IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2021 MTWCC 5

WCC No. 2020-4988

SUSIE ROBERTSON

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

APPEALED TO MONTANA SUPREME COURT – DA 21-0156 04/05/21

APPEAL DISMISSED PER STIPULATION OF PARTIES – 05/21/21

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Summary: Petitioner argues she is entitled to PTD benefits because — although Respondent has several approved JAs, including sedentary positions with her time-of-injury employer — her pain and her age and lack of skills render her unable to physically perform regular work.

Held: Petitioner is not entitled to PTD benefits. This Court is not persuaded that Petitioner's pain is so severe, or that her age and lack of skills are such impediments, that she is unable to physically perform any regular work. This Court is convinced that Petitioner could have successfully returned to work for her time-of-injury employer in the jobs it offered her.

¶ 1 The trial in this matter was held on September 22, 2020, in Helena, Montana. Petitioner Susie Robertson was present and was represented by Bernard J. "Ben" Everett. Respondent Montana State Fund (State Fund) was represented by Melissa Quale. Chris Simonson, claims adjuster, was present on behalf of State Fund.

¶ 2 Exhibits: This Court admitted Exhibits 1 through 19 without objection.

¶ 3 Witnesses and Depositions: This Court admitted the deposition of Susie Robertson into evidence. Susie Robertson, John C. Schumpert, MD, James Robertson, Andy Fowler, CRC, and Chris Simonson were sworn and testified at trial.

¶ 4 Issue Presented: This Court restates the issues set forth in the Pretrial Order as follows: Is Susie Robertson entitled to permanent total disability (PTD) benefits for her March 14, 2019, injury?

FINDINGS OF FACT

¶ 5 This Court finds the following facts by a preponderance of the evidence.[1]

¶ 6 At the time of trial, Robertson was 61 years old. She has a high school education and, except for a short stint taking care of her mother, has only ever had one job; she worked as a certified nursing assistant (CNA) at Community Hospital of Anaconda Nursing Home (ACH Nursing Home) for 41 years. As a CNA for ACH Nursing Home, Robertson's job duties included helping the residents with their activities of daily living, as well as stripping and making the beds, and charting.

¶ 7 On March 14, 2019, Robertson suffered a low-back injury in the course and scope of her employment.

¶ 8 State Fund accepted Robertson's claim for a disc herniation at L4-5 and has paid medical and indemnity benefits.

¶ 9 Before surgery for the herniation, Robertson had severe pain, at a level of 9 out of 10, in the lower-right-side of her back, that radiated down her right leg and into the tops of her feet.

¶ 10 On May 17, 2019, Robertson underwent an L4-5 right lateral microdiscectomy performed by Richard Day, MD. The operative records indicate that the surgery was successful; there were no complications, a satisfactory decompression of the nerve root was achieved, and no disc fragments were retained.

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[1] Ordinarily, the claimant bears the burden of proving by a preponderance of the evidence that she is entitled to the benefits she seeks. *Dumont v. Wickens Bros. Constr. Co.*, 183 Mont. 190, 201, 598 P.2d 1099, 1105-06 (1979) (citations omitted). However, "where the dispute is whether the claimant has the right to permanent total disability (PTD) benefits under § 39-71-702, MCA, the insurer bears the initial burden of proving that the claimant is not permanently totally disabled. . . . The insurer meets its burden by showing that a physician has: determined that the claimant is at maximum medical improvement, set the claimant's physical limitations, and approved a job analysis. If the insurer meets its initial burden, the burden shifts to the claimant to prove that he is entitled to PTD benefits notwithstanding the approved job analysis." *Davis v. Liberty Ins. Corp.*, 2017 MTWCC 21, ¶ 43 (quotation marks and citations omitted); *see also Kellegher v. MACO Workers' Comp. Trust*, 2015 MTWCC 16, ¶ 71; *Holmes v. Safeway Inc.*, 2012 MTWCC 8, ¶ 59; *Drivdahl v. Zurich Am. Ins. Co.*, 2012 MTWCC 43, ¶ 24; *Weisgerber v. Am. Home Assurance Co.*, 2005 MTWCC 8, ¶ 32.

¶ 11 On June 7, 2019, at Robertson's three-week follow-up appointment, Dr. Day noted, "45% improvement in her leg symptoms but still has some anterior shin pain and some tightness in her posterior hamstring region. She'll sometimes get gripping pain when she rolls over in bed." He thought she needed more time to heal and recommended conservative management, consisting of daily walking and gentle stretching.

¶ 12 At Robertson's July 26, 2019, appointment, Dr. Day noted, "45% improvement but still considerable radiating leg pain down her anterior shin to her ankle. She denies any numbness or weakness and has the most trouble rolling over in bed or trying to climb stairs. Improvement was rather study (sic) from surgery but may have plateaued and she does not report a relapse or new injury." Among other treatment, Dr. Day referred her for an epidural steroid injection and an MRI of her lumbar spine.

¶ 13 The MRI, performed on August 15, 2019, showed, "Postoperative changes following discectomy right L4-5 level. No evidence of residual or recurrent disc herniation. Otherwise negative contrast/noncontrast MR lumber spine."

¶ 14 On August 22, 2019, Robertson saw Brian M. Bradley, CRNA, reporting pain at a level 8 out of 10 and that she was "challenged by daily activities due to pain." He noted that she could not have an interlaminar injection "due to recent surgery," but that she "could certainly benefit from transforaminal injections covering the right L4-5 and L5-S1 levels," which he proceeded to perform.

¶ 15 When Robertson saw Dr. Day several weeks later, on September 4, 2019, she reported she was feeling better generally but had pain in her right foot and difficulty getting out of bed first thing in the morning. Dr. Day noted "slow but continued improvement of a right L4 radiculopathy for large far lateral herniated disc." He counseled Robertson that she needed more time to heal and prescribed six weeks of physical therapy.

¶ 16 At her follow-up appointment with Dr. Day on October 4, 2019, Robertson complained of "radiating *left* block pain down the lateral aspect of her leg towards her knee with persistent low back pain."[2] She continued to report that, upon waking, she "is so stiff and painful all over she can hardly get out of bed." Dr. Day noted that Robertson's last complaints were about her *right* leg and that he could not attribute her all-over pain complaints and mobility issues to her L4 radiculopathy for which she had surgery. He further noted, "At this juncture she is (sic) probably essentially reached MMI from the standpoint of her far lateral microdiscectomy and therefore recommending functional capacity exam occupational medicine evaluation for her ability to return to work in any capacity."

¶ 17 Robertson underwent the functional capacity examination (FCE) with Mike Cline, DPT, on November 5 and 6, 2019. She told him that surgery had not helped her very

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[2] Emphasis added.

much and that she was still having pain in her right leg and foot. She also reported that she now also had pain on her left side, down the back and side of her hip and thigh. Cline observed that Robertson "gave maximal effort on most test items," but "limited some activities prior to objective signs of maximal performance due to reports of lower back pain." Her performance was consistent or better on the second day of testing.

¶ 18 At some point ACH Nursing Home verbally offered Robertson the temporary transitional work assignment of Resident Interactive Coordinator. That position primarily involved providing socialization to the residents; it did not involve assisting with patient transfers or exerting any force over 10 pounds.

¶ 19 Cline issued his FCE report on December 9, 2019. He concluded that Robertson was capable of light physical demand level work with push and pull at medium physical capacity. Accordingly, he opined that Robertson should not return to her time-of-injury job as a CNA unless the job could be modified to include two-person assisted lifting and transferring. Cline did, however, opine that Robertson could safely meet the physical demands of the Resident Interactive Coordinator position. He noted that the consistency of her performance over both days of testing indicated that Robertson should be able to sustain her work ability on a day-to-day basis.

¶ 20 On December 17, 2019, ACH Nursing Home sent Robertson a formal written offer for the Resident Interactive Coordinator position. ACH Nursing Home noted that the position fell within Robertson's restrictions and paid the same hourly wage as her time-of-injury job.

¶ 21 On December 19, 2019, State Fund sent Robertson a 14-day termination letter, explaining that it would be terminating her temporary total disability (TTD) benefits because she had been offered work within her restrictions.

¶ 22 On December 27, 2019, Robertson notified ACH Nursing Home by letter that her pain prevented her from accepting its job offer. She explained:

> I continue to experience constant low-back pain and pain down both of my legs despite undergoing low-back surgery. I cannot sit, stand, walk, nor engage in any activity for more than a few minutes at a time due to the pain I suffer.
>
> My pain is at a level 7 out of 10 and it interferes with every aspect of my life. One of the most frustrating problems that my pain causes is my inability to . . . sleep. . . . I find I am so tired that I am cranky.
>
> . . . I would not want the residents to have to tolerate the fact I am cranky and short with people.

¶ 23 On January 13, 2020, State Fund notified Robertson by letter that she was not permanently totally disabled "because she ha[d] not reach (sic) maximum medical healing" — because State Fund had yet to get the opinion of an independent medical examiner as to her maximum medical improvement (MMI) status — and had been "released to work in a modified capacity."

¶ 24 On January 14, 2020, State Fund notified Robertson by letter that it would be paying her retroactive TTD benefits between December 19 and January 28 and terminating those benefits as of January 28 because she had declined medically-approved work.

¶ 25 On February 10, 2020, Robertson attended an examination with John C. Schumpert, MD, under § 39-71-605, MCA. Dr. Schumpert characterized her complaints as: "left greater than right lumbosacral junction pain radiating into the left greater than right buttocks and radiating cephalically to the cervicothoracic junction." Robertson reported that her pain was, at worst, a 10 out of 10, and, on average, at best, and presently, a 7 out of 10 in intensity. On physical examination, Dr. Schumpert noted she had "at most mild to moderate tenderness in the lumbar spinous processes and paralumbar muscles and only mild tenderness in the upper thoracic region." While he documented that the tenderness he observed was consistent with Robertson's left-greater-than-right complaints, since her time-of-injury "pain was greater by far on the right side than on the left," Dr. Schumpert did "not have any explanation for why her symptoms ha[d] changed sides in terms of their predominance."

¶ 26 Dr. Schumpert assessed Robertson as having claim-related lumbar region strain with chronic pain and right L4-5 disc herniation and microdiscectomy. He determined that Robertson was at MMI for each. He noted that she had other symptoms, including "global pain," as well as objective findings, but he determined that, outside of Robertson's lumbosacral and lower-extremity symptoms, none were related to her work injury.

¶ 27 As part of his assessment, Dr. Schumpert sent Robertson for several additional tests to, among other things, "identify a source of ongoing lumbar region pain." None, however, provided Dr. Schumpert with a "physiological basis" for Robertson's pain complaints.

¶ 28 On March 31, 2020, Dr. Schumpert disapproved Robertson's time-of-injury job of CNA, which is a medium-duty position, noting that "[a]fter a microdiscectomy, and with her current subjective complaints, it is very likely she will be injured were she to do so." He also disapproved the alternate, light-duty position of Home Care/Personal Care Attendant.

¶ 29 However, Dr. Schumpert approved four sedentary positions, meaning Robertson would be required to lift or exert force up to 10 pounds on an occasional basis and be able to sit for a majority of the work day. The approved positions include: 1) Resident Interactive Coordinator (by then, a permanent, modified position) for ACH Nursing Home,

which involves coordinating residents' care and well-being, providing socialization, and managing the gift shop; 2) Ward Clerk (a permanent, modified position) for ACH Nursing Home, which involves general medical office work in support of patient care; 3) Office Assistant (an alternate position) for Columbus Plaza, which involves general office work in support of that nonprofit's mission; and 4) Customer Service Associate (an alternate position) for Wesco Distribution Inc., which involves interacting with customers and establishing and maintaining a rapport to generate sales.

¶ 30 On April 10, 2020, Robertson filed a Petition for Trial in this Court, contending that she is permanently totally disabled from her March 14, 2019, injury.[3]

The Robertsons' Testimony

¶ 31 Robertson testified that she suffers constant back pain at a level 8 out of 10 that radiates down both legs into her ankles. In describing the effects that her injury has had on her life, she testified:

> [T]he pain, it consumes me. I can't think, I can't sleep. I'm so fatigued and tired and cranky, and I just don't care if I do anything . . . .

Robertson testified that she cannot take narcotic pain relievers because they make her sick; instead, she takes Ibuprofen — around 12 a day — but it does not work well. She testified that, at night, she gets up three to four times due to pain and she estimated that she gets four to four-and-a-half hours of good sleep a night. As a result, she explained, her preexisting depression feels worse, and she is cranky, short-tempered, fatigued, and only able to engage in activity for a maximum of two hours a day.

¶ 32 Robertson testified that she is not currently receiving any treatment for her back or leg pain; her last treatment, which she undertook at the direction of the Social Security Administration as part of her disability application, was around the end of July or the beginning of August 2020. She last saw her primary care physician several months before that to refill an unrelated prescription. Robertson testified that she has not sought an increase in her antidepressant medication since her injury.

¶ 33 Robertson testified that, in a typical day, she wakes up around 10:30 a.m., showers and dresses, has coffee, watches television, turns on her robotic vacuum, and dusts a little — although her husband does most of the cleaning. She then visits with her sisters for a few hours, either at one of their houses or hers, and talks to her grandkids on the phone. She testified that her pain limits her ability to sit and stand to 15 to 20 minutes at

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[3] Robertson's Petition for Trial also included a claim that she was temporarily totally disabled from the time of her injury until Dr. Schumpert determined she was at MMI. She did not, however, include the issue of her entitlement to TTD benefits in the Pretrial Order. Accordingly, this Court does not consider it. *See Siegler v. Liberty Ins. Corp.*, 2001 MTWCC 23, ¶ 68 (not considering a request for temporary partial disability benefits because it was outside the issues raised in the Pretrial Order, and therefore, not properly before this Court).

a time each. Robertson testified that she can walk for 15 to 20 minutes at a time but testified inconsistently as to whether her pain causes her any trouble doing so. She testified that she can bend and twist, but both hurt and that she can drive only short distances, for example, five minutes to the store.

¶ 34 As for recreational pursuits, Robertson testified that, whereas she used to golf, camp, hike, or go on walks before her accident, she now engages in no recreational activities due to her pain. She testified that, for exercise, she stretches and rides a stationary bike, and that, for fun, she reads biographies but does not comprehend much because she is tired.

¶ 35 Robertson testified that her pain and irritability would prevent her from being able to do any one of the four approved jobs. For example, she testified that she would not be able to be a Resident Interactive Coordinator, due, primarily, to the social aspects of the job:

> Because when you're working with residents you want to be cheery and happy. And they know when you don't want to be there, or you're — I couldn't be nice and sing with them, and play games, and lift them up when they're sliding out of their chairs, and sit them down when they're not supposed to be standing up. And they get combative. I couldn't fight them off. I couldn't be nice. I wouldn't have patience.

¶ 36 Likewise, Robertson testified that she would not be able to perform the tasks described in the Ward Clerk job analysis (JA). Specifically, she testified that her pain impeded her ability to concentrate and that she could not do the work, including consulting with providers and using the phone and intercom, in a "polite and respectful manner."

¶ 37 Robertson testified that she did not think she could be a Customer Service Associate either. She testified that tasks like interacting with customers to provide information and handling complaints would be difficult, "Because I couldn't be personable. I hate talking on the phone," and "I wouldn't handle their complaints. They would be complaining about me."

¶ 38 Nor did Robertson think she could be an Office Assistant. She testified that pain and irritability would prevent her from fully assisting visitors and callers and, as for tasks like handling inquiries, drafting letters, scheduling appointments, and maintaining files, that she has no computer training and no computer skills. Although she used computers to input chart notes as a CNA, Robertson testified that she cannot type well and does not know how to use a search engine or social media.

¶ 39 Much of Robertson's husband's testimony mirrored Robertson's own. But he also testified that he had suggested to Robertson that she seek additional treatment for her pain, e.g., going to another doctor. He testified, however, that she had not done so.

Medical Testimony

¶ 40 Dr. Schumpert testified that Robertson did not fit the two patterns he had observed, from reviewing thousands of patient charts, in people with very high levels of chronic pain. The first pattern is "lots of utilization of medical resources":

> [T]hey're going to the doctor all the time. They are looking for another fix. They are — they want more chiropractic, or they want acupuncture, or they want a change in their meds, or they want more physical therapy, or you know, they want more opioids . . . . You know, they're doing a lot of stuff and they're doing it constantly.

The second pattern "is a fairly good — a fairly wide range in their subjective reports of pain," e.g., the worst being at a level of 10 out of 10, but the average being something like "a 3 to 5, maybe a 6."

¶ 41 Regarding Robertson, Dr. Schumpert testified,

> The levels of pain being described and the chronicity, you know, not just how high they are, but the fact that it just never varies. And there's nothing that's been done. And then added to that that she's really not seeking any kind of medical care, when the pattern is they're there — they're at the doctor's every week, every couple of weeks. They want something because this is too much. That all makes you wonder what's really going on?

In sum, based on his experience, Dr. Schumpert testified that someone with Robertson's reported levels of pain, i.e., severe to excruciating pain, on a chronic basis, would be seeking additional treatment modalities.

¶ 42 Although Dr. Schumpert acknowledged that lack of sleep affects a person's mental state, and their ability to concentrate and tolerate, and can make them irritable, with respect to Robertson's ability to work, he testified, "I have found no evidence that would lead me to think she could not be gainfully employed in some capacity." He further testified that each of the JAs he approved was at the sedentary level of activity, which, he explained, would require the same amount of physical effort as Robertson was expending performing her activities of daily living at home.

Vocational Testimony

¶ 43 State Fund's vocational consultant, Andy Fowler, CRC, prepared two JAs: one for Robertson's time-of-injury job as a CNA and one for Resident Interactive Coordinator. His colleague, Shannon Willhite, CRC, prepared the rest of the JAs, including Home Care/Personal Attendant, Ward Clerk, Office Assistant, and Customer Service Associate.

¶ 44 Fowler never met with Robertson or interviewed her. His explanation for not doing so was that, when a claimant is represented, he develops JAs with the employer, then gives claimant's counsel two weeks to propose changes. Fowler followed that procedure here, and counsel requested no changes. Fowler testified that the method by which he developed his understanding of her qualifications was through preparing the time-of-injury JA, i.e., if she had those qualifications before her injury, she is qualified for other positions — within her restrictions — that fall within those same qualifications. In this manner and taking into account the skills she developed in 40-plus years of CNA work, Fowler testified that Robertson was vocationally qualified for the Residential Interactive Coordinator, Ward Clerk, Office Assistant, and Customer Service Associate positions. He also testified that she was competitive for each job.

¶ 45 With respect to the Office Assistant position, Fowler testified that Robertson was competitive because of the skills she developed as a CNA, including using a computer to enter data into patients' electronic medical records, greeting visitors and callers, and handling their questions or directing them to the appropriate person. While he conceded that office assistants are required to interact with others constantly, and that Robertson's irritability from pain and lack of sleep could interfere with her competitiveness, Fowler testified that those issues were properly within the domain of the medical provider reviewing the JAs.

¶ 46 With respect to the Customer Service Associate position, the JA states that the employer prefers one year of experience in customer service and one year of sales experience. Fowler testified that although, to his knowledge, Robertson did not have any formal sales experience, she had sales skills because sales takes social perceptiveness, persuasion, and communication. On cross-examination, Fowler conceded he did not know whether Robertson had persuasion skills. Nevertheless, he testified that, in his experience, a person without sales experience would still be a competitive candidate for the position. He further testified that, from speaking with the listed employer, the Customer Service Associate position is regularly available for employment.

Resolution of Dispositive Facts

MMI

¶ 47 Robertson was at MMI for all injury-related conditions as of her examination with Dr. Schumpert on February 10, 2020.

JAs

¶ 48 Dr. Schumpert approved four JAs on March 31, 2020, including Resident Interactive Coordinator, Ward Clerk, Office Assistant, and Customer Service Associate.

Prospect of Performing Regular Employment

¶ 49 State Fund met its initial burden of providing evidence that Robertson is not permanently totally disabled because it has four approved JAs.[4]

¶ 50 The burden then shifted to Robertson to show that, despite the approved JAs, she does not have a reasonable prospect of physically performing regular work.[5] Robertson failed to meet her burden because this Court is persuaded that she could physically perform the two approved modified JAs, including the Resident Activity Coordinator and Ward Clerk positions at ACH Nursing Home. This Court reaches this finding for three reasons.

¶ 51 First, Robertson's testimony that her pain and depressed mood preclude her from working is not entirely credible. Robertson turned down ACH Nursing Home's modified job offers at her time-of-injury rate of pay due to pain but never tried to return to work. While an injured worker is not required to try to return to work, such an attempt is evidence that the injured worker wants to return to work but cannot due to their pain.[6] Further, Robertson testified that her pain is so bad that it would prevent her from being able to concentrate or perform job tasks in a "polite and respectful manner." Nevertheless, at trial, which lasted over four hours, Robertson complained of 8-level, or what she described as "constant," "severe," and "intense" pain, but had no observable difficulty sitting, concentrating on the questions she was asked, or being polite. Finally, this Court agrees with Dr. Schumpert that if Robertson's pain were as severe and persistent as she claims, she would be seeking additional treatment.

¶ 52 As to her depressed mood, Robertson testified that she cannot interact with others, because, due to a pain-related sleep deficit, she lacks patience, "snap[s]" at people, and cannot be "cheery" or "nice." However, Robertson was depressed before the accident and offered insufficient evidence that her disposition is markedly different now than it was then. Indeed, post-accident, Robertson never sought to increase her antidepressant medication, nor did her husband suggest that she seek additional treatment for her mood like he did for her pain.

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[4] *See Davis*, ¶ 43.

[5] *See Davis*, ¶ 43.

[6] *See, e.g.*, *Schieber v. Liberty Nw. Ins. Corp.*, 2019 MTWCC 14 (where this Court found claimant was permanently totally disabled, notwithstanding an approved JA, when claimant returned to work in a different position after his injury but had to leave a few months later due to pain); *Kellegher* (where this Court found claimant was permanently totally disabled, notwithstanding an approved JA, when claimant performed unsatisfactorily in two modified positions due to difficulty multitasking, remembering things, and a flare in headaches).

¶ 53 Second, no physician opined that Robertson cannot physically perform regular work.[7] Neither Dr. Day nor any of Robertson's other treating medical providers was asked to give an opinion on this issue. And, Dr. Schumpert opined that she can physically perform the duties of four positions.[8]

¶ 54 Third, although Fowler's failure to meet with Robertson or interview her undercuts his opinions,[9] this Court still agrees with him to the extent he opined that Robertson is physically and vocationally qualified and competitive for these two positions. Robertson's work history, though narrow, has provided her with relevant transferable skills, like communication and data entry, while many of the other required skills for these positions are either basic life skills or skills that could be learned on the job. Her limited computer knowledge would not be a problem in either position since most of the essential functions of the Resident Interactive Coordinator position involve non-computer work and the computer work involved in the Ward Clerk position is in the same vein as the computer work Robertson did as a CNA. Nor would Robertson's age prevent her from doing either of these sedentary jobs since the physical effort required to perform both is comparable to that which she already expends performing her activities of daily living.

CONCLUSIONS OF LAW

¶ 55 This case is governed by the 2017 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Robertson's industrial accident.[10]

¶ 56 Under § 39-71-702(1), MCA, "If a worker is no longer temporarily totally disabled and is permanently totally disabled, as defined in 39-71-116, the worker is eligible for permanent total disability benefits." Section 39-71-116(28), MCA, provides:

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[7] *But see Thompson v. Mont. State Fund*, 2013 MTWCC 25, ¶¶ 65-70 (where this Court found claimant was permanently totally disabled, despite an approved JA, when one of two approving doctors later equivocated as to his approval and this Court found the duties described in the approved JA incompatible with claimant's limitations); *Peterson v. Mont. Schools Grp. Ins. Auth.*, 2006 MTWCC 14, ¶ 73 (where this Court found claimant was permanently totally disabled, despite five approved JAs, when the signing physician later disavowed his approval of all five JAs); *Stephenson, III v. Cigna Ins. Co.*, 2001 MTWCC 12, ¶ 36 (where this Court found claimant was permanently totally disabled, despite two approved JAs, because the approving physician acknowledged "pain is a limiting factor in claimant's employment").

[8] *But see Wilson v. Uninsured Employers' Fund*, 2010 MTWCC 33, ¶¶ 22, 32 (concluding that claimant was permanently totally disabled based, in part, on this Court's observation of claimant and his treating physician's testimony that he believed claimant was in chronic pain and could not foresee an employer hiring him: "I mean, he is depressed, he moves [like] he's in pain all the time. This is certainly not someone you want to have deal with the public.").

[9] *See Leastman v. Liberty Mut. Fire Ins. Co.*, 1999 MTWCC 2, ¶ 66 (under the rehabilitation section of the Workers' Compensation Act, a vocational consultant must conduct a "careful assessment of the worker's *realistic* and reasonable prospects for obtaining employment and a further assessment of the realistic wages he or she is likely to earn") (emphasis added).

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

> "Permanent total disability" means a physical condition resulting from injury as defined in this chapter, after a worker reaches maximum medical healing, in which a worker does not have a reasonable prospect of physically performing regular employment. Lack of immediate job openings is not a factor to be considered in determining if a worker is permanently totally disabled.

Under § 39-71-702(2), MCA, a determination of PTD must be based on objective medical evidence.

¶ 57 Section 39-71-116(33), MCA, defines "regular employment" as "work on a recurring basis performed for remuneration in a trade, business, profession, or other occupation in this state." The Montana Supreme Court has held that regular employment means a job for which a claimant is both physically and vocationally qualified. This Court has ruled that for a claimant not to be permanently totally disabled, the statute requires the existence of specific jobs for which claimant is not only qualified, but competitive, as well.[11]

¶ 58 Citing *Killoy v. Reliance National Indemnity*,[12] Robertson argues that she is permanently totally disabled because her pain, which is severe and constant, prevents her from sleeping and interferes with her ability to think and concentrate. Moreover, she argues, her testimony to this effect is uncontroverted and this Court cannot disregard uncontroverted evidence.

¶ 59 Robertson is correct that, pursuant to *Killoy*[13] and other cases,[14] this Court must take pain into consideration when deciding whether a person is permanently totally disabled, as severe pain can render a person physically incapable of performing the person's job duties. Robertson's implication that this Court cannot disregard uncontroverted evidence is also correct but leaves out an important prerequisite: the evidence must first be credible.[15] In *Killoy*:

> [The] claimant testified that he experiences constant pain from the base of the skull, down the middle of the back through his shoulders. He described

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[11] *Schieber*, ¶¶ 114-15. Although that case was governed by the 2011 version of the statute, the pertinent law is the same in the 2017 version.

[12] 278 Mont. 88, 923 P.2d 531 (1996).

[13] 278 Mont. at 93-95, 923 P.2d at 534-35 (citing *Robins v. Anaconda Aluminum Co.*, 175 Mont. 514, 521-22, 575 P.2d 67, 71 (1978); *Jensen v. Zook Bros. Constr. Co.*, 178 Mont. 59, 63, 582 P.2d 1191, 1192-93 (1978)).

[14] *See, e.g.*, *Larson v. Cigna Ins. Co.*, 276 Mont. 283, 292, 915 P.2d 863, 868 (1996) (citing *Robins*, 175 Mont. at 521, 575 P.2d at 71; *Cleveland v. Cyprus Indus. Minerals*, 196 Mont. 15, 19, 636 P.2d 1386, 1388 (1981)); *Haupt v. Mont. State Fund*, 2004 MTWCC 25, ¶ 45 (citing *Killoy*); *Stephenson, III*, ¶ 43 (citing *Killoy*); *Winfield v. State Comp. Ins. Fund*, 1999 MTWCC 41, ¶ 72 (citing *Killoy*); *DesJardins v. Liberty Nw. Ins.*, 1997 MTWCC 50, Conclusions of Law 3 (citing *Killoy*).

[15] *See Killoy*, 278 Mont. at 95, 923 P.2d at 535 (citation omitted).

> headaches and muscle spasms. His level of pain increases if he engages in any increased activity or if he is stationary for any length of time. On "bad" days, he seeks relief through hot showers and uses a heating pad.[16]

In holding that this Court "erred in concluding that claimant [wa]s capable of tolerating his pain and physically performing at regular employment,"[17] the Montana Supreme Court relied on claimant's testimony. The court explained, "This Court has held that a trial court may not disregard uncontradicted *credible* evidence,"[18] and "In this matter, not only did Dr. Dewey testify that he considered claimant's response to his injury as appropriate, the court also found that '[claimant's] testimony regarding his pain was credible.' "[19] As this Court found above, Robertson's testimony that her pain precludes her from working is not entirely credible.

¶ 60 Further, Robertson cites *Metzger v. Chemetron Corp.* for the proposition that mental capacity, education, training, and age are additional factors to be considered when deciding whether a person is permanently totally disabled.[20] She argues that she is permanently totally disabled because she is in her sixties, worked as a CNA for the same employer for the last 41 years, and has no other training.

¶ 61 Robertson is correct that this Court considers other factors besides pain — including mental capacity, education, training, and age — in determining whether a claimant is permanently totally disabled.[21] Having considered all these factors, however, this Court is convinced, as found above, that Robertson could physically perform the two approved modified JAs, including the Resident Activity Coordinator and Ward Clerk positions at ACH Nursing Home.

¶ 62 Because this Court has found that Robertson failed to meet her burden of proving that, despite the approved JAs, she does not have a reasonable prospect of physically performing regular work, Robertson is not permanently totally disabled.

JUDGMENT

¶ 63 Robertson is not entitled to PTD benefits for her March 14, 2019, injury.

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[16] *Killoy*, 278 Mont. at 95, 923 P.2d at 535 (alteration added).

[17] *Killoy*, 278 Mont. at 96, 923 P.2d at 536.

[18] *Killoy*, 278 Mont. at 95, 923 P.2d at 535 (emphasis added).

[19] *Killoy*, 278 Mont. at 95, 923 P.2d at 535 (alteration in original).

[20] 212 Mont. 351, 357, 687 P.2d 1033, 1036 (1984).

[21] *See Davis*, ¶ 41 n.7 (collecting cases).

¶ 64 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 16th day of March, 2021.

(SEAL)

David M. Sandler
JUDGE

c: Bernard J. "Ben" Everett
Melissa Quale

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