that the stress of her workers' compensation case had worsened her asthma, forcing her to use her rescue inhaler daily. She testified that doing any activity at all made it hard to breathe, which in turn, caused her to feel fatigued, stressed, and lightheaded, and made it hard to think clearly. Even though, since 2016, Ray had taken over most of the grocery shopping and half of the cooking and laundry, she asserted that her daily tidying and weekly laundry wiped her out, requiring her to rest about nine hours each day. For exercise, she was trying to walk in a two-to-three block radius, although not in the winter months. She went to the gym every few months and tried to work out. But inevitably, she would struggle and then stop going again. She had gone once so far in 2019, back in January. Although she repeatedly denied taking any trips since 2016, even after CNA's attorney told her that he had seen her vacation photographs on her Facebook page, Patti signed an Affidavit a few days after her deposition, admitting that she had been untruthful. She admitted that she had, in fact, vacationed in Hawaii in 2017, Arizona in 2018, and Mexico in early 2019.

¶ 35 On May 13, 2019, Dr. DiCello gave a deposition. Reviewing Patti's ACT scores from 2015 to 2018, Dr. DiCello agreed that the numbers suggested better and better control of her asthma over time.

¶ 36 Dr. DiCello also testified that PFTs are another tool in the toolbox. He explained that PFTs have three components, including measurement of airflow rates (spirometry), lung volumes, and diffusing capacity. All three components are objective tests, although all are based on a patient's effort. Dr. DiCello testified that he never got the impression that Patti was not trying. When asked about Patti's progress, Dr. DiCello agreed that it appeared that things had gotten substantially better for her since he first met her in 2013.

¶ 37 Dr. DiCello testified that there is no cure for Patti's conditions, and that she will require treatment for the rest of her life. Further, he recommended that she stop any physical exertion she is engaged in if she gets symptoms. However, as far as restrictions or limitations in the workplace, and approval or disapproval of job descriptions, Dr. DiCello testified that he would defer to an occupational medical physician.

¶ 38 Shortly thereafter, Dr. Headapohl provided another supplemental report, in which she updated her medical record review and discussion of Patti's OD claim, based on additional medical records, Patti's 2019 deposition, and Dr. DiCello's deposition. She stated that Patti's "objective measurements are somewhat at odds with her 2019 symptom reports," and that her "[o]bjective test results do not explain her current subjective reports of symptoms and limitations." She approved the following six additional JAs: Work at Home Customer Service Representative for Concentrix, a technology/business services company (sedentary duty); Sales Representative for T-Mobile (light duty); Work at Home Customer Service Representative for Dialog Direct,<sup>1</sup> a business services company (sedentary duty); Cashier for Bob Wards, a sporting goods store (light duty); Customer Service Representative – Work from Home for TTEC, a business services company (sedentary duty); and Motel Front Desk Clerk for Fairfield Inn & Suites (light duty).

¶ 39 At trial, Patti testified that her medications just maintain her condition, they do not make it better, and that she still has shortness of breath, coughing, and fatigue. She explained that, although she reported on her ACT questionnaires that her condition had improved over the years, she "probably worded it wrong." When she wrote that her condition was "well-controlled," what she meant was, "I can function some." And, even though she admitted that Dr. DiCello had made it clear to her that the ACT questions pertained to the two-to-four-week period before each appointment, Patti testified that, "To me, when they asked me questions, how does it feel that day is to me, when I go there. Does it feel okay? Does it feel controlled?"

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<sup>1</sup> "Dialogue Direct" referenced in the record has been corrected throughout this decision to "Dialog Direct."

¶ 40 Patti testified that on good days she can do a maximum of three hours of activity with breaks. She spends the remainder of those days resting, which includes a one-to-two-hour nap, sitting on the couch, concentrating on her breathing, watching tv, listening to music, and playing games on her phone. However, she testified that she has more bad days than good ones. On bad days, she finds it hard to breathe, which wears her out, and she goes back to bed, napping for three-to-four hours. For the rest of those days, she does “nothing.”

¶ 41 Regarding her computer skills, Patti testified that she uses her home computer to pay bills, check e-mail and Facebook, and search the Internet. She testified that she uses her phone to make calls, send texts, take pictures and videos, post to Facebook, play games, and use apps such as Maps, Facetime, Walmart, Amazon, and Expedia. But, she explained that she has never been a secretary, is a two-finger typist, does not know how to use Excel, Word, or WordPerfect, and is no longer capable of learning new computer programs.

¶ 42 As for her physical limitations, Patti testified that she becomes is fatigued and must rest after walking a block-and-a-half to two blocks, standing in one spot for 15-to-20 minutes, and sitting upright (as at a workstation) for 15 minutes. She testified that Dr. Headapohl never asked about or observed her abilities on exertion and no one ever reviewed the JAs with her. When her counsel took her through them at trial, Patti testified that she did not think she was qualified or physically capable of performing even one. Indeed, she could not think of any job she could do for four hours a day and explained that she does not consider herself to be a dependable employee. She elaborated that she did not think she could be on time or even make it to work much of the time and guessed she would be fired.

¶ 43 As for exercise, notwithstanding that she testified at her April deposition that she had gone to the gym only once in 2019, Patti’s Fuel Fitness records showed that she had gone over 15 times in the first four months of the year. When confronted with the records, Patti explained that she has gone there to get a tan and that she lets her daughter use her membership card. She could not recall failing to mention either at her last deposition.

¶ 44 Patti testified that she still watches her grandchild on occasion to help her daughter. But she explained that she cannot do it on bad days, and never does it on back-to-back good days unless Ray is home to help her. She did not agree with opposing counsel that taking care of an infant is harder than office work and explained that she can sit down with the child as needed.

¶ 45 Patti further testified that, for enjoyment, she visits her son in Billings every six weeks and stays for the weekend. As to why she denied taking vacations at her last deposition, Patti testified that she thought she had done something wrong by going. She also admitted that, at the time of her deposition, she thought being able to go on trips cut against her contention that she could not work. She explained, however, that she had since come to believe, “I have to live a little. I’m not dead yet, so --.”



¶ 46 At trial, Dr. Headapohl testified that nothing she had seen to date had caused her to change her opinion about Patti's ability to engage in the 12 JAs she had approved. She acknowledged that there is no way to objectively test whether an individual can tolerate her symptoms to be able to perform a job. But she did explain that the symptoms Patti currently reports are out of sync with the objective medical evidence. In particular, Dr. Headapohl testified: "Well, the objective measures — and for asthma they're FEV-1 and FEF 25/75 percent — . . . that objective data did not explain the subjective symptoms and decreased abilities." For example, according to Dr. Headapohl, the PFTs Patti had in June of 2019 show that, if anything, her measures of asthma were slightly improved. And based on Dr. DiCello's office testing at that time, Patti did not have inflammation of her airways.

¶ 47 Dr. Headapohl further testified that she did not order a functional capacity evaluation because it would not have helped her understand whether Patti could do a job based on her asthma. As she explained:

For asthma what one need [sic] to think about is can — is this job going to be highly aerobic or not? Because asthmatics tend not to be [sic] to do well in highly aerobic jobs. You know, because that can precipitate symptoms. I have enough information in the job analyses to know that none of these are highly aerobic jobs, and none of them require heavy exertional lifting, or really any significant load on the cardio pulmonary systems.

¶ 48 At trial, Bonnie Hale, the Genex vocational services provider CNA hired to assist Patti, testified that there are job openings available in Montana for which Patti would be qualified and competitive. According to Hale, these include full- and part-time work-from-home positions. She would consider both to be substantial or significant employment opportunities.

¶ 49 Hale explained that she had reviewed information about Patti gathered in person by one of her predecessors. This included Patti's work history, experience working with computers and Microsoft Office programs like Word, Excel, and Outlook, and her estimated typing speed. And, taking into consideration Patti's age, education, and work experience, Hale produced the last six JAs that Dr. Headapohl approved. These consisted of work-from-home customer service representative positions for business service companies Concentrix, TTEC, and Dialog Direct, Sales Representative for T-Mobile, Cashier for sporting goods store Bob Wards, and Motel Front Desk Clerk for Fairfield Inn & Suites.

¶ 50 Hale explained that she had talked with the managers for each position about such details as hiring practices, job duties, physical demands, and education, knowledge, and experience required. She testified that she thought Patti would be competitive for these positions because her 35 years of retail and customer service experience, including handling cash transactions, would transfer into these other occupations, and because the employers would provide training for their specific computer systems.

¶ 51 On cross-examination, counsel for Patti pressed Hale on whether she actually knew if Patti had the skills the alternate employers required, such as communication (Concentrix, TTEC, Dialog Direct, T-Mobile, and Bob Wards), and “high levels of energy” (T-Mobile); and the ability to “thrive in a dynamic environment” (TTEC), “work independently” (Concentrix, Fairfield Inn & Suites), “perform repetitive work” (Fairfield Inn & Suites), “work under pressure” (Fairfield Inn & Suites), be “dependable and flexible” (Dialog Direct), and type at “25 WPM with 90% accuracy” (Dialog Direct). Hale responded that she did not know. However, on redirect, Hale explained that she would expect that someone employed in retail and customer service for 35 years without ever being terminated would, in fact, have all of these skills.

¶ 52 Patti testified in rebuttal that she never gave Hale’s predecessor an estimated typing speed because she has never had a typing test and uses two fingers to “hunt and peck” on the keyboard. She further clarified that when she testified that doing anything, even thinking and reading, exacerbates her asthma symptoms, she meant that overthinking or concentrating too hard makes her anxious and stressed, which in turn, brings on breathing problems. Finally, Patti testified that she believes she has difficulty communicating.

#### Resolution

¶ 53 According to Dr. DiCello’s testimony and medical records, Patti’s condition improved substantially between 2013 and 2018. Patti’s comments to Dr. DiCello during appointments, as well as her answers to the ACT questionnaire, during the same time period show the same thing. Dr. Kahn and Dr. Headapohl agree that Patti has been at MMI since 2015.

¶ 54 Dr. DiCello testified that he would defer to an occupational medicine physician with regard to restrictions and the approval or disapproval of JAs. Dr. Headapohl has approved a total of 12 JAs, half as recently as about a month before trial.

¶ 55 The most recent JAs include part-time and work-from-home positions, which Hale testified were “substantial or significant” and would allow Patti to take breaks as needed, and Dr. Headapohl testified would allow Patti to control the physical aspects of her environment. They require a range of skills, such as the ability to communicate well, use basic computer programs, learn employer-specific applications, answer the phone, use a cash register, and provide customer service. Hale testified that Patti is qualified and competitive for each of them.

¶ 56 While this Court agrees that Patti’s successful 35-year work history in positions involving customer service and her ability to use her home computer and smart phone for personal business and enjoyment generally support this, there are exceptions. Specifically, this Court is not convinced that Patti has the energy level necessary to compete for the Sales Representative position at T-Mobile or the typing skills necessary to compete for the Work-at-Home Customer Service Representative position with Dialog

Direct. Moreover, given that the JAs for the remaining work-from-home positions do not sufficiently describe the type of business in which the employer is engaged, this Court is not convinced that Patti is qualified or would be competitive for these positions. However, this Court finds that Patti is qualified and competitive for the Cashier position at Bob Wards and the Motel Front Desk Clerk position at Fairfield Inn & Suites. Accordingly, this Court finds that Patti has a reasonable prospect of physically performing regular employment.

¶ 57 The only evidence that Patti offered that she cannot work came from Patti herself. However, her claims are not credible because her subjective complaints do not correlate with the objective findings, her subjective complaints of worsening started with this litigation, and she was not entirely truthful while testifying. In short, while Patti continues to have symptoms from her OD, this Court is not persuaded that they are so severe as to preclude her from physically performing regular employment.

#### CONCLUSIONS OF LAW

¶ 58 Generally, the law in effect when a claimant files her claim, or on her last day of work, whichever is earlier, governs an OD claim.<sup>2</sup> Based on the record, which provides a range of dates for both events, the applicable version of the Montana Workers' Compensation Act (WCA) is either 2011 or 2013. The relevant language is the same in both versions.

#### **Issue One: Is Patti Maldonado permanently totally disabled as defined by the Montana Workers' Compensation Act as the result of her occupational disease and therefore, entitled to continued medical benefits?**

¶ 59 An insurer is liable for primary medical services, including prescription drugs for conditions that are a direct result of an OD.<sup>3</sup> Under the 60-month statutory limit, medical benefits terminate 60 months from the diagnosis of the OD.<sup>4</sup> However, this limit does not apply to a worker who is permanently totally disabled as a result of the OD.<sup>5</sup>

¶ 60 "Permanent total disability" means "a physical condition resulting from injury . . . after a worker reaches maximum medical healing, in which a worker does not have a

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<sup>2</sup> *Hardgrove v. Transp. Ins. Co.*, 2004 MT 340, ¶ 2, 324 Mont. 238, 103 P.3d 999 (citing *Grenz v. Fire & Cas.*, 278 Mont. 268, 272, 924 P.2d 264, 267 (1996)); *Bouldin v. Liberty Northwest Ins. Corp.*, 1997 MTWCC 8. *But see Nelson v. Cenex, Inc.*, 2008 MT 108, ¶¶ 30, 33, 342 Mont. 371, 181 P.3d 619 (worker's later employment was irrelevant to his hazardous exposure and OD, and the court therefore applied the Occupational Disease Act in effect on the date in which the period of employment which included his last injurious exposure ended).

<sup>3</sup> § 39-71-704(1)(a), MCA.

<sup>4</sup> § 39-71-704(1)(f)(i), MCA.

<sup>5</sup> § 39-71-704(1)(f)(ii), MCA.

reasonable prospect of physically performing regular employment.”<sup>6</sup> “Regular employment” means “work on a recurring basis performed for remuneration in a trade, business, profession, or other occupation in this state.”<sup>7</sup> In *McFerran v. Consolidated Freightways*, the Montana Supreme Court held, “If a particular job is both substantial and significant, then that job would constitute regular employment, regardless of whether the position was part-time or full-time.”<sup>8</sup>

¶ 61 As explained above, this Court has found that Patti has a reasonable prospect of physically performing regular employment. Therefore, she is not permanently totally disabled within the meaning of the WCA, and she is not entitled to additional medical benefits.

### JUDGMENT

¶ 62 Patti is not permanently totally disabled and is, therefore, not entitled to additional medical benefits under § 39-71-704(1)(f)(ii), MCA.

¶ 63 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 22<sup>nd</sup> day of April, 2020.

(SEAL)

/s/ DAVID M. SANDLER  
JUDGE

c: Bernard J. Everett  
Thomas A. Hollo/Todd A. Hammer

Submitted: July 16, 2019

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<sup>6</sup> § 39-71-116(28), MCA.

<sup>7</sup> § 39-71-116(33), MCA.

<sup>8</sup> 2000 MT 365, ¶ 14, 303 Mont. 393, 15 P.3d 935.