

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

**1995 MTWCC 83**

**WCC No. 9403-7018**

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**JOHN SMART**

**Petitioner**

**vs.**

**STATE COMPENSATION INSURANCE FUND**

**Respondent/Insurer for**

**THE MONTANA HISTORICAL SOCIETY**

**Employer.**

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**Affirmed in Smart v. State Compensation Mutual Ins. Fund, 277 Mont. 89 (1996)  
(No. 95-532)**

**DECISION AND FINAL JUDGMENT**

**Summary:** 47 year old archival photographer no longer able to work around photographic chemicals claimed entitlement to permanent total disability benefits under the Occupational Disease Act. He argued he is "disabled" within the meaning of section 39-72-102(4), MCA (1991) because he cannot return to his historical occupation, though evidence indicates he can perform other medically approved jobs.

**Held:** Where claimant is physically able to perform jobs which are typically available and for which he is qualified, he is not entitled to benefits under section 39-72-701(1), MCA (1991) and is limited to the maximum \$10,000 payment authorized by section 39-72-405, MCA (1991). (Note that later decisions of the Supreme Court may entitle occupational disease claimants to the same permanent partial disability benefits available under the Workers' Compensation Act. See, *Stavenjord v. Montana State Fund*, 2003 MT 67).

**Topics:**

**Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-72-102(4), MCA (1991).** Where occupational disease claimant is physically able to perform jobs which are typically available and for which he is qualified, he is not entitled to benefits under section 39-72-701(1), MCA (1991) and is limited to the maximum \$10,000 payment authorized by section 39-72-405, MCA (1991). **Affirmed in Smart v. State Compensation Mutual Ins. Fund, 227 Mont. 89 (1996)** (No. 95-532), but note that later decisions of the Montana Supreme Court may entitle an occupational disease claimant to the same permanent partial disability benefits available under the Workers' Compensation Act. See, **Stavenjord v. Montana State Fund, 2003 MT 67.**

**Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-72-405, MCA (1991).** Where occupational disease claimant is physically able to perform jobs which are typically available and for which he is qualified, he is not entitled to benefits under section 39-72-701(1), MCA (1991) and is limited to the maximum \$10,000 payment authorized by section 39-72-405, MCA (1991). **Affirmed in Smart v. State Compensation Mutual Ins. Fund, 227 Mont. 89 (1996)** (No. 95-532), but note that later decisions of the Montana Supreme Court may entitle an occupational disease claimant to the same permanent partial disability benefits available under the Workers' Compensation Act. See, **Stavenjord v. Montana State Fund, 2003 MT 67.**

**Occupational Disease: Indemnity (39-72-405) Awards.** Where occupational disease claimant is physically able to perform jobs which are typically available and for which he is qualified, he is not entitled to benefits under section 39-72-701(1), MCA (1991) and is limited to the maximum \$10,000 payment authorized by section 39-72-405, MCA (1991). **Affirmed in Smart v. State Compensation Mutual Ins. Fund, 227 Mont. 89 (1996)** (No. 95-532), but note that later decisions of the Montana Supreme Court may entitle an occupational disease claimant to the same permanent partial disability benefits available under the Workers' Compensation Act. See, **Stavenjord v. Montana State Fund, 2003 MT 67.**

Petitioner, John Smart (claimant), is a 47 year old archival photographer who was employed by the Montana Historical Society for 11 years. Due to his exposure to photographic chemicals over the years, he began experiencing various physical symptoms and was unable to continue working. On October 29, 1992, he filed a claim under the Occupational Disease Act. The State Compensation Insurance Fund, which insures the Historical Society, accepted liability.

Claimant and State Fund were unable to agree on the amount of benefits due claimant. In his petition to this Court, claimant contends he is "disabled" within the meaning of section 39-72-102(4), MCA (1991), because he cannot return to his historical occupation, and that he is therefore entitled to permanent total disability benefits pursuant to section 39-72-701(1), MCA (1991). The State Fund agrees that claimant is precluded from returning to work in any photographic position which would expose him to photographic chemicals. However, it contends that he is not entitled to permanent total disability benefits because he is able to perform other jobs outside his historical occupation. The State Fund argues that claimant is only entitled to the \$10,000 award permitted under section 39-72-405, MCA (1991).

On June 22, 1994, claimant moved for summary judgment, arguing that his inability to return to work as an archival photographer entitles him, as a matter of law, to permanent total disability benefits. In their arguments regarding the motion, both parties indicated that the issues presented by the petition are legal, not factual. State Fund agreed claimant could not return to his usual occupation. Claimant did not contend that he was incapable of returning to any sort of employment, rather he contended that his ability to do so was irrelevant under the disability definition of section 39-72-102(4), MCA (1991).

Section 39-72-102(4), MCA (1991), defines "disablement" as "the event of becoming physically incapacitated by reason of an occupational disease from performing work in the workers' job pool." It further states that the terms "disability", "total disability", and "totally disabled" are synonymous with "disablement".

On September 19, 1994, this Court issued its Order Denying Motion for Summary Judgment. That Order adopted the definition of "worker's job pool" set out in section 39-71-1011(7), MCA (1987) (repealed by 1991 Montana Laws, ch. 574, § 8). As so defined, the term "worker's job pool" means "those jobs typically available for which a worker is qualified, consistent with the worker's age, education, vocational experience and aptitude and compatible with the worker's physical capacities and limitations as the result of the worker's injury." The definition does not limit the worker's job pool to his principal or historical occupation. Therefore, I denied claimant's motion for summary judgment because he had not established, as a matter of law, his inability to perform other jobs for which he may be qualified and which are consistent with his age, education, vocational experience and aptitude, and physical limitations.

In denying the motion I entered the following Order concerning further proceedings:

Within twenty (20) days of this Order the petitioner shall notify the Court whether he wishes to continue to prosecute his petition for disability benefits. If he does, then this matter will be set for trial to determine whether petitioner is disabled within the meaning of § 39-72-102(4), MCA (1991).

The claimant then moved for entry of final judgment. I read his request as indicating that he did not contend that he was incapable of performing other work. I therefore entered an Order Certifying Matter for Appeal Purposes.

Following entry of the Order Certifying, the claimant appealed to the Montana Supreme Court. That Court, however, did not consider the denial of summary judgment as final, specifically noting that the denial of summary judgment did not finally determine claimant's entitlement, if any, to permanent total disability benefits. The Court dismissed the appeal without prejudice.

Following dismissal of the appeal, this Court resumed jurisdiction over the matter. The claimant then filed a Request for Final Determination on the Briefs. That request contains a statement of facts, including a recitation of the fact that claimant had undergone an employability assessment in June of 1994 which determined that he is employable. A copy of the assessment is attached to claimant's request. After analyzing claimant's education, work history, and transferable skills, the report concludes that three jobs -- hotel desk clerk, convenient store cashier, and teacher's aide -- are suitable for claimant and typically available in the job market.

The respondent agreed that the matter should be decided on the briefs. (Respondent's Brief Replying to Petitioner's Request for Determination on Briefs.) The Court began work on the matter but discovered that one essential fact was lacking: specifically, it was unable to find medical approval for the three jobs identified in the vocational assessment. The Court contacted counsel for the parties and apprised them of the omission. Thereafter, the parties filed a Stipulation in which they stated that job analyses for the positions were submitted to Dr. Dana Headapohl. They further stipulated and agreed "that Dr. Headapohl would approve these job analyses, indicating that in her opinion Mr. Smart is physically able to perform these positions." (*Id.* at 1.) With the Stipulation, the Court is now able to rule on the matter.

As previously found, if claimant is physically able to perform jobs which are typically available and for which he is qualified, he is not entitled to benefits under section 39-72-701(1), MCA (1991), and is limited to the maximum \$10,000 payment authorized by section 39-72-405, MCA (1991). The additional facts agreed to by the parties establish that claimant is physically able to perform and qualified for the three jobs identified by the vocational counselor, and that those jobs are typically available. He is therefore not entitled to total disability benefits under section 39-72-701(1), MCA (1991), and is limited to a maximum award of \$10,000 pursuant to section 39-72-405, MCA (1991).

JUDGMENT

1. Claimant is not entitled to permanent total disability benefits under section 39-72-701(1), MCA (1991).
2. Claimant is permanently partially disabled and entitled to an award, up to \$10,000, under section 39-72-405, MCA (1991). However, he has not requested the Court to determine what may be due him and no award is made.
3. This judgment is certified as final for purposes of appeal.

Dated in Helena, Montana, this 31st day of October, 1995.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Ms. Linda M. Deola  
Mr. Daniel J. Whyte  
Submitted Date: October 18, 1995