

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

**2010 MTWCC 33**

**WCC No. 2008-2058**

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**TIMOTHY WILSON**

**Petitioner**

**vs.**

**UNINSURED EMPLOYERS' FUND**

**Respondent**

**and**

**UNINSURED EMPLOYERS' FUND**

**Third-Party Petitioner**

**vs.**

**ELK MOUNTAIN MOTOR SPORTS, INC.**

**Third-Party Respondent.**

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

**Summary:** Petitioner suffered an industrial injury on January 8, 2004, while working for Third-Party Respondent. Third-Party Respondent was not enrolled in a workers' compensation insurance program at the time. Respondent/Third-Party Petitioner accepted the claim. Petitioner alleges he is permanently totally disabled and entitled to a penalty and attorney fees. Respondent/Third-Party Petitioner and Third-Party Respondent contend that Petitioner has not reached maximum medical healing and, therefore, is not permanently totally disabled. Petitioner, Respondent/Third-Party Petitioner and Third-Party Respondent ask this Court to determine: 1) whether Petitioner has reached maximum medical healing; 2) whether Petitioner is permanently totally disabled; 3) whether a preponderance of the objective medical findings supports entitlement to permanent total disability; 4) if Petitioner is not permanently totally disabled, whether he is temporarily totally disabled, permanently partially disabled, or

otherwise disabled; 5) whether Third-Party Respondent is obligated to indemnify Respondent/Third-Party Petitioner for all benefits paid or payable; 6) whether Petitioner is entitled to a penalty and attorney fees; and 7) whether Third-Party Respondent's contentions are improper in light of this Court's ruling granting Respondent/Third-Party Petitioner's motion for partial summary judgment.

**Held:** Petitioner has reached maximum medical healing within the meaning of § 39-71-116(18), MCA. Petitioner is permanently totally disabled within the meaning of § 39-71-116(24), MCA. A preponderance of objective medical findings supports Petitioner's entitlement to permanent total disability. Issue 4 is moot, and Issues 5 and 7 were resolved by this Court's Order Granting Respondent/Third-Party Petitioner's motion for partial summary judgment. Petitioner is not entitled to a penalty or attorney fees.

¶ 1 The trial in this matter was held on August 30, 2010, and August 31, 2010, at the Workers' Compensation Court in Helena, Montana. Petitioner Timothy Wilson (Wilson) was present for most of the trial and represented by Richard J. Pyfer. Leanora O. Coles represented Respondent/Third-Party Petitioner Uninsured Employers' Fund (UEF). David B. Gallik represented Third-Party Respondent Elk Mountain Motor Sports, Inc. (Elk Mountain).

¶ 2 **Exhibits:** Exhibits 1 through 5, 7 through 10, 12 through 29, 32, 34 through 37, 40 through 53, 55, 56, and 58 were admitted without objection. The Court overruled the UEF's and Elk Mountain's relevancy objections and admitted Exhibits 6 and 11. Wilson withdrew his relevancy, foundation, and hearsay objections to Exhibits 30 and 31, and his hearsay and foundation objections to Exhibits 38 and 39, and the Court admitted these exhibits. The Court sustained Elk Mountain's foundation objection to Exhibit 33, and did not admit the exhibit. The UEF withdrew its relevancy objection to Exhibit 54 and the Court admitted it into evidence. The Court overruled Wilson's relevancy objection to Exhibit 57 and admitted it into evidence. Wilson submitted Exhibit 59 at the time of trial, and the Court admitted it without objection. Elk Mountain submitted Exhibit 60 during trial, and the Court admitted it without objection. The UEF submitted Exhibit 61 at the time of trial, and the Court admitted it without objection.

¶ 3 **Witnesses and Depositions:** The depositions of Allen M. Weinert, Jr., M.D., taken on October 9, 2008, and August 5, 2010, were submitted to the Court. The Court admitted Dr. Weinert's depositions by agreement of the parties. Wilson; his wife, Konnie Wilson (Konnie); Philip H. Bornstein, Ph.D.; Bob McWilliams; Bernadette Rice; Micki Marion, MA, CRC; and Margot Luckman were sworn and testified at trial.

¶ 4 **Issues Presented:** The Pretrial Order states the following contested issues of law:<sup>1</sup>

Issue 1: Whether Wilson has reached maximum medical healing within the meaning of § 39-71-116(18), MCA.

Issue 2: Whether Wilson is permanently totally disabled within the meaning of § 39-71-116(24), MCA.

Issue 3: Whether there is a preponderance of the objective medical findings within the meaning of § 39-71-702(2), MCA, to support entitlement to permanent total disability.

Issue 4: If Wilson is not permanently totally disabled, whether he is temporarily totally disabled, permanently partially disabled, or otherwise disabled.

Issue 5: Whether Elk Mountain is obligated to indemnify the UEF for all benefits paid or payable by the UEF to Wilson pursuant to §§ 39-71-504 and 39-71-541, MCA.

Issue 6: Whether Wilson is entitled to a penalty and attorney fees.

Issue 7: Whether Elk Mountain's contentions – that Wilson's injuries did not arise from his employment with Elk Mountain and that Elk Mountain had coverage under the Montana's Workers' Compensation Act through the Montana State Fund on January 8, 2004 – are improper in light of this Court's ruling granting UEF's motion for partial summary judgment.

### **FINDINGS OF FACT**

¶ 5 I found the trial testimony of the witnesses to be credible.

¶ 6 Wilson was hired as an auto/ all-terrain vehicle (ATV) sales representative by Elk Mountain in February 2003.<sup>2</sup> Prior to working for Elk Mountain, Wilson owned TJ's Auto Body in Helena, Montana, which he operated for 22 years.<sup>3</sup>

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<sup>1</sup> Pretrial Order at 3-4.

<sup>2</sup> Ex. 23 at 17.

<sup>3</sup> Ex. 23 at 17; Ex. 31 at 2.

¶ 7 On January 8, 2004, while in the course and scope of his employment, Wilson was loading ATVs onto a semitrailer for shipment to another dealer.<sup>4</sup> Some of the ATVs did not have batteries in them and had to be manually loaded.<sup>5</sup> In attempting to pull an ATV sideways, Wilson grabbed the ATV by its loading rack.<sup>6</sup> As Wilson was pulling on the loading rack, it broke away from the ATV, causing Wilson to fall backwards and land on his back.<sup>7</sup>

¶ 8 At the time of Wilson's injury, Elk Mountain was not enrolled in a workers' compensation insurance program.<sup>8</sup>

¶ 9 Wilson continued to work for about two weeks after his injury.<sup>9</sup> On January 22, 2004, Wilson sought treatment for his injury through the VA Medical Center (VA) at Fort Harrison, Montana.<sup>10</sup> Wilson had been receiving treatment at the VA for psychological issues prior to his injury.<sup>11</sup> He had also been diagnosed with sleep apnea through the VA.<sup>12</sup> On January 28, 2004, orthopedic surgeon B. Max Iverson, M.D., diagnosed Wilson with a lumbar strain.<sup>13</sup> He treated Wilson with a Medrol dose pack, Flexeril, and Vicodin.<sup>14</sup> Wilson received epidural steroid injections from Dr. Iverson on March 26, 2004, and May 6, 2004, without therapeutic benefit.<sup>15</sup>

¶ 10 On February 5, 2004, the UEF received Wilson's First Report of Injury. On February 27, 2004, the UEF determined that Wilson had a compensable claim pursuant to the Montana Workers' Compensation Act (WCA).<sup>16</sup>

¶ 11 Following benign MRI findings, Dr. Iverson referred Wilson to Allen M. Weinert, Jr., M.D., who began treating Wilson on May 19, 2004.<sup>17</sup> According to Dr. Weinert,

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<sup>4</sup> Trial Test.

<sup>5</sup> Trial Test.

<sup>6</sup> Trial Test.

<sup>7</sup> Trial Test.

<sup>8</sup> See *Wilson v. Uninsured Employers' Fund*, 2010 MTWCC 5, Order Granting Uninsured Employers' Fund's Motion for Partial Summary Judgment.

<sup>9</sup> Trial Test.

<sup>10</sup> Weinert Dep. (October 9, 2008) 39:14-18.

<sup>11</sup> Trial Test.

<sup>12</sup> Weinert Dep. (August 5, 2010) 47:16-25 - 48:1; Ex. 50 at 1.

<sup>13</sup> Weinert Dep. (2008) 39:19-25; Ex. 25 at 25.

<sup>14</sup> Ex. 25 at 25.

<sup>15</sup> Ex. 25 at 25.

<sup>16</sup> *Wilson v. Uninsured Employers' Fund*, 2010 MTWCC 5, Statement of Uncontroverted Facts.

Wilson claimed that, at the time of the accident, he had landed on his low back and buttocks.<sup>18</sup> Wilson complained of low-back pain with radiation into the left buttock, occasional pain in the left thigh, and intermittent numbness and tingling in the left foot.<sup>19</sup> Dr. Weinert initially diagnosed Wilson with mechanical low-back pain and lumbar degenerative disk disease at L1-L2, L2-L3, and L3-L4.<sup>20</sup>

¶ 12 Dr. Weinert has managed Wilson's care, and attempted to control his low-back pain and chronic pain, for the last six years.<sup>21</sup> On August 16, 2004, Dr. Weinert determined that no further specific intervention, injections, or surgery would benefit Wilson.<sup>22</sup> Dr. Weinert indicated that Wilson was capable of performing sedentary work and recommended vocational rehabilitation.<sup>23</sup>

¶ 13 On September 13, 2004, Dr. Weinert determined that Wilson had reached maximum medical improvement (MMI) for his physical condition.<sup>24</sup> On December 6, 2004, Dr. Weinert reaffirmed Wilson's release to sedentary to light work, but noted that Wilson should "avoid prolonged sitting or repetitive bending, etc."<sup>25</sup>

¶ 14 Wilson testified that he would rate his lower back pain at 7 out of 10 on a good day, and at a 9 or 10 on bad days.<sup>26</sup> In addition to receiving numerous pain injections over the course of his treatment, Wilson has been prescribed a wide variety of medications to manage his daily physical pain and pain-related sleep issues.<sup>27</sup> His medications have included Vicodin (hydrocodone), OxyContin, morphine, Duragesic (fentanyl), Flexeril, metoclopramide, trazodone, Lyrica, Wellbutrin, Ultram (tramadol), the Flector patch, and the Lidoderm patch.<sup>28</sup> He has also been prescribed medications such as Wellbutrin for depression and lorazepam for anxiety and depression.<sup>29</sup>

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<sup>17</sup> Weinert Dep. (2008) 40:1-7; Ex. 25 at 25-29.

<sup>18</sup> Ex. 25 at 25.

<sup>19</sup> Ex. 25 at 25.

<sup>20</sup> Ex. 25 at 26.

<sup>21</sup> Weinert Dep. (2010) 52:6-17; Ex. 25.

<sup>22</sup> Ex. 29 at 6.

<sup>23</sup> Ex. 29 at 7.

<sup>24</sup> Ex. 25 at 15.

<sup>25</sup> Ex. 29 at 10.

<sup>26</sup> Trial Test.

<sup>27</sup> Weinert Dep. (2010) 52:18-21; Trial Test.

<sup>28</sup> Weinert Dep. (2010) 41:6-9; Exs. 7, 25, 29 and 59; Trial Test.

<sup>29</sup> Trial Test.

¶ 15 The UEF contracted with PACBLU Northwest to provide vocational rehabilitation services to Wilson.<sup>30</sup> PACBLU Northwest vocational case manager Micki Marion, MA, CRC, prepared a vocational rehabilitation plan for Wilson. Marion identified two potential jobs as suitable for Wilson; these were membership coordinator and auto sales representative. On June 1, 2006, Dr. Weinert approved these two positions.<sup>31</sup> In a December 27, 2007, letter to the UEF, Dr. Weinert reiterated his belief that Wilson could perform the sedentary occupation of membership coordinator. Dr. Weinert further stated that the occupation of auto sales with a modification for no snow removal also appears to be within the patient's physical capacities.<sup>32</sup> Wilson participated in a 12-week job placement services plan; however, because of Wilson's remote geographical location, lack of transportation, and ongoing pain issues, vocational rehabilitation placement efforts were unsuccessful.<sup>33</sup> On July 1, 2007, Wilson asked to close his Montana Vocational Rehabilitation Services case, administered by the Montana Department of Public Health and Human Services, due to his extreme pain.<sup>34</sup>

¶ 16 On July 1, 2008, Dana Headapohl, M.D., who specializes in occupational medicine, and Philip H. Bornstein, Ph.D., who specializes in clinical psychology, performed a panel independent medical evaluation (IME) of Wilson.<sup>35</sup> In the IME report, Dr. Headapohl diagnosed Wilson with chronic mechanical low-back pain, bilateral lower extremity pain, SI joint dysfunction, depression, and sleep disruption stemming from his industrial injury.<sup>36</sup> The IME panel concluded that Wilson would be able to carry out gainful employment on a reasonably continuous basis if adequate pain control could be achieved.<sup>37</sup>

¶ 17 In the IME report, Dr. Bornstein diagnosed Wilson with dysthymic disorder, a psychiatric condition which he describes as an affective disorder which lasts for a more extended period than major depression.<sup>38</sup> The panel determined that Wilson was "not capable of gainful employment at this point in time. He is severely depressed and in near-continuous pain."<sup>39</sup> Dr. Bornstein testified at trial that Wilson had not reached

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<sup>30</sup> Ex. 23 at 1-25; Trial Test.

<sup>31</sup> Ex. 23 at 20.

<sup>32</sup> Ex. 34.

<sup>33</sup> Ex. 23 at 2; Trial Test.

<sup>34</sup> Ex. 23 at 36; Trial Test.

<sup>35</sup> Ex. 38.

<sup>36</sup> Ex. 38 at 3.

<sup>37</sup> Ex. 38 at 4.

<sup>38</sup> Ex. 38 at 6-7; Trial Test.

<sup>39</sup> Ex. 38 at 7.

maximum medical healing with respect to his dysthymic disorder.<sup>40</sup> He noted that Wilson's prospects for regular employment were greatly diminished even if he fully healed from his dysthymic disorder, and Wilson's chronic pain would likely make regular employment "extremely difficult."<sup>41</sup>

¶ 18 At trial, Dr. Bornstein testified that Wilson's psychiatric condition of dysthymic disorder was proximately caused by the 2004 industrial injury.<sup>42</sup> Dr. Bornstein opined that Wilson's industrial injury possibly aggravated his preexisting psychiatric condition of depression.<sup>43</sup>

¶ 19 Upon Dr. Bornstein's recommendation, Dr. Weinert referred Wilson to clinical psychologist John A. Platt, Ph.D., for cognitive behavioral therapy.<sup>44</sup> Wilson met with Dr. Platt on August 25, 2009, and September 8, 2009.<sup>45</sup> Dr. Platt noted Wilson's clinical presentation of depression, as well as sleep disturbance, likely reflected a mood disorder and the impact of chronic pain.<sup>46</sup> According to Dr. Platt, Wilson "was in so much discomfort that he would have difficulty participating [in] a cognitive behavioral treatment regime targeting depression alone."<sup>47</sup> Dr. Platt noted that Wilson's difficulties were not feigned or exaggerated to avoid cooperating with treatment recommendations.<sup>48</sup> Because of Wilson's "near-constant and high levels of pain" and because depression and chronic pain management were outside Dr. Platt's training and usual clinical practice, he referred Wilson to James V. English, Psy.D., a neuropsychologist, whom Dr. Platt believed might be able to help Wilson with his chronic orthopedic difficulties, pain, and depression.<sup>49</sup>

¶ 20 Wilson met with Dr. English on March 29, 2010.<sup>50</sup> Dr. English noted that Wilson reported intolerance to lengthy sitting; that he had been tested previously; and that Wilson did not see the point of further evaluation or therapies.<sup>51</sup> Dr. English noted that

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<sup>40</sup> Trial Test.

<sup>41</sup> Ex. 38 at 7.

<sup>42</sup> Trial Test.

<sup>43</sup> Trial Test.

<sup>44</sup> Exs. 36 and 44.

<sup>45</sup> Ex. 44.

<sup>46</sup> Ex. 44 at 1.

<sup>47</sup> Ex. 44 at 1.

<sup>48</sup> Ex. 44 at 1.

<sup>49</sup> Ex. 44 at 1.

<sup>50</sup> Ex. 50.

<sup>51</sup> Ex. 50 at 4.

Wilson had been receiving ongoing treatment for depression at the VA.<sup>52</sup> Dr. English did not schedule Wilson for a follow-up appointment.<sup>53</sup>

¶ 21 Dr. Weinert, the physician who regularly treated Wilson and managed his care from the date of Wilson's industrial injury, testified twice via deposition.<sup>54</sup> Although Dr. Weinert believed at one time that Wilson could handle part-time sedentary work,<sup>55</sup> he testified at his August 2010 deposition that he no longer believed Wilson could handle the auto sales position.<sup>56</sup> Regarding the membership coordinator position, Dr. Weinert testified that as long as someone is "awake and can talk, they can probably do the job."<sup>57</sup> However, Dr. Weinert also testified that Wilson is "not going to have that sparkling voice on the phone that is going to draw you in."<sup>58</sup> Dr. Weinert testified that if he were an employer, Wilson "probably wouldn't be on my candidates' list to hire."<sup>59</sup> Dr. Weinert testified that Wilson would "have a difficult time obtaining competitive employment, given that there was another warm body to hire besides him."<sup>60</sup>

¶ 22 Dr. Weinert opined that further psychological testing, such as behavioral cognitive therapy, would be fruitless.<sup>61</sup> Dr. Weinert noted that Wilson cooperated and complied throughout the process, and he attended all the appointments the UEF asked him to attend.<sup>62</sup> Dr. Weinert concluded:

In reality, I don't think Tim Wilson is hireable. I mean, I can't 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. And I don't think he can perform significant functional activities, whether it's flipping burgers or making backpacks at Helena Industries or something like that, I don't think he can really do that.<sup>63</sup>

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<sup>52</sup> Ex. 50 at 1.

<sup>53</sup> Weinert Dep. (2010) 56: 4-11; Ex. 50.

<sup>54</sup> Weinert Dep. (2008); Weinert Dep. (2010); Ex. 25.

<sup>55</sup> Weinert Dep. (2008) 70: 11-12; Ex. 25 at 27.

<sup>56</sup> Weinert Dep. (2010) 53:18-20.

<sup>57</sup> Weinert Dep. (2010) 54:1-2.

<sup>58</sup> Weinert Dep. (2010) 54:13-14.

<sup>59</sup> Weinert Dep. (2008) 70:12-14.

<sup>60</sup> Weinert Dep. (2008) 70:14-16.

<sup>61</sup> Weinert Dep. (2010) 24:9-25.

<sup>62</sup> Weinert Dep. (2010) 50:19-23.

<sup>63</sup> Weinert Dep. (2010) 28:22 - 29:6.

¶ 23 Dr. Weinert testified that Wilson is more symptomatic at some times than others, but he believes Wilson always has chronic pain.<sup>64</sup> According to Dr. Weinert, Wilson “never walks normally, he never can bend normally. I’ve never seen him not depressed in his affect.”<sup>65</sup> Dr. Weinert expressed his conviction that Wilson is disabled based on his pain problems and psychological conditions.<sup>66</sup> Dr. Weinert testified:

[I]t’s been six years since his injury. He has not made any appreciable improvement or gain over six years. If you look at any literature on industrial back injury, after two years, you’re pretty well shot, I mean, you’re not going to get somebody back to work. He is done being employed. If there was something obvious that we had missed, there may be a chance. But we’ve done MRIs, we’ve done bone scans, we’ve done EMGs, there is nothing that is hidden here. I don’t see that there is any silver bullet or cure for this gentleman, unfortunately. I wish there was.<sup>67</sup>

¶ 24 Margot Luckman, a certified rehabilitation counselor who has been licensed for 25 years, testified at trial.<sup>68</sup> Luckman reviewed the PACBLU Northwest rehabilitation files; the State of Montana’s vocational rehabilitation’s files; the IME report; Dr. Platt’s, Dr. English’s, and Dr. Weinert’s treatment notes; and Dr. Weinert’s deposition testimony. Luckman testified that Wilson is not hireable.<sup>69</sup> Luckman opined that, while behavioral cognitive therapy might give Wilson some coping mechanisms that may possibly improve his chronic pain, it would not increase his physical functioning to where he could perform any better on a job.<sup>70</sup>

### **CONCLUSIONS OF LAW**

¶ 25 This case is governed by the 2003 version of the Montana Workers’ Compensation Act since that was the law in effect at the time of Wilson’s industrial accident.<sup>71</sup>

¶ 26 Wilson bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks<sup>72</sup>

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<sup>64</sup> Weinert Dep. (2010) 33:15 – 34:1.

<sup>65</sup> Weinert Dep. (2010) 33:21-23.

<sup>66</sup> Weinert Dep. (2010) 52:3-6.

<sup>67</sup> Weinert Dep. (2010) 52:6-17.

<sup>68</sup> Trial Test.

<sup>69</sup> Trial Test.

<sup>70</sup> Trial Test.

<sup>71</sup> *Buckman v. Montana Deaconness Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

**Issue 1: Whether Wilson has reached maximum medical healing within the meaning of § 39-71-116(18), MCA.**

¶ 27 Section 39-71-116(18), MCA, states:

"Medical stability", "maximum healing", or "maximum medical healing" means a point in the healing process when further material improvement would not be reasonably expected from primary medical treatment.

¶ 28 Dr. Weinert determined early on that Wilson had reached MMI for his physical condition.<sup>73</sup> Dr. Bornstein also testified at trial that Wilson is at MMI for his physical condition.<sup>74</sup> The UEF argues that even if Wilson is at MMI for his physical injuries arising from the 2004 industrial accident, he is not at MMI for his psychological injuries relating to the industrial accident. Dr. English's report does not state or make any recommendation that additional cognitive behavioral therapy would be beneficial for Wilson.<sup>75</sup> Dr. Weinert testified that he did not believe further psychological counseling or cognitive behavioral therapy would be beneficial for Wilson; characterizing further psychological workups as "fruitless."<sup>76</sup> In light of Dr. Weinert's testimony, I conclude that Wilson would not be reasonably expected to derive material improvement from further treatment of his psychological condition. I conclude that Wilson has reached maximum medical healing within the meaning of § 39-71-116(18).

**Issue 2: Whether Wilson is permanently totally disabled within the meaning of § 39-71-116(24), MCA.**

¶ 29 Permanent total disability is defined in § 39-71-116(24), 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. Regular employment means work on a recurring basis performed for remuneration in a trade, business, profession, or other occupation in this state. Lack of immediate job openings is not a factor to be considered in determining if a worker is permanently totally disabled.

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<sup>72</sup> *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).

<sup>73</sup> Ex. 25 at 15.

<sup>74</sup> Trial Test.

<sup>75</sup> Ex. 50.

<sup>76</sup> Weinert Dep. (2010) 24:5-25.

¶ 30 Wilson asserts that he does not have a reasonable prospect of physically performing regular employment.<sup>77</sup> The UEF argues that Wilson cannot be permanently totally disabled because Dr. Weinert approved the membership coordinator position and the auto sales representative position. The UEF also argues that Wilson cannot be permanently totally disabled because he cannot reach MMI until he has undergone additional evaluation to determine if a pain clinic or cognitive behavioral treatment program might improve his condition.<sup>78</sup>

¶ 31 UEF's argument that Wilson should receive additional medical evaluation to determine if a pain clinic or cognitive behavioral treatment program is appropriate lacks merit. Dr. Weinert determined that no specific intervention, injections, or surgery would further benefit Wilson.<sup>79</sup> He referenced the battery of EMGs, bone scans, and MRIs to which Wilson was subjected.<sup>80</sup> Wilson has already undergone extensive psychological and psychiatric treatment. Dr. Weinert testified that further psychological testing – including cognitive behavioral therapy – would be fruitless.<sup>81</sup>

¶ 32 Based on the deposition and trial testimony, a complete review of the proffered exhibits, and the opportunity to observe Wilson at trial, I conclude that Wilson does not have a reasonable prospect of physically performing regular employment. Dr. Weinert's recent August 2010 deposition testimony leaves little doubt that Wilson is neither hireable nor physically capable of performing regular employment. Dr. Weinert's deposition testimony, Luckman's trial testimony, the IME report of Drs. Bornstein and Headapohl, and my observation of Wilson compels me to conclude that Wilson is permanently totally disabled within the meaning of § 39-71-116(24), MCA.

**Issue 3: Whether there is a preponderance of the objective medical findings within the meaning of § 39-71-702(2), MCA, to support entitlement to permanent total disability.**

¶ 33 Section 39-71-702(2), MCA, provides: "The determination of permanent total disability must be supported by a preponderance of objective medical findings." Section 39-71-116(19), MCA, defines objective medical findings as "medical evidence, including range of motion, atrophy, muscle strength, muscle spasm, or other diagnostic evidence, substantiated by clinical findings."

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<sup>77</sup> Trial Test.

<sup>78</sup> Uninsured Employers' Fund[s] Proposed Findings of Fact and Conclusions of Law and Judgment at 7-8.

<sup>79</sup> Ex. 29 at 6.

<sup>80</sup> Weinert Dep. (2010) 52:6-17.

<sup>81</sup> Weinert Dep. (2010) 24:9-25.

¶ 34 Dr. Weinert testified that he observed the following objective medical findings regarding Wilson's condition: tenderness over the SI joint, abnormal posture, and limited range of motion.<sup>82</sup> Dr. Weinert further testified that Wilson's abnormal posture and limited range of motion has been consistent throughout his treatment of Wilson and he attributes these findings to Wilson's chronic low back pain.<sup>83</sup> I conclude that the preponderance of the objective medical findings within the meaning of § 39-71-702(2), MCA, supports Wilson's PTD entitlement.

**Issue 4: If Wilson is not permanently totally disabled, whether he is temporarily totally disabled, permanently partially disabled, or otherwise disabled.**

¶ 35 In light of my resolution of Issue 3, Issue 4 is moot.

**Issue 5: Whether Elk Mountain is obligated to indemnify the UEF for all benefits paid or payable by the UEF to Wilson pursuant to §§ 39-71-504 and 39-71-541, MCA.**

¶ 36 I resolved this issue in my Order Granting UEF's Motion for Partial Summary Judgment.<sup>84</sup> That Order is dispositive of this issue and will not be revisited here.

**Issue 6: Whether Wilson is entitled to a penalty and attorney fees.**

¶ 37 Wilson argues that he is entitled to a penalty and attorney fees based on the UEF's failure to recognize that he is permanently totally disabled.<sup>85</sup> The UEF argues that this Court has previously held that the UEF is not an "insurer" for purposes of the attorney fee and penalty provisions of the Workers' Compensation Act.<sup>86</sup> Wilson fails to address the UEF's legal argument and offers no reason for revisiting the cases cited by the UEF. Since Wilson provides this Court with no authority for reconsidering the prevailing case law on this issue, his request for a penalty and attorney fees is denied.

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<sup>82</sup> Weinert Dep. (2010) 44:14-17.

<sup>83</sup> Weinert Dep. (2010) 12:15 – 14:2.

<sup>84</sup> *Wilson v. Uninsured Employers' Fund*, 2010 MTWCC 5.

<sup>85</sup> Pretrial Order at 2.

<sup>86</sup> Uninsured Employers' Fund's Proposed Findings of Fact and Conclusions of Law and Judgment at 8, citing *Pekus v. Uninsured Employers' Fund*, 2003 MTWCC 33; *Thayer v. Uninsured Employers' Fund*, 297 Mont. 179, 991 P.2d 447 (1999).

**Issue 7: Whether Elk Mountain's contentions – that Wilson's injuries did not arise from his employment with Elk Mountain and that Elk Mountain had coverage under the Montana's Workers' Compensation Act through the Montana State Fund on January 8, 2004 – are improper in light of this Court's ruling granting UEF's motion for partial summary judgment.**

¶ 38 The UEF and Wilson argue that the issues of whether Wilson's injuries did not arise from his employment with Elk Mountain and whether Elk Mountain had coverage under the Montana's Workers' Compensation Act through the Montana State Fund on January 8, 2004 were resolved in my Order granting the UEF's motion for partial summary judgment.<sup>87</sup> I agree. That Order is dispositive of these issues.

### **JUDGMENT**

¶ 39 Wilson has reached maximum medical healing within the meaning of § 39-71-116(18), MCA.

¶ 40 Wilson is permanently totally disabled within the meaning of § 39-71-116(24), MCA.

¶ 41 There is a preponderance of objective medical findings within the meaning of § 39-71-702(2), MCA, to support Wilson's entitlement to permanent total disability.

¶ 42 Issue 4 is moot.

¶ 43 Issues 5 and 7 were resolved by this Court's Order Granting Uninsured Employers' Fund's Motion for Partial Summary Judgment.

¶ 44 Wilson is not entitled to a penalty and attorney fees.

¶ 45 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.

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<sup>87</sup> *Wilson v. Uninsured Employers' Fund*, 2010 MTWCC 5.

DATED in Helena, Montana, this 9<sup>th</sup> day of December, 2010.

(SEAL)

/s/ JAMES JEREMIAH SHEA  
JUDGE

c: Richard J. Pyfer  
Leanora O. Coles  
David B. Gallik  
Submitted: August 31, 2010