

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2013 MTWCC 25

WCC No. 2012-2965

CONNIE THOMPSON

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Petitioner alleges she is permanently and totally disabled as a result of an occupational disease affecting her right wrist, cervical spine, and right vocal cord that impairs her ability to speak audibly. Respondent counters that Petitioner has jobs approved for her by her treating physician and is therefore employable and not totally disabled.

Held: Petitioner's job approvals were inconsistent with her physical limitations and vocal impairment which renders her unable to speak above a whisper. Given the totality of Petitioner's condition, she does not have a reasonable prospect of employment, and is therefore permanently and totally disabled.

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-116(25). Physician-approved job analyses were incongruous with Petitioner's physical limitations and her sedentary-only release assigned by her treating orthopedist in light of Petitioner's two neck fusions, her carpal tunnel syndrome, and her right-side vocal cord paralysis that left her voice barely audible at best and completely inaudible when fatigued. In consideration of the totality of Petitioner's limitations, the Court concluded Petitioner did not have a reasonable prospect of physically performing regular employment once she reached MMI for both her orthopedic condition and her vocal cord injury and was, therefore, PTD

within the meaning of § 39-71-116(25), MCA (2007), and entitled to PTD benefits retroactive to when her TTD benefits were discontinued.

Disability: Permanent Total. Physician-approved job analyses were incongruous with Petitioner's physical limitations and her sedentary-only release assigned by her treating orthopedist in light of Petitioner's two neck fusions, her carpal tunnel syndrome, and her right-side vocal cord paralysis that left her voice barely audible at best and completely inaudible when fatigued. In consideration of the totality of Petitioner's limitations, the Court concluded Petitioner did not have a reasonable prospect of physically performing regular employment once she reached MMI for both her orthopedic condition and her vocal cord injury and was, therefore, permanently totally disabled within the meaning of § 39-71-116(25), MCA (2007), and entitled to PTD benefits retroactive to when her TTD benefits were discontinued.

Benefits: Permanent Total Disability Benefits: Generally. Physician-approved job analyses were incongruous with Petitioner's physical limitations and her sedentary-only release assigned by her treating orthopedist in light of Petitioner's two neck fusions, her carpal tunnel syndrome, and her right-side vocal cord paralysis that left her voice barely audible at best and completely inaudible when fatigued. In consideration of the totality of Petitioner's limitations, the Court concluded Petitioner did not have a reasonable prospect of physically performing regular employment once she reached MMI for both her orthopedic condition and her vocal cord injury and was, therefore, permanently totally disabled within the meaning of § 39-71-116(25), MCA (2007), and entitled to PTD benefits retroactive to when her TTD benefits were discontinued.

Insurers: Adjusters. Where a case involved a complex factual situation implicating multiple, overlapping medical conditions and with contradicting medical opinions, it was not unreasonable for Respondent to discontinue TTD benefits after it determined Petitioner was at MMI for both her orthopedic condition and her vocal cord injury and after receiving physician-approved alternative job analyses. Whether Petitioner could in fact perform the duties of the positions constituted a legitimate factual dispute which is a reasonable basis for an insurer to deny a claim.

Attorney Fees: Reasonableness of Insurer. Where a case involved a complex factual situation implicating multiple, overlapping medical conditions and with contradicting medical opinions, it was not

unreasonable for Respondent to discontinue TTD benefits after it determined Petitioner was at MMI for both her orthopedic condition and her vocal cord injury and after receiving physician-approved alternative job analyses. Whether Petitioner could in fact perform the duties of the positions constituted a legitimate factual dispute which is a reasonable basis for an insurer to deny a claim.

¶ 1 Trial in this matter began on January 24, 2013, and reconvened on February 7, 2013. Both days of trial were held in the Workers' Compensation Court in Helena, Montana. During both days of trial, Petitioner Connie Thompson was present and represented by Norman L. Newhall. Respondent Montana State Fund (State Fund) was represented by Charles G. Adams.

¶ 2 **Exhibits:** I admitted Exhibits 1 through 25, 27, 28, and 30 through 33. Thompson withdrew Exhibit 26. State Fund withdrew its hearsay objection to Exhibit 29, I overruled State Fund's relevancy objection to Exhibit 29, and reserved ruling on the foundation objection to it. On the second day of trial, I noted the foundation affidavit submitted by Thompson's attorney for Exhibit 29. State Fund withdrew its foundation objection to it and I admitted Exhibit 29.

¶ 3 **Stipulations:** The parties stipulated that paragraphs 48 and 49 of Thompson's proposed findings of fact could be amended by substituting a new, amended page 9. The parties also stipulated that the handwritten changes to Exhibit 18, page 10, were made as a result of Royce Pyette, M.D.'s deposition and the corrections he made to his own records of April 19, 2011.

¶ 4 **Witnesses and Depositions:** The parties agreed that the depositions of Dr. Pyette and Paul J. Byorth, M.D., and the video deposition of Thompson can be considered part of the record. On January 24, 2013, Amy Kirscher, Dale Bochy, MS, CRC, VRC, Karen Black, M.Ed., CRC, CCM, CDMS, and Thompson were sworn and testified. On February 7, 2013, Kirscher, Bochy, and Thompson concluded their testimony.

¶ 5 **Issues Presented:** The Pretrial Order sets forth the following issues:¹

Issue One: Whether Petitioner is permanently totally disabled.

Issue Two: Whether Petitioner is entitled to retroactive and ongoing total disability benefits.

¹ Pretrial Order at 4, Docket Item No. 26.

Issue Three: Whether Respondent has acted unreasonably in its handling of the claim.

Issue Four: Whether Petitioner is entitled to reasonable costs, penalties, and attorney fees in accordance with § 39-71-611, MCA, and/or § 39-71-2907, MCA.

FINDINGS OF FACT

¶ 6 Thompson developed an occupational disease within the meaning of the Workers' Compensation Act (WCA) affecting her neck and right wrist in the course and scope of her employment as Office Manager for Potter Clinton Development, Inc. (Potter Clinton) in Bozeman, Gallatin County, Montana.²

¶ 7 A First Report shows a "date and time of injury" as April 2, 2009.³

¶ 8 On June 23, 2009, State Fund accepted liability for the claim.⁴

¶ 9 As a result of her condition, Thompson underwent a C7-T1 anterior cervical discectomy, implantable device cage with plate arthrodesis surgery on June 12, 2009. A recognized risk of the surgery was vocal cord paresis.⁵

¶ 10 In correspondence dated May 12, 2011, State Fund issued a 14-day notice terminating temporary total disability (TTD) benefits based upon approval of an alternative job as a librarian's assistant.⁶

¶ 11 By letter dated December 16, 2011, Thompson advised State Fund that the librarian's assistant job required her to use her voice for extended periods of time and was clearly not within Thompson's vocal capacity. Thompson requested reinstatement of total disability wage-loss benefits effective April 19, 2011, and conversion to permanent total disability (PTD) status.⁷

² Pretrial Order, Uncontested Facts.

³ Pretrial Order, Uncontested Facts; Ex. 1 at 1.

⁴ Pretrial Order, Uncontested Facts.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

¶ 12 By letter dated December 19, 2011, State Fund refused to reinstate total disability benefits or to convert Thompson to PTD status.⁸

¶ 13 State Fund re-commenced payment of TTD benefits under a reservation of rights as of July 15, 2012.⁹

Medical

¶ 14 Thompson initially saw Michael A. Layman, M.D., on March 28, 2009, complaining of pain in her right shoulder blade radiating down her arm into her long and ring fingers with associated numbness. According to Dr. Layman's office note, Thompson described a classic C7 right cervical radiculopathy.¹⁰ Dr. Layman recommended Thompson follow-up with Steven R. Speth, M.D., for her neck and right upper extremity pain, and Robert B. Blake, M.D., for carpal tunnel syndrome.

¶ 15 Thompson saw Dr. Speth on April 3, 2009, complaining of 50% neck pain and 50% right upper extremity pain. After reviewing X-ray and MRI scans of Thompson's neck which showed degenerative changes at several levels, Dr. Speth recommended a nerve root block injection at Thompson's C7 level, and medial branch blocks at C7 and T1.¹¹

¶ 16 On April 17, 2009, Thompson saw Dr. Blake for her right hand numbness and elbow pain. Dr. Blake referenced Dr. Speth's referral to John A. Vallin, M.D., for a C7 nerve root block, which did provide Thompson some relief.¹² Dr. Vallin also performed electrodiagnostic studies that revealed carpal tunnel and cubital canal syndromes on the right, and an acute C7 radiculopathy.¹³

¶ 17 On June 1, 2009, Dr. Layman wrote to State Fund Claims Examiner Amy Kirscher, stating that the degenerative and arthritic changes in Thompson's neck affecting her cervical nerve root were more likely than not related to an occupational disease as a result of her many years as an executive assistant. Dr. Layman felt that Thompson needed a referral to a surgeon for a determination of further treatment for her cervical spine. Dr. Layman also opined that Thompson's ulnar neuropathy and carpal tunnel syndrome were a result of repetitive trauma and overuse and also

⁸ *Id.*

⁹ *Id.*

¹⁰ Ex. 13 at 1.

¹¹ Ex. 13 at 8.

¹² Ex. 16 at 8.

¹³ *Id.*

constituted an occupational disease. Dr. Layman deferred to Dr. Blake's opinion that these conditions could be treated conservatively without surgery.¹⁴

¶ 18 Thompson underwent her first cervical surgery on November 9, 1999, consisting of an anterior cervical discectomy and C-4 to C-7 fusion performed by Howard C. Chandler, Jr., M.D., at St. Patrick Hospital in Missoula.¹⁵ On June 12, 2009, Chriss A. Mack, M.D., performed Thompson's second cervical surgery at St. Patrick Hospital, consisting of a C7-T1 anterior cervical discectomy and an implantable device cage with plate arthrodesis.¹⁶

¶ 19 A CT scan of Thompson's cervical spine on September 11, 2009, revealed a solid fusion from C4-T1, anterolisthesis of C2 on C3 with marked bilateral facet disease, and very marked anterior osteophyte formation with degenerative facet disease at C3-C4.¹⁷ On that same day, Dr. Mack performed a postoperative exam of Thompson. He prescribed physical therapy and noted that Thompson's residual weakness in her voice "would be a significant impairment" in her type of occupation. Dr. Mack further noted: "I will need some advice from my ENT [ear, nose and throat] colleagues on whether or not a tincture of time is in order . . . or whether or not speech therapy would be indicated."¹⁸

¶ 20 On December 31, 2009, Dr. Mack responded to Kirscher's inquiry, stating that Thompson was at maximum medical improvement (MMI) for her cervical condition, but that she had vocal cord paresis that might affect her occupation, and asked for a referral to an occupational medicine specialist to determine her impairment rating. Dr. Mack approved Thompson to return to work on a medical basis, but noted that her employer would need to determine if her "voice issue" would preclude employment. He also referred her for follow-up with an ENT specialist.¹⁹

¶ 21 Thompson was referred by the Montana Health System Service Coordinator to Paul J. Byorth, M.D., a Billings Otolaryngologist, for evaluation of her voice and throat problems.²⁰ Dr. Byorth first saw Thompson on November 17, 2009, and determined that her hoarseness was secondary to right vocal cord paresis – meaning a temporary condition – as opposed to paralysis which would imply a permanent condition.²¹

¹⁴ Ex. 13 at 10-11.

¹⁵ Ex. 19 at 4-6.

¹⁶ Ex. 19 at 14-15.

¹⁷ Ex. 19 at 21-22.

¹⁸ Ex. 22 at 9.

¹⁹ Ex. 22 at 10-11.

²⁰ Ex. 20 at 1.

²¹ Byorth Dep. 6:4-7; 7:17 - 8:2.

Dr. Byorth noted that Thompson's voice was weak, breathy and easily fatigued, and she had difficulty projecting her voice.²²

¶ 22 Dr. Byorth noted the increased chance of laryngeal nerve injuries with repeat anterior cervical surgeries such as Thompson had undergone. He advised Thompson it could take up to a year for her right vocal cord to reinnervate.²³ Dr. Byorth explained that a year's wait was standard for someone with recurrent laryngeal nerve injury. Dr. Byorth noted that if after that time reinnervation has not occurred, the paresis becomes paralysis.²⁴

¶ 23 On March 26, 2010, Dr. Byorth approved Thompson to return to work in the alternative jobs of toy assembler and librarian's assistant, and disapproved the job of cashier, with the caveat that the approvals were only in regards to her vocal cord paresis and "not her spine status."²⁵

¶ 24 Dr. Byorth next saw Thompson on June 10, 2010, and Thompson reported that her voice was improving.²⁶ Dr. Byorth recommended Thompson undergo videostrobe voice evaluation and attend speech therapy sessions.²⁷ The doctor explained that speech therapy can be viewed as a type of physical therapy, while a videostrobe provides both the therapist and the patient a form of biofeedback to understand the patient's weaknesses and strengths.²⁸

¶ 25 On Thompson's next visit in March 2011, she told Dr. Byorth that she had attended speech therapy but did not feel like her sessions were helping her anymore. Thompson stated she did not feel like she had improved since her last visit: her voice was still weak, she had difficulty in projecting her voice, and she still got fatigued easily.²⁹ On examination, Dr. Byorth found that Thompson's left vocal cord was normal but that her right vocal cord was paralyzed. He found Thompson at that time to be at maximum medical improvement (MMI) in regards to her vocal cord, but Dr. Byorth

²² Ex. 20 at 1.

²³ Ex. 20 at 3.

²⁴ Byorth Dep. 17:24 - 18:7.

²⁵ Ex. 20 at 13.

²⁶ Ex. 20 at 5.

²⁷ Ex. 20 at 6.

²⁸ Byorth Dep. 25:6 - 26:9.

²⁹ Ex. 20 at 7.

preferred not to assign Thompson an impairment rating, as he wanted to continue to be her treating physician and not a determiner of her disability.³⁰

¶ 26 In his office note of March 18, 2011, Dr. Byorth described Thompson's voice as "intelligible." Dr. Byorth clarified that he used the word "intelligible" because although Thompson could articulate words and her voice was intelligible, she had difficulty in projecting her voice and her voice "fatigued."³¹

¶ 27 On her last visit with Dr. Byorth in March of 2012, Thompson complained of shortness of breath while exercising.³² Dr. Byorth found pharyngeal inflammation in Thompson's throat, that her "[v]oice is quite poor with a poor respiratory effort that is hoarse and breathy, and she also appears to have developed a compensatory whisper." Dr. Byorth discussed surgical options that would likely worsen her voice, and Thompson chose not to undergo further surgery.³³

¶ 28 In his deposition, Dr. Byorth explained that someone with Thompson's condition (a paralyzed vocal cord in the paramedian position on one side) tries to overcompensate with the other vocal cord, which causes the muscles to fatigue, resulting in the inability to make any sound, stating "they just can't talk."³⁴ After rest, the cord will return to its previous functioning level, which in Thompson's case, is marginal.³⁵

¶ 29 Dr. Byorth admitted that when he approved the librarian's assistant job for Thompson in March of 2010, he had not seen her for the purposes of that job approval, and based his opinion on the clinical assessment he made of Thompson on his initial evaluation in November 2009.³⁶ When he approved the librarian's assistant position, Thompson was not yet at MMI.³⁷ When Dr. Byorth assessed Thompson at MMI in March of 2011, State Fund did not ask him if he still approved the librarian's assistant job for Thompson.³⁸

¶ 30 On July 2, 2012, Thompson's attorney wrote to Dr. Byorth asking his opinion, "based upon the *current* condition of [Thompson's] vocal cord paresis," whether he still

³⁰ Ex. 20 at 8; Byorth Dep. 60:13 - 61:1.

³¹ Ex. 20 at 7; Byorth Dep. 27:12 - 28:10.

³² Ex. 20 at 11.

³³ Ex. 20 at 12.

³⁴ Byorth Dep. 29:1-13.

³⁵ Byorth Dep. 30:9-21.

³⁶ Byorth Dep. 56:12 - 57:4.

³⁷ Byorth Dep. 55:18 - 56:16; Ex. 20 at 13.

³⁸ Byorth Dep. 58:6-21; Trial Test.

approved Thompson for the librarian's assistant position. Dr. Byorth responded on July 16, 2012: "Although she may be capable of many of the tasks, due to her poor vocal quality she is disabled from performing all duties."³⁹ In his letter to Thompson's attorney, Dr. Byorth clarified his opinion: "[A]s of today, I would probably still approve of her performing the job as [a] library assistant, however, due to her vocal cord paralysis and inability to project her voice she is not qualified for that position any longer due to her disability."⁴⁰

¶ 31 In his deposition, Dr. Byorth explained his approval of the librarian's assistant position for Thompson as a medical opinion; that as her treating physician, he would not disable her because of her vocal cords. He believed she should try to perform the duties of that position and encouraged her to do so, and that the true test of whether Thompson was able to perform the duties of an assistant librarian was to try and do it. If, after trying to do the job and determining "you can't perform the duties of your job description, then maybe it is disabling."⁴¹

¶ 32 To further clarify his position, Dr. Byorth explained he was not making a determination of disability, and as of the date of his deposition, he still approved of Thompson attempting to perform the duties of an assistant librarian:

Would she be successful? Let her find out . . . , [b]ut I think, reasonably speaking, from a medical standpoint, I don't know if she could perform that duty.⁴²

¶ 33 State Fund referred Thompson to Dr. Pyette, a Bozeman physician whose practice includes sports medicine and non-operative musculoskeletal care.⁴³ Dr. Pyette saw Thompson on April 19, 2011, for the purposes of a closing examination and an impairment rating.⁴⁴ Thompson presented with complaints of neck pain on flexion, extension, and rotation.⁴⁵ She demonstrated decreased range of motion for cervical flexion, extension, and rotation.⁴⁶ Thompson also complained of bilateral hand

³⁹ Ex. 27 at 5.

⁴⁰ Ex. 27 at 1.

⁴¹ Byorth Dep. 31:19 - 33-1; 59:20 - 60:1.

⁴² Byorth Dep. 66:21 - 67:6.

⁴³ Pyette Dep. 5:4-5.

⁴⁴ Pyette Dep. 6:1-5; 19:10-12.

⁴⁵ Ex. 18 at 8; Pyette Dep. 12:17-25.

⁴⁶ Ex. 18 at 9.

numbness and tingling related to carpal tunnel syndrome, with increased symptoms with repetitive activity.⁴⁷

¶ 34 Upon examination, Dr. Pyette found Thompson to be at MMI and assigned her a 22% whole person impairment rating that included her cervical spine, carpal tunnel syndrome, and speech and voice deficit.⁴⁸ Dr. Pyette released Thompson to work in jobs with a sedentary physical demand level, but indicated she may have difficulty working in a noisy environment or in a position that required speaking for an extended period of time.⁴⁹ Dr. Pyette would defer to an ENT doctor to determine Thompson's restrictions from a vocal perspective.⁵⁰

¶ 35 In a letter to Kirscher dated May 13, 2011, Dr. Pyette modified Thompson's release "to work in a light/sedentary capacity."⁵¹ Dr. Pyette approved Thompson for the positions of librarian's assistant and office manager, both light-duty positions, and disapproved the position of cashier "due to her cervical spine injury and current carpal tunnel syndrome." Dr. Pyette also disapproved the toy assembler job, since it required "repetitive activity for extended and sustained periods of time."⁵² Dr. Pyette's opinions on Thompson's return to work were based solely from an orthopedic standpoint, and he would defer to Dr. Byorth as to whether those positions were appropriate for Thompson in terms of her vocal cord disability.⁵³

¶ 36 The librarian's assistant position requires frequent, intermittent twisting and bending of the neck, lifting up to 20 pounds, and frequent use of hands and fingers in computer work, covering books, picking up books, and checking books in and out.⁵⁴ Similarly, the office manager position requires frequent, intermittent twisting and bending of the neck, lifting up to twenty pounds, and repetitive hand and fine finger dexterity using a computer.⁵⁵

⁴⁷ Pyette Dep. 13:6-12; Ex. 18 at 8.

⁴⁸ Pyette Dep. 20:22 - 21:4; Ex. 18 at 10.

⁴⁹ Pyette Dep. 21:22 - 22:7; Ex. 18 at 10.

⁵⁰ Pyette Dep. 23:15-18.

⁵¹ Ex. 18 at 11.

⁵² Ex. 18 at 11; Ex. 25 at 58, 59.

⁵³ Pyette Dep. 26:6-12; 27:23 - 28:4.

⁵⁴ Ex. 25 at 29, 31.

⁵⁵ Ex. 25 at 54, 56.

¶ 37 In his deposition, Dr. Pyette reiterated his belief that Thompson was employable in sedentary to light-duty jobs.⁵⁶

¶ 38 Thompson was referred by Montana Health Systems to Allen M. Weinert, M.D., a Helena orthopedic physician.⁵⁷ Throughout the two-year period that Dr. Weinert treated Thompson beginning in June 2010, he kept her restricted to sedentary employment, with only occasional lifting of up to 10 lbs.⁵⁸

Vocational

¶ 39 Dale Bochy testified at trial. I found Bochy to be a credible witness. Bochy holds a master's degree in rehabilitation counseling and is a certified rehabilitation counselor working out of Billings, Montana. Bochy was asked by State Fund to do a time-of-injury job analysis of office manager with Thompson's employer, Potter Clinton.⁵⁹

¶ 40 Bochy sent the office manager job analysis, a light duty job, to Dr. Mack, who approved the position for Thompson, with the caveat: "Unless voice is issue to employer."⁶⁰ Bochy explained that the difference between sedentary duty and light duty is the amount of lifting and standing; a sedentary position requires lifting up to ten pounds and very little standing; light duty requires frequent lifting of ten pounds, occasional lifting up to 20 pounds, and both sitting and standing.⁶¹

¶ 41 In March 2010, Kirscher asked Bochy to meet with Thompson to complete an employability and wage-loss analysis, and identify alternate jobs to determine if Thompson was employable. Bochy met with Thompson on March 11, 2010, and determined that Thompson had experience and skills working with people, using a computer, and performing general clerical work.⁶²

¶ 42 Bochy identified the alternative jobs of cashier, toy assembler, and librarian's assistant as most closely meeting Thompson's skills and limitations.⁶³ She submitted those job descriptions to Dr. Byorth, who approved the toy assembler and librarian's

⁵⁶ Pyette Dep. 21:20 - 22:7; 22:15-23.

⁵⁷ Ex. 21 at 1.

⁵⁸ Ex. 21 at 1-20.

⁵⁹ Trial Test; Ex. 25 at 1, 4-6.

⁶⁰ Trial Test.; Ex. 25 at 12.

⁶¹ Trial Test.

⁶² *Id.*

⁶³ *Id.*

assistant positions just on the basis of Thompson's vocal cord impairment.⁶⁴ Bochy also submitted job analyses to Dr. Pyette, who approved the positions of office manager and librarian's assistant, noting that Thompson "may have difficulty performing jobs or be unable to tolerate work that requires her to project her voice, speak for an extended period of time, or speak in a noisy environment due to her vocal cord injury."⁶⁵

¶ 43 Bochy opined that Thompson was employable in both her local Bozeman area labor market as well as the state-wide labor market in the fields of small office receptionist or small office manager, utilizing Thompson's many years of experience in clerical work and greeting the public.⁶⁶

¶ 44 Bochy explored the idea of a rehabilitation plan with Thompson, as her time-of-injury wage was high and Thompson would incur a significant wage loss, but according to Bochy, Thompson expressed no interest in retraining.⁶⁷

¶ 45 Karen Black testified at trial. I found Black to be a credible witness. Black has a master's degree in adult higher education with a minor in counseling. She is a certified rehabilitation counselor, a certified disability management specialist, and a certified case manager. Black has been a vocational consultant since 1989 and has owned her own consulting business since 1997.⁶⁸

¶ 46 Black was asked by Thompson's attorney to review Thompson's case to determine if Thompson was employable. Black reviewed Thompson's medical records and met personally with Thompson to determine Thompson's perception of her own functional abilities.⁶⁹

¶ 47 Because she concluded that Thompson was limited to only sedentary employment, Black found Thompson's job prospects were limited to approximately 11% of the labor market. Black then factored in Thompson's limitations of fine and gross motor skills due to her carpal tunnel syndrome, Thompson's voice issues, and her limitations with regard to flexion, extension, and rotation of her neck, all of which served to significantly reduce Thompson's occupational base down to very few jobs.⁷⁰

⁶⁴ *Id.*

⁶⁵ Trial Test.; Ex. 18 at 11.

⁶⁶ Trial Test.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

¶ 48 Black next reviewed the job description for Thompson's time-of-injury position of office manager with Potter Clinton.⁷¹ Black pointed out that, because the position was categorized as light duty requiring lifting up to twenty pounds, Black believed that alone took it out of Thompson's physical abilities to lift up to only ten pounds since Black believed Thompson was limited to only sedentary work. Black also noted that because the office manager job required relaying messages, answering the phone, and communicating effectively with people, these activities would not be conducive to someone with Thompson's voice limitations. The position also required frequent twisting of the neck, which Black believed was also incompatible with Thompson's restrictions.⁷²

¶ 49 Black found the librarian's assistant job incompatible with Thompson's restrictions because that position was a light-duty position⁷³ and Black believed that Thompson was at a sedentary physical functioning level. Black also found the position incompatible with Thompson's vocal limitations due to the number of people whom the librarian's assistant was expected to greet and assist.⁷⁴

¶ 50 Of the three job descriptions prepared by Bochy, Black found only one compatible with Thompson's sedentary-duty restriction: toy assembler. However, she noted that Dr. Pyette disapproved that position for Thompson.⁷⁵ Based on Thompson's physical limitations and the fact that her transferable skills were limited to the clerical field, Black concluded that Thompson was limited in her employability in any occupation that would exist in any significant number in the labor market.⁷⁶

¶ 51 Thompson testified at trial. I found Thompson to be a credible witness. At trial, Thompson spoke in a whispered voice that was barely audible. Thompson worked four or five years doing secretarial duties and then attended a Florida junior college where she obtained a medical assistant certificate. Thompson then worked for approximately nine years as a medical assistant before moving to Wyoming in the early 1980's.⁷⁷

¶ 52 In Wyoming, Thompson worked as an administrative assistant at the Jackson Hole ski resort. Since that time, Thompson has worked in the administrative and clerical fields. In 1995, Thompson began working for Potter Clinton in a part-time

⁷¹ Trial Test.; Ex. 25 at 53-57.

⁷² *Id.*

⁷³ Trial Test.; Ex. 25 at 28-33.

⁷⁴ Trial Test.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

position, and was moved to full-time within a year. By the time Thompson quit working for Potter Clinton just prior to her second cervical surgery in 2009, she had been promoted to office manager, supervising two other secretaries, and earning \$65,000 per year. Thompson's duties included answering phones, public relations, filing, typing, and other administrative and secretarial duties.⁷⁸

¶ 53 In 1999, Thompson underwent her first neck surgery. Afterward, she was able to return to work full-time at Potter Clinton and resumed her duties. In 2009, Thompson began developing neck pain that radiated down into her arms and sought medical treatment, eventually settling with Dr. Mack and his recommendations for repeat neck surgery. When she took time off from work at Potter-Clinton in 2009, it was the last time Thompson worked. Potter Clinton ceased operations at some point after Thompson stopped working there.⁷⁹

¶ 54 Thompson hoped to return to work, and submitted a resume for a position with the Yellowstone Club in the late fall of 2010. However, she was unsuccessful in getting an interview.⁸⁰

¶ 55 Thompson explained that she is very limited now in the kind of activities she can perform. Routine tasks such as driving, doing the dishes, or working on a computer keyboard are difficult for her due to the positioning of her neck and hands. She experiences pain and numbness in her hands on a daily basis, also neck pain and muscle spasms due to her fusions. When her voice fatigues, she is unable to make any sound at all, and the effort to communicate and be heard is "exhausting." Thompson also has difficulty breathing at times, experiencing shortness of breath due to her vocal cord injury, and she has difficulty swallowing when she eats.⁸¹

¶ 56 Thompson testified that she would be unable perform the tasks of her time-of-injury job of office manager because of her inability to do extensive typing, filing, and talking on the phone. She is restricted from repeated bending or twisting of her neck, and cannot lift more than ten pounds on an occasional basis. She also believes she is incapable of performing the job of a librarian's assistant due to the requirement of frequent bending and twisting of the neck, lifting up to 20 pounds, and frequent use of a computer.⁸²

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Trial Test.; Ex. 28 at 32.

⁸¹ Trial Test.

⁸² Trial Test.; Ex. 25 at 28-32.

¶ 57 Kirscher testified at trial. I found Kirscher to be a credible witness. Kirscher has been a claims examiner for State Fund for approximately six years, and has been the only claims examiner assigned to Thompson's case by State Fund. Kirscher accepted liability for Thompson's claim on behalf of State Fund, and has paid medical benefits, TTD benefits, and impairment benefits on her claim. Thompson's TTD benefits were paid retroactive to the date she left work at Potter Clinton, after applying the statutory waiting period.⁸³

¶ 58 Kirscher referred Thompson's claim to Bochy to do a time-of-injury job analysis, which was then sent to Thompson's surgeon, Dr. Mack, for review. Dr. Mack approved the job for Thompson medically, but deferred to someone else to determine if her voice would be an impediment to performing her old job.⁸⁴

¶ 59 Kirscher had spoken to Thompson prior to her surgery so she was cognizant of the change in Thompson's vocal ability post-surgery. Kirscher took Thompson's vocal deficit into account in looking at Thompson's employability options.⁸⁵ On May 12, 2011, Kirscher issued a 14-day notice to Thompson, advising her that State Fund was terminating her TTD benefits.⁸⁶ The letter was based on the fact Thompson had reached MMI for her orthopedic and vocal cord conditions, and the approval from both Drs. Byorth and Pyette for Thompson to return to work in alternative jobs.⁸⁷ Both doctors medically approved Thompson to work as an assistant librarian; Dr. Pyette also approved the office manager position, while Dr. Byorth approved the toy assembler job.

¶ 60 After Kirscher received a copy of Dr. Byorth's letter to Thompson's attorney dated July 16, 2012, disapproving the position of librarian's assistant for Thompson, Kirscher reinstated Thompson's TTD benefits effective July 16, 2012, under a reservation of rights.⁸⁸ Thompson has continued to receive TTD benefits through the time of trial.⁸⁹

⁸³ Trial Test.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Ex. 6 at 1.

⁸⁷ Ex. 18 at 10, 11; Ex. 20 at 13; Trial Test.

⁸⁸ Ex. 30 at 3; Trial Test.

⁸⁹ Trial Test.

CONCLUSIONS OF LAW

¶ 61 This case is governed by the 2007 version of the Workers' Compensation Act (WCA) since the law in effect on the employee's last day of work governs the resolution of an occupational disease claim.⁹⁰

¶ 62 The injured worker bears the burden of proving by a preponderance of the evidence that she is entitled to the benefits she seeks.⁹¹

Issue One: Whether Petitioner is permanently totally disabled.

¶ 63 Section 39-71-116(25), MCA, defines permanent total disability (PTD) as "a physical condition resulting from injury . . . after a worker reaches maximum medical healing, in which a worker does not have a reasonable prospect of physically performing regular employment." A determination of PTD must be supported by a preponderance of objective medical findings.⁹²

¶ 64 As noted in *Holmes v. Safeway Inc.*,⁹³ "[w]hile an injured worker bears the initial burden of proof, the insurer bears the initial burden to produce evidence showing that an injured worker is not permanently totally disabled by obtaining a physician's approval of one or more jobs suitable for the injured worker."

¶ 65 Here, neither party disputes that Dr. Pyette medically approved Thompson to return to work in the positions of librarian's assistant and office manager, based on the orthopedic disability to her cervical spine and carpal tunnel syndrome. Likewise, neither party disputes Dr. Byorth's initial approval for Thompson to return to work in the librarian's assistant and toy assembler positions based on her vocal cord injury. The only position approved by both physicians for Thompson's orthopedic and vocal cord disabilities was the librarian's assistant position.

¶ 66 However, merely obtaining a physician's approval of an alternative job analysis is not dispositive of the issue of PTD. Claimants have successfully challenged such conclusions on various grounds, as in *Peterson v. Montana Schools Group Ins. Authority*, where this Court determined that the claimant was permanently and totally

⁹⁰ *Montana State Fund v. Grande*, 2012 MT 67, ¶ 23, 364 Mont. 333, 274 P.3d 728, citing *Hardgrove v. Transp. Ins. Co.*, 2004 MT 340, 324 Mont. 238, 103 P.3d 999.

⁹¹ *Ricks v. Teslow Consol.*, 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wickens Bros. Constr. Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

⁹² § 39-71-702(2), MCA.

⁹³ 2012 MTWCC 8, ¶ 59.

disabled in spite of the existence of five approved job analyses, where the signing physician later disavowed his approval of all five jobs.⁹⁴

¶ 67 A close examination of Dr. Byorth's approval of the librarian's assistant position shows that he went from an unequivocal "yes" on March 26, 2010, to "no" in his letter to Thompson's attorney on July 16, 2012, to "I don't know" in his deposition.

¶ 68 Also vexing is Dr. Pyette's approval of the light-duty librarian's assistant position for Thompson, given his release for her to return to work initially in only sedentary jobs. Dr. Pyette never explained why, less than a month later, he changed his release to light/sedentary work. In reviewing the physical demands of that position, which required frequent bending and twisting of the neck and frequent use of hands and fingers in computer work, covering books, and checking books in and out, I find the job requirements incongruous with Thompson's two cervical fusions and carpal tunnel syndrome.

¶ 69 Dr. Pyette's light/sedentary duty release for Thompson in May 2011 was also contrary to orthopedist Dr. Weinert, who treated Thompson from June 2010 to June 2012 and maintained a sedentary-capacity-only release for Thompson throughout that period.

¶ 70 Based on the trial testimony, a complete review of the proffered exhibits, and the opportunity to observe and listen to Thompson at trial, I conclude that Thompson does not have a reasonable prospect of physically performing regular employment. Dr. Byorth was, at best, equivocal in his approval of the librarian's assistant position, while the job duties for that position and the office manager position are incompatible with Thompson's physical limitations in light of her two neck fusions, her carpal tunnel syndrome, and her right-side vocal cord paralysis that leaves her voice barely audible at best and completely inaudible when fatigued. When considering the totality of Thompson's limitations, I conclude that Thompson does not have a reasonable prospect of physically performing regular employment and therefore is permanently totally disabled within the meaning of § 39-71-116(25), MCA.

Issue Two: Whether Petitioner is entitled to retroactive and on-going total disability benefits.

¶ 71 State Fund terminated Thompson's TTD benefits pursuant to a letter from Kirscher dated May 12, 2011, based on the fact both Dr. Byorth and Dr. Pyette had found Thompson had reached MMI and both had approved light-duty jobs for her. However, there is countervailing evidence to consider. Dr. Weinert, who like Dr. Pyette

⁹⁴ 2006 MTWCC 14, ¶ 73.

is an orthopedist, and unlike Dr. Pyette treated Thompson for two years, released Thompson only to sedentary employment. As a treating physician, Dr. Weinert's opinion is entitled to greater weight than Dr. Pyette's, who only saw Thompson one time for the purposes of a closing report and an impairment rating.⁹⁵ Regarding Dr. Byorth's release, I note that there is no discernible change in Thompson's condition between the time Dr. Byorth responded to Kirscher's letter approving the librarian's assistant position and his later disapproval of the position on July 12, 2012. On that date, he opined that Thompson's vocal cord paralysis had become permanent and wrote: "[D]ue to her vocal cord paralysis and inability to project her voice she is not qualified for [the librarian's assistant] position any longer due to her disability."⁹⁶

¶ 72 Regarding the vocational evidence, I found Black's testimony persuasive in her assessment of Thompson's vocational potential. Black noted that Thompson is impaired in her use of both a computer keyboard and a phone -- two of the mainstays of the clerical field in which Thompson has worked during the last twenty years. Given Thompson's multiple physical limitations as a result of her carpal tunnel syndrome and her repeated neck surgeries, combined with the fact that her voice is barely audible under the best of circumstances and can fatigue to the point that she is totally unable to make a sound, I find it hard to envision Thompson performing any of the jobs submitted.

¶ 73 For the foregoing reasons, I conclude that Thompson has been permanently totally disabled since she reached MMI for both her orthopedic conditions and her right vocal cord injury. She is entitled to retroactive PTD benefits back to when her TTD benefits were discontinued in May 2011, and ongoing PTD benefits.

Issue Three: Whether Respondent has acted unreasonably in its handling of the claim.

¶ 74 "Reasonableness is a question of fact."⁹⁷ Although upon reviewing the evidence in its entirety, I have concluded that Thompson does not have a reasonable prospect of physically performing regular employment, this case involved a complex factual situation implicating multiple, overlapping medical conditions, with contradicting medical opinions. State Fund discontinued Thompson's TTD benefits after it determined she was at MMI for both her orthopedic condition and her vocal cord injury, and that there were physician-approved alternative jobs. Whether Thompson could in fact perform the duties of either position formed "a legitimate factual dispute," which is a reasonable

⁹⁵ *EBI/Orion Group v. Blythe*, 281 Mont. 50, 57, 931 P.2d 38, 42 (1997).

⁹⁶ Ex. 27 at 1.

⁹⁷ *Marcott v. Louisiana Pacific Corp.*, 275 Mont. 197, 203, 911 P.2d 1129, 1133 (1996).

basis for an insurer to deny a claim.⁹⁸ I also note that State Fund immediately reinstated Thompson's TTD benefits under a reservation of rights when it received a copy of Dr. Byorth's opinion rescinding his approval of the librarian's assistant position. Although I have resolved the factual dispute of Thompson's benefit entitlement in her favor, I conclude that it was not unreasonable for State Fund to terminate Thompson's benefits under these factual circumstances.

Issue Four: Whether Petitioner is entitled to reasonable costs, penalties, and attorney fees in accordance with § 39-71-611, MCA, and/or § 39-71-2907, MCA.

¶ 75 Section 39-71-611, MCA, provides in pertinent part:

(1) The insurer shall pay reasonable costs and attorney fees as established by the workers' compensation court if:

(a) the insurer denies liability for a claim for compensation or terminates compensation benefits;

(b) the claim is later adjudged compensable by the workers' compensation court; and

(c) in the case of attorney fees, the workers' compensation court determines that the insurer's actions in denying liability or terminating benefits were unreasonable.

¶ 76 Section 39-71-2907, MCA, provides in pertinent part:

(1) The workers' compensation judge may increase by 20% the full amount of benefits due a claimant during the period of delay or refusal to pay, when:

(a) the insurer agrees to pay benefits but unreasonably delays or refuses to make the agreed-upon payments to the claimant; or

(b) prior or subsequent to the issuance of an order by the workers' compensation judge granting a claimant benefits, the insurer unreasonably delays or refuses to make the payments.

¶ 77 Having adjudged Thompson's claim compensable, she is entitled to her reasonable costs. Since I have not found State Fund's termination of Thompson's benefits to be unreasonable, she is not entitled to a penalty or attorney fees.

⁹⁸ *Marcott*, 275 Mont. at 204, 911 P.2d at 1134.

JUDGMENT

¶ 78 Petitioner is entitled to PTD benefits, retroactive to the date TTD benefits were discontinued in the spring of 2011, and ongoing.

¶ 79 Petitioner is not entitled to attorney fees or a penalty.

¶ 80 Petitioner is entitled to her reasonable costs.

¶ 81 Pursuant to ARM 24.5.348(2), this Judgment is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

DATED in Helena, Montana, this 30th day of August, 2013.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Norman L. Newhall
Charles G. Adams
Submitted: February 7, 2013