IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2002 MTWCC 56

WCC No. 2002-0534

MARK EDMUNDSON

Petitioner

vs.

LIBERTY MUTUAL FIRE INSURANCE COMPANY

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: 56-year old claimant petitioned for permanent total disability benefits. He suffers from multiple medical conditions but was released to return to work for several jobs, however, he claims that his pain and need to lie down during the day preclude him from regular work.

Held: Claimant's testimony about the extent of his pain and his need to lie down every day to manage his pain was not credible especially in light of his pattern of arising early and spending what amounts to almost a full work day visiting, smoking, and drinking in local smoke shops and bars. His deposition answers indicate he is unmotivated rather than unable to work.

Topics:

> **Benefits: Permanent Total Benefits: Generally.** 56-year old claimant with shoulder and neck problems, ongoing problems with diabetes, high blood pressure, high cholesterol, and dysthymia, was not credible in his testimony about the extent of his pain and his need to lie down every day to manage his pain. When claimant's claim of a need to lie down is discounted, the medical and vocational testimony supports the conclusion claimant has a reasonable prospect of physically performing regular employment.

¶1 The trial in this matter was held on August 29, 2002, in Kalispell, Montana. Petitioner, Mark Edmundson (claimant), was present and represented by Mr. Garry D. Seaman. Respondent, Liberty Mutual Fire Insurance Company (Liberty), was represented by Mr. Larry W. Jones and Ms. Carrie Garber.

¶2 Exhibits: Exhibits 1 through 15 were admitted without objection. Exhibit 16, a report prepared by respondent's expert after the close of discovery, was refused.

¶3 Witnesses and Deposition: Claimant, Mark Schwager, and Kathy Kleinkopf testified at trial. The deposition of claimant was received.

¶4 Issues presented: The issues stated in the Pretrial Order are:

- Whether Petitioner is permanently totally disabled and entitled to benefits pursuant to §39-71-702, M.C.A.
- Whether Petitioner is entitled to an award of costs and attorney fees under §39-71-611, M.C.A., and 39-71-612, M.C.A.

(Pretrial Order at 2.)

¶5 Having considered the Pretrial Order, the testimony presented at trial, the demeanor and credibility of the witnesses, the deposition and exhibits, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

I. Claimant and his Work History

¶6 Claimant is 56 years old. He has a GED and is a military veteran.

¶7 Claimant worked as a logger for approximately nine years, followed by twenty years work as a heavy equipment operator in road construction and hazardous waste. During the late 1970s or early 1980s, he also managed a bar at the same time he was working road construction. As a bar manager, he tended bar, made change, and hired and fired employees. He did not do the bookkeeping.

¶8 Approximately twelve years ago, claimant decided to become a respiratory therapist and attended college for three quarters of a year, taking and passing courses in English, history, and algebra. He obtained good grades but quit school after deciding not to pursue the new career. (Edmundson Dep. at 31.)

¶9 Claimant had a training certificate in managing hazardous waste, which evidently has lapsed. (Ex. 13 at 34.)

II. Industrial Accident

¶10 On August 18, 1999, claimant began working for Caza Drilling, Incorporated, as a rig worker. (Ex. 1 at 1.) On October 27, 1999, while working in Sweetwater, Wyoming, he was hit by pipe tongs and knocked to the ground. (*Id*.) He suffered a cut to the back of his head, dislocated his jaw, and hurt his neck and shoulders.

¶11 At the time of the accident, claimant's employer was insured by Liberty, which accepted liability for the injury.

III. Medical Treatment for Injuries

¶12 Claimant was initially treated at a Veterans Administration Medical Center. He first mentioned his injury on November 10, 1999, when seeking treatment for an unrelated condition. On November 30, 1999, he was seen by a VA orthopedic surgeon. (Ex. 10 at 4.) The doctor suspected a left shoulder rotator cuff tear. (*Id*.)

¶13 On January 10, 2000, claimant began treating with Dr. Stephen G. Powell, an orthopedic surgeon practicing in Missoula, Montana. (Ex. 5 at 1.) Following imaging of both shoulders, Dr. Powell noted rotator cuff tears on both the right and the left. (*Id*.) On January 25, 2000, Dr. Powell performed a "[r]epair of rotator cuff tear, left shoulder, and excision of distal clavicle, *left* shoulder." (*Id*. at 2.) On April 5, 2000, Dr. Powell surgically repaired a rotator cuff tear on the *right* shoulder and investigated the "possible rupture of previous rotator cuff repair left shoulder." (*Id*. at 8.) On the left shoulder, diagnostic arthroscopy showed "a rupture of the rotator cuff tear which had been previously repaired." (*Id*.)

¶14 On May 25, 2000, claimant began treating with Dr. John W. Hilleboe, who is also an orthopedic surgeon. (Ex. 7 at 1.) Dr. Hilleboe recommended a physical therapy program for claimant's right shoulder, to be followed by consideration of further treatment. (*Id*.)

¶15 Claimant's physical therapy over the next month and a half was sporadic (Ex. 9 at 6) and punctuated by his involvement in "a scuffle with a buddy" in which his right arm was pulled. (*Id*. at 5.) On June 19, 2000, claimant told the therapist he believed he may have re-injured the right shoulder in that incident. (*Id*. at 6.)

¶16 On July 17, 2000, Dr. Hilleboe performed a "[s]urgical Mumford-type procedure (distal clavicle excision) with removal of spur, division of acromioclavicular ligament, and repair of rotator cuff tear" on the *left* shoulder. (Ex. 6 at 4.)

¶17 Following this last surgery, claimant underwent two courses of physical therapy (Ex. 7 at 7-8; Ex. 9 at 10) but the therapy was halted on October 12, 2000, when claimant reported to Dr. Hilleboe that his shoulder was being overworked in therapy. (Ex. 7 at 9.) In his office note of October 12, 2000, Dr. Hilleboe estimated that claimant would be at maximum medical improvement (MMI) in four weeks and recorded, "He still has some difficulty associated with his R shoulder and the x-rays do show AC joint degenerative change on the R side but he's at the point he doesn't want to do anything else, nor have any other operative procedures performed." (*Id*.)

¶18 On November 9, 2000, claimant returned to Dr. Hilleboe for what the doctor characterized as "basically a final visit." (*Id*. at 10.) At that time, claimant told Dr. Hilleboe he "has episodes where he's quite good and then he has episodes where he has sharp pain

in his shoulder. He says it really hurts bad and then is unable to function with his shoulder." (*Id*.) Dr. Hilleboe found some limitation in motion and crepitus with motion of the left shoulder and rated claimant's impairment at 8% of the whole person. (*Id*.) Later, on July 18, 2001, Dr. Hilleboe rated claimant's impairment for the right shoulder at 8%. (*Id*. at 13.) At that time, claimant told the doctor his left shoulder "continues to bother him and he thinks that he reinjured it doing PT." (*Id*.)

¶19 On March 15, 2001, claimant returned to Dr. Hilleboe complaining that "his entire L shoulder girdle area is getting worse and more painful." (*Id*. at 11.) He also noted pain "up along the lateral posterior aspect of his neck along the levator scapulae supraspinatus area of the shoulder, all the way down his arm." (*Id*.) Claimant said "he can't sleep, he can't get around, he can't turn his head without marked discomfort and he just can't get away from the pain." (*Id*.) Dr. Hilleboe found no neurologic abnormality and fairly good shoulder range of motion. He suspected cervical degenerative changes, perhaps exacerbated by the 1999 injury. (*Id*.) X-rays of the neck showed "very significant degenerative arthritis of C5-6 and C6-7 with foraminal encroachment at both levels with spur formation." (*Id*.) Dr. Hilleboe referred claimant to "one of the neurosurgical people or Dr. Wilson to evaluate his neck." (*Id*.)

¶20 On April 11, 2001, claimant was first examined by Dr. Ned Wilson, another orthopedic surgeon. Dr. Wilson noted his initial examination of claimant was "remarkable for a gentleman who is in no significant acute distress." (Ex. 3 at 1.) He found tenderness along the pericervical region and, through plain x-rays, degenerative changes at C4-C7. Dr. Wilson assessed degenerative spondylosis of the cervical spine "with apparent precipitation of symptoms secondary to injury that occurred Oct. of 1999." (*Id*.) He recommended a "conservative course of treatment including cervical traction and modalities, as well as trial of Cox-2 inhibitors." (*Id*.)

¶21 On June 29, 2001, claimant returned to Dr. Wilson, who noted there was apparently "some sort of confusion" with regard to physical therapy in that claimant "did get started with this but was only with them for a couple of weeks." (*Id*. at 3.) Following claimant's report of a symptom flareup, a CT myelogram demonstrated "multi-level degenerative spondylosis most marked at 4-5, 5-6, and 6-7 with left-sided foraminal stenosis at 4-5 and 6-7 and bilateral foraminal stenosis at 5-6." (Ex. 3 at 3.) Dr. Wilson recommended resumption of physical therapy. He opined that surgery was contraindicated due to the multi-level spondylosis, noting claimant, in any event, was "not interested in any more surgery at this point." (*Id*.)

¶22 Claimant returned to Dr. Wilson for follow-up on August 29, 2001. (Ex. 3 at 4.) He reported "excellent response to his cervical traction." (*Id*.)

¶23 Meanwhile, on August 8, 2001, claimant saw Dr. Hilleboe and told him his "shoulder is still just hurting him like mad. . . . He said that after the PT thing where he reinjured his

shoulder it's become a problem." (Ex. 7 at 14.) Based on an arthrogram, Dr. Hilleboe believed claimant had "a reoccurrence, or at least a hole, in his rotator cuff." (*Id*.) Given the two prior repairs of that rotator cuff, Dr. Hilleboe recommended "evaluation by Dr. Matsen at the University of WA. . . as to whether a third attempt at repair of this rotator cuff could be accomplished." (*Id*.)

¶24 On October 5, 2001, claimant was evaluated by Dr. Frederick A. Matsen at the University of Washington Medical Center in Seattle. (Ex. 11.) On physical examination, Dr. Matsen noted that claimant had "good strength of internal and external" shoulder rotation and full range of neck motion. (*Id.* at 4.) Neurological findings were normal. Imaging showed evidence of postoperative changes and showed a "leak." (*Id*.) Dr. Matsen discussed the pros and cons of "revision surgery" of the shoulders but told claimant "that we thought that a posterior capsular stretching program would be helpful to him to manage what appears to be some posterior capsular tightness." (*Id*.) Dr. Matsen recorded that claimant "would like to try the therapy route and will let us know if there are further questions or problems with respect to his shoulder." (*Id*.)

IV. Other Medical Conditions

¶25 Claimant suffers from type II diabetes, hypertension, dysthemia (mood disorder), and hyperlipidemia (the presence of excess fat or lipids in the blood). He is a heavy smoker and drinker. (*See generally* Ex. 10; Trial Test.) VA medical records for 2000 and 2001 indicate that claimant is not compliant with medical advice for treating his conditions. (*Id*.) He also has had prior knee surgeries. (Ex. 2 at 15-16.)

V. Release to Return to Work

¶26 Initially, it is undisputed that claimant cannot return to his time-of-injury job. As early as August 31, 2000, Dr. Hilleboe wrote:

> As far as going back to work as a rig worker for Castlio Drilling, or for any other drilling firm for that matter, I think that's probably out of the question. He can't do lifting, pushing or shoving with his elbows higher than mid chest. For any reason, I think this is a permanent impairment.

(Ex. 7 at 8.) On the other hand, the doctor indicated that claimant was capable of working and should be retrained. On November 9, 2000, he wrote:

> He will not be able to return to his previous occupation working in labor jobs where he was working on a drilling rig or doing construction. Therefore, I think he needs to move to a sedentary type of occupation and, because of his education level, he would probably have to be retrained to do that. . . . I think he just needs to decide on what he wants to do. **He's 50+ yr.'s of age and it's difficult to talk these individuals into retraining but I still feel he has at least 10 yrs. of work capability.**

(*Id*. at 10, emphasis added.)

¶27 Dr. Wilson, who was treating claimant for his neck problems, was asked whether claimant was capable of working. He declined to provide an opinion; instead he referred claimant to Dr. Bruce R. Belleville, a specialist in occupational medicine to address claimant's ability to work. (Ex. 3 at 4-5.)

¶28 Dr. Belleville evaluated claimant on November 5, 2001. At that time, claimant's principal complaints were:

> **Left**-sided neck pain especially toward the back of the neck. **Left** arm pain which is "always there." The neck pain is rated as "5" on a 0 to 10 pain scale. **Left** arm sometimes has numbness and tingling, especially in the **left** thumb and the **left** index, although this is only "once or twice a day."

(Ex. 2 at 11.) Claimant told the doctor that aggravating factors were: "Standing too long. Walking too long." (*Id*. at 12.) He said reclining helped. (*Id*.)

¶29 Dr. Belleville reviewed diagnostic studies and examined claimant. His impressions, which were consistent with those of other physicians, were (1) moderate to severe degenerative changes in the cervical spine, with facet changes and posterior osteophyte formation at the C6-7 level that could be considered severe on the left; (2) right shoulder mild to moderate AC joint changes; and (3) a recurrent rotator cuff tear of the left shoulder. (*Id*. at 14-15.)

¶30 Dr. Belleville noted claimant's past knee surgeries, the most recent in 1989, and recent bilateral shoulder surgeries. He considered claimant at MMI several months prior to the examination. He recommended continued home exercise and cervical traction, as well as continuation of Naproxen for pain. (*Id*. at 15-16.)

¶31 With respect to his industrial injuries, Dr. Belleville opined that claimant had been at MMI for several months. He further opined that claimant is able to work:

> I would not agree that Mr. Edmundson is fully and completely disabled, but apparently this discussion has been made by other parties, specifically the Social Security Administration. There are many sedentary jobs that he could do. In fact, Dr. Hilleboe had opined within the last couple of years that a sedentary job would be entirely reasonable but also noted that Mr. Edmundson did not feel that his age and his level of educational experience would allow him to be easily retrained.

(*Id*. at 16.)

¶32 On December 11, 2001, Dr. Belleville met with a rehabilitation provider and reviewed job descriptions for jobs the claimant might do. He concluded:

> I would approve without restrictions the jobs of ***flagger, casino cashier, and motel desk clerk***. The job of ***pizza delivery driver*** has a bit more pulling required, apparently zero to five percent of the time being up to fifty pounds. I would stipulate that Mark Edmundson would be released to ***pizza delivery driver*** if pulling could be limited to the twenty to twenty-five pounds upper limit and not the fifty pounds upper limit. I realize that even this amount of pulling is a rare event, at no more than five percent of the work shift. Otherwise I believe he could also do the ***pizza delivery driver*** position.

(Ex. 2 at 18, emphasis in original.)

VI. Alleged Disability

¶33 Claimant has presented no testimony contradicting Dr. Belleville's medical opinion that he is medically able to work. Rather, he alleges he is unable to perform regular work because he has severe pain and has to lie down during the day. While I am convinced that he has some pain during the day, I did not find claimant to be wholly credible and am unpersuaded that his pain is as severe as he claims or that it precludes him from working in the jobs approved by Dr. Belleville.

¶34 Initially, his claim of disability is refuted in large part by his own description of his daily activities. Claimant testified he typically arises at 6:00 or 6:30 a.m. He makes coffee, then sits on the porch drinking coffee and smoking cigarettes. He takes his medications, showers, then goes into town around 8:00 or 8:30 a.m. He goes into the smoke shop, where he buys a paper, smokes, drinks coffee, and reads the paper. Around 9:00 a.m., he goes up the street to a bar owned by a friend. He talks with his friend and drinks coffee. He then goes down the street to another bar owned by another friend, where he visits until about 1:00 or 2:00 p.m., when he goes home. During his deposition, he testified that he usually drinks beer or vodka and orange juice at the bars. (Edmundson Dep. at 21.) At trial he claimed he spent only five or six hours in town each day; at deposition he said it was six to seven hours a day. (*Id*. at 19.)

¶35 Claimant testified that when he arrives home, he puts his neck in traction for twenty minutes, then lies down, usually for a couple of hours. When he wakes up, he reads or watches television. He usually cooks dinner for himself. He does his own laundry. He goes to sleep by 9:00 or 10:00 p.m. He testified he sleeps a few hours at a time, typically waking up to go to the bathroom, which he attributes to diabetes, but said that pain also interferes with his sleeping.

¶36 Claimant drives and recently drove his sister from Montana all the way to Alaska, a trip of 2,800 miles each way. He testified he can drive for 150 miles without stopping.

¶37 Claimant testified he can lift around 20 to 25 pounds but has trouble bending, stooping, and climbing. He testified he can run "for awhile" but cannot sit for long without moving around.

¶38 Claimant suffered work injuries during the 1970s and 1980s involving his knees. His right knee has a pin in it. He testified the knee bothers him and affects his ability to stand and to walk, and that after five minutes standing on flat surfaces he is uncomfortable. However, he worked years with his condition and I am unpersuaded it is debilitating.

¶39 Claimant also attempted to portray his dysthymia as limiting his ability to work. He testified he suffers from a bipolar condition, however, the medical records fail to support his claim. In any event he portrayed himself as angry and depressed and testified he becomes angry if anyone is rude to him or "gets in my face," although he tries to avoid arguments. As with his knees problems, claimant has suffered from dysthymia, or bipolar disorder if that indeed is what it is, for years (15 according to claimant), yet has been able to successfully work over those years.

¶40 I am persuaded that claimant is unmotivated rather than unable to work. At deposition, he testified he was opposed to returning to work. (Edmundson Dep. at 32.) He stated: "Because I know I can't do it. It's just the idea that I know I can't hold a job down." (*Id.*) When asked if he would be willing to attempt a job if a vocational provider could come up with something he was interested in, claimant testified, "No." (*Id.*) Claimant also testified he did not believe he could go back to school now because he has trouble concentrating.

¶41 But at trial, his testimony flipped. He said he would probably enjoy going back to school and would be happy to retrain and get back to work. When asked about his contradictory deposition testimony, claimant stated he had not understood the question and would in fact rather be working. His explanation was implausible and unbelievable.

VII. Vocational Evidence

¶42 During December 2001, Rod Wallette, a certified rehabilitation consultant, developed job analyses which were then presented to Dr. Belleville. (Ex. 14 at 2.) As previously noted, Dr. Belleville medically approved jobs of flagger, casino cashier and motel desk clerk, and conditionally approved a pizza delivery driver job if claimant's lifting was limited to twenty to twenty-five pounds. Based on contact with three employers, Wallette noted there were ten full-time and four part-time motel desk clerk positions, with ten new hires in a year. (*Id.*) For the casino cashier position, he contacted three employers, finding seven full-time and eight part-time jobs, with eight new hires a year. (*Id.* at 2.) For the flagger position, he noted the job is seasonal, with hiring typically occurring out of a union hiring hall and the number of hires per year varying from fifty to one hundred. (*Id.*)

¶43 Kathy Kleinkopf (Kleinkopf), a certified rehabilitation consultant hired by the insurer, reviewed claimant's records and conducted labor market research. She testified that

claimant has transferable skills and is employable. In assessing his skills, she relied on information about claimant's past jobs, including the construction jobs, work as a bar manager, and self-employment buying and selling cars which claimant told a previous vocational consultant he did for a time.

¶44 Kleinkopf contacted employers in Polson, Bigfork, Kalispell, and Missoula regarding positions as casino cashier or hotel desk clerk. She contacted ten employers relating to casino cashier jobs. Seven indicated no experience was required for the job. The total number of casino cashiers working for those employers was forty seven and a half. There were twenty-two openings during the previous year, and an additional five openings were anticipated. Kleinkopf contacted eight employers of hotel desk clerks. Six required no experience for the job. Those six employers had thirty desk clerk positions, twenty-one total openings in the last year, and one opening anticipated. Kleinkopf testified these positions did not require prior computer experience and were all "absolutely entry level" positions. She confirmed that employers told her they had hired people without any computer experience. Based on this survey, Kleinkopf believed there was a viable labor market for claimant.

¶45 Kleinkopf also testified as to the availability of cashier and hotel desk clerk jobs statewide. Suffice it to say that there are ample openings.

¶46 Kleinkopf testified that hotel desk clerk and casino cashier jobs typically require occasional to frequent sitting, standing, and walking, but with the opportunity to rotate those activities. On the other hand, she testified she had never found any employer who would hire someone required to nap or lie down for an extended time during a shift.

¶47 Mark Schwager (Schwager), a certified rehabilitation consultant hired by claimant, reviewed medical records, interviewed claimant, and rendered an opinion regarding claimant's "residual skills and employability." (Ex. 12 at 1.) Schwager did not consider claimant's past bartending work.

¶48 Schwager opined claimant does not have the skills to perform cashier or hotel clerk jobs. He noted those jobs require three to six months experience or training, with most jobs in those categories requiring computer use. I found Kleinkopf's analysis more persuasive and compelling, especially in light of the claimant's prior experience as a bartender and his successful completion of some college courses and Kleinkopf's contact with employers who have hired workers without computer or other experience. I therefore find that claimant is in fact qualified and competitive for both casino cashier and hotel desk clerk.

¶49 Schwager noted that considering "his other physical and mental conditions, including his dysthymic disorder and depressed mood and affect, he [claimant] may be precluded from all employment due to a combination of all his physical and mental disabilities." (*Id.* at 4.) Schwager considered claimant's "bipolar" condition when reaching this conclusion, but

did not give weight to diabetes and high blood pressure. Schwager believed the "bipolar" condition would impact claimant's ability to perform work involving public contact, such as cashier and hotel clerk. I am unpersuaded. Claimant worked for 15 years after being diagnosed, according to him, as bipolar. Moreover, there is no medical support for the diagnosis and no medical testimony or reports indicating that claimant's dysthymic disorder, which is treated with medication, precludes him from interacting with the public.

¶50 While Schwager's written report states that claimant "may" be precluded from all employment, he opined at trial that claimant **was** precluded from all employment. He based this opinion primarily on claimant's statement he has to lie down during the day. Schwager testified that if claimant did not have to lie down during the day, there would be unskilled sedentary work he could perform. Schwager acknowledged that when he interviewed claimant on January 3, 2001, claimant did not convey that he had to lie down during the day, though Schwager did ask him a series of questions concerning his physical abilities.

¶51 Schwager also interviewed Dr. Belleville about his approval of "light" jobs for claimant when he had indicated sedentary work was appropriate for claimant. According to Schwager, Dr. Belleville told him he believed claimant could lift up to 15 pounds, which the doctor considered sedentary work. Schwager testified Dr. Belleville told him he did **not** consider claimant's alleged need to lie when approving job analyses.

¶52 On August 19, 2002, Dr. Belleville met with Schwager. The doctor made an addendum to his chart stating:

> The questions concern whether I considered Mark Edmundson's pain behavior in my decision to approve him for three (3) positions. Please see my note of December 11, 2001, about approval of ***flagger, casino cashier,*** and ***motel desk clerk***. Generally, the overall pain behavior and pain symptoms were considered in the evaluation. Only if there were a safety-sensitive position wherein narcotic or muscle relaxant use would be issues would I have prohibited the patient on the basis of medications for pain. Another issue was whether I considered Mark Edmundson's need to lie down for a couple of hours in the middle of each day in my assessment of job assignments.
>
> Mark Edmundson did <u>not</u> specifically report to this examiner that he needed to lie down for a couple of hours each day. He said that lying down on a bed or recliner was comforting to him when he was having a lot of pain but he did <u>not</u> extend that to suggest that he needed to lie down in the middle of each day as a portion of his pain treatment.

(Ex. 15, emphasis in original.)

¶53 I am unpersuaded that claimant needs to lie down as he claims or that his pain precludes him from regular employment. I note that he is able to rise in the morning and spend, by his own report, six to seven hours in town frequenting bars and coffee houses, drinking, smoking, and visiting. He was also able to drive 2,800 miles to Alaska and then back again. I also note that claimant did not report any need to lie down to Dr. Belleville or other medical providers. I find claimant's assertion that he cannot work on account of pain and because he needs to lie down **not** credible.

¶54 Schwager's opinions that claimant is not employable is based on his acceptance of claimant's assertions concerning a bipolar disorder and having to lie down. Since his factual predicates are untrue, I find his opinions unpersuasive. Moreover, I found Kleinkopf's opinions to be better reasoned and supported.

CONCLUSIONS OF LAW

¶55 This case is governed by the 1999 Workers' Compensation Act since that was the law in effect at the time of claimant's October 27, 1999, injury. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶56 Under section 39-71-702, MCA (1999), "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, MCA (1999), in turn, defines "permanent total disability" as: 18, 321, 730 P.2d 380, 382 (1986).

> 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.

¶57 Claimant bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks. *Ricks v. Teslow Consolidated*, 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wicken Bros. Construction Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

¶58 Claimant failed to persuade me that he is incapable of performing regular work. To the contrary, the evidence presented in this case demonstrates he is capable of and qualified to work on a regular basis as a casino cashier and a hotel desk clerk and that those jobs are regularly available. He has failed to prove his entitlement to benefits.

JUDGMENT

¶59 Claimant is **not** entitled to permanent total disability benefits.

¶60 Having failed to prove his claim for benefits, claimant isnot entitled to attorney fees or costs.

¶61 This JUDGMENT is certified as final for purposes of appeal.

¶62 Any party to this dispute may have 20 days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

Dated in Helena, Montana, this 12th day of November, 2002.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Garry D. Seaman
Mr. Larry W. Jones -- Ms. Carrie Garber
Submitted: August 29, 2002