

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1999 MTWCC 49

WCC No. 9902-8158

LOUIS NIELSON

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

TNT WELL SERVICING, INCORPORATED

Employer.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT

Summary: 49-year old hot oiler filed claims for left hand and arm and right arm numbness and pain, which State Fund accepted. Claimant alleged permanent total disability, claiming debilitating pain preventing any employment.

Held: Claimant not PTD where WCC did not credit claimant's testimony and medical records contain numerous indications that subjective pain reports were not supported by objective findings or contradicted by things such as observations of his capabilities and callouses on his hands.

Topics:

Benefits: Permanent Total Benefits: Generally. 49-year old hot oiler with accepted claims relating to hand and arm pain not PTD where WCC did not credit claimant's testimony and medical records contain numerous indications that subjective pain reports were not supported by objective findings or contradicted by things such as observations of his capabilities and callouses on his hands.

Disability: Permanent Total. 49-year old hot oiler with accepted claims relating to hand and arm pain not PTD where WCC did not credit claimant's testimony and medical records contain numerous indications that subjective pain reports were not supported by objective findings or contradicted by things such as observations of his capabilities and callouses on his hands.

Evidence: Credibility. 49-year old hot oiler with accepted claims relating to hand and arm pain not PTD where WCC did not credit claimant's testimony and medical records contain numerous indications that subjective pain reports were not supported by objective findings or contradicted by things such as observations of his capabilities and callouses on his hands.

Medical Evidence: Non-organic Findings. 49-year old hot oiler with accepted claims relating to hand and arm pain not PTD where WCC did not credit claimant's testimony and medical records contain numerous indications that subjective pain reports were not supported by objective findings or contradicted by things such as observations of his capabilities and callouses on his hands.

Pain. 49-year old hot oiler with accepted claims relating to hand and arm pain not PTD where WCC did not credit claimant's testimony and medical records contain numerous indications that subjective pain reports were not supported by objective findings or contradicted by things such as observations of his capabilities and callouses on his hands.

¶1 The trial in this matter was held on April 27 and 28, 1999, in Billings, Montana. Petitioner, Louis Nielson (claimant), was present and represented by Mr. Marvin L. Howe. Respondent, State Compensation Insurance Fund (State Fund), was represented by Mr. David A. Hawkins. A transcript of the trial has not been prepared.

¶2 Exhibits: Exhibits 1 through 6 and 8 through 20 were admitted without objection. Exhibit 7 was objected to by petitioner and refused.

¶3 Witnesses and Depositions: Claimant, Cynthia Nielson, Dennis McLuskie and Dr. Scott Ross were sworn and testified. The parties agreed the Court may consider the depositions of Louis Nielson, Bob Zadow and Dr. Lotfi Ben-Youssef, M.D.

¶4 Issues: As set forth in the Pre-trial Order, the following issues are presented for determination:

A. Whether the Petitioner is entitled to Permanent Total Disability Benefits pursuant to §39-71-702 M.C.A.

B. Whether the Respondent/Insurer wrongfully denied Petitioner's Claim for Total Disability Benefits.

C. Whether the Petitioner is entitled to an increase award of 20% of benefits pursuant to §39-71-2907 M.C.A. because the Respondent/Insurer unreasonably refused to accept Petitioner's Claim for Permanent Total Disability Benefits.

D. Whether the Respondent/Insurer shall pay reasonable costs and attorney's fees as established by the Court pursuant to §39-71-611 and 612 M.C.A.

¶15 Having considered the Pre-trial Order, the testimony presented at trial, the demeanor and credibility of the witnesses, the depositions, and exhibits, the Court makes the following:

FINDINGS OF FACT

¶16 Claimant is 49 years old. He is a high school graduate and attended junior college for a short time. (Nielson Dep. at 6; Trial Test.)

¶17 Claimant has worked pumping gas, performing minor car repairs, selling cars, stocking shelves for a retail store, as a ranch hand, a timber faller, a timber skidder, and a logging truck driver. He has also worked as a truck driver, driving dump trucks and hauling salt water in the oil fields. (Trial Test.)

¶18 Claimant's last job was with TNT Well Servicing, Incorporated (TNT) as a hot oiler. (Ex. 1.) This job entailed servicing oil wells and included working with a heavy hose at well sites.

¶19 On or about April 18, 1995, the claimant experienced bilateral numbness in his hands and arms. On that date he saw Dr. Lotfi Ben-Youssef, an orthopedic surgeon practicing in Sidney, Montana. Dr. Ben-Youssef recorded a "three weeks history of sudden onset of numbness of the left hand, radiating upward to the posterior medial aspect of the left elbow." (Ex. 9 at 9.) Claimant was also experiencing numbness in his right arm, headaches, and dizziness. Dr. Ben-Youssef's impression at the time of the first appointment was "[b]ilateral cubital tunnel syndrome." (*Id.* at 9.)

¶10 At the time of his complaints, TNT was insured by the State Fund.

¶11 Claimant filed a Claim for Compensation in May 1995. (Ex. 1.) The State Fund has accepted liability for his left hand and arm complaints under the Occupational Disease Act. It has accepted liability for his right arm complaints under the Workers' Compensation Act. (Paragraphs A and B, Statement of Uncontested Facts.)

¶12 Claimant has not worked since being taken off work at TNT four years ago. He asserts in this proceeding that he suffers debilitating pain which precludes him from any regular employment. He seeks permanent total disability (PTD) benefits.

¶13 Claimant testified that over the past four years he has suffered constant pain in both hands and arms. He characterized the pain as like a toothache at times, at other times it involves numbness. He was unable to recall a day without pain. On a ten point scale, he graded his pain on a good day at one to three, on a bad day at seven to eight, on average at three to five. He testified that any activity involving his hands increases his pain and that the pain starts in one or both elbows, then migrates to his forearms, wrists, and hands.

¶14 Claimant asserts he is unemployable. He testified that there is no point in looking for work because he cannot work even two or four hours a day. He described his daily activities

after arising in the morning as helping his daughters get ready for school, sometimes making breakfast; driving them four blocks to school (which, according to claimant, increases his pain); then sitting in a chair for much of the morning on account of pain, watching TV. He testified that sitting in his chair helps his pain and that on some days he spends most of his day in his chair. Three days every week he cooks the evening meal, consisting of pizza or TV dinners, but, according to claimant, the cooking increases his pain. After supper he sits in his chair until bedtime. He sometimes vacuums but usually stops when his arms hurt too much, and testified that if he ignores his pain while vacuuming he is unable to do anything the next day because of pain.

¶15 Claimant did admit to some recreational activities. He has a camper and a boat. He testified that he goes camping and fishing but that his pain limits his activities.

Medical Findings and Diagnoses

¶16 Dr. Ben-Youssef is the claimant's treating physician. He saw claimant on a monthly basis from April through November of 1995, twice in 1996, five times in 1997, three times in 1998 and once, so far, in 1999. Claimant has also been examined by numerous other physicians and undergone four separate EMG/NCV (electromyography/nerve conduction velocity) studies of his arms.

¶17 The medical opinions of the doctors who have examined claimant are conflicting both as to his current medical condition and his ability to work. But ultimately, the disability claimed by claimant rests on his reports of his subjective pain, not on his medical diagnosis.

¶18 The physicians who have tested and examined claimant have reached different conclusions concerning the cause and nature of claimant's arm complaints.

¶19 Dr. Ben-Youssef's initial diagnosis was bilateral cubital tunnel syndrome. (Ex. 9 at 9.) He referred claimant to Dr. Peterson in Glendive for an EMG but claimant was a no-show for his appointment. (*Id.*) He was then referred to Dr. Roger S. Williams in Sidney.

¶20 Dr. Williams examined claimant and did nerve conduction testing in May 1995. On May 15, 1995, he reported to Dr. Ben-Youssef. (Ex. 13.) In his report he concluded that "the exact etiology for his left upper extremity discomfort remains somewhat obscure." (*Id.* at 2.) He commented that claimant's reported symptoms were suggestive of carpal tunnel syndrome "but he does not have overt neurophysiological abnormalities at the present time." (*Id.*) Dr. Williams recommended a splint be worn, that the claimant stay off work for a time and finally, "If all else fails, I would recommend consideration of surgical exploration of the left carpal tunnel." (*Id.* at 3.) Dr. Williams did not comment concerning claimant's right arm and hand complaints. Apparently, those complaints were not significant at that time.

¶21 Following Dr. Williams' report, Dr. Ben-Youssef took claimant off work for five weeks and prescribed physical therapy (PT). (Ex. 9 at 10.) Claimant reported increased soreness after PT. (Ex. 19 at 3; Ex. 9 at 10.) On July 11, 1995, Dr. Ben-Youssef provided the following impression:

IMPRESSION: Unimproved overuse syndrome of the left wrist and forearm, made worse by starting Physical Therapy.

(*Id.*) He referred claimant to Dr. Curtis R. Settergren, an orthopedic surgeon in Billings.

¶22 Dr. Settergren examined claimant on July 26, 1995. Dr. Settergren's impression was "left lateral epicondylitis and some signs and symptoms of cubital tunnel syndrome without much for medial epicondylitis." (Ex. 16 at 2.) He recommended a trial steroid injection, which the claimant refused, then referred claimant to Dr. Mary Gaddy, a neurologist practicing in Billings, for a repeat nerve conduction study using an inching method. (*Id.*)

¶23 Dr. Gaddy performed EMG and nerve conduction testing on August 3, 1995. Based on the testing, her impression was as follows:

IMPRESSION: Abnormal study. Electrical evidence of involvement of the right and left ulnar motor fibers at the level of the olecranon as would be seen in bilateral cubital tunnel syndrome. There is also electrical evidence of involvement of the right and left median motor fibers, and when they are compared to the ulnar distal latencies, these do appear to be significant implicating right and left carpal tunnel syndrome.

(Ex. 18 at 1.)

¶24 At the insurer's request, on April 18, 1996, Dr. Thomas L. Schumann, who specializes in occupational and preventive medicine, performed an independent medical examination (IME). In addition to examining claimant and taking a medical history, Dr. Schumann reviewed the records of Drs. Ben-Youssef, Gaddy, Settergren, and Williams, and physical therapy notes. His diagnosis was:

DIAGNOSIS: Bilateral cubital and carpal tunnel syndrome, left more symptomatic than right. At maximum medical improvement at this time in terms of the contribution to his problem of the occupational exposure which ended approximately one year ago.

(Ex. 15 at 3.) Dr. Schumann found "no current indication that surgery is mandatory at this time" but indicated that claimant might choose surgery in the future if his symptoms worsened. (*Id.*) The doctor also ordered additional lab work for the purpose of ruling out an underlying metabolic contributor. The results of the additional lab tests showed some abnormalities and Dr. Schumann recommended follow-up testing and evaluation. (*Id.* at 5.)

¶25 Dr. Bill S. Rosen, a physiatrist at Saint Vincent Hospital in Billings, conducted a second IME on January 10, 1997. In addition to examining claimant and taking a history, Dr. Rosen reviewed medical records of Drs. Ben-Youssef, Williams, Settergren, Gaddy, and Schumann. (Ex. 10 at 6-7.) Dr. Rosen found the evidence for prior diagnoses inconclusive, and found objective evidence for a previously undiagnosed condition. His impression, in relevant part was as follows:

IMPRESSION:

- 1) 46 year old male with a chronic pain syndrome whose subjective complaints do not fit the objective findings on examination today. He is somewhat of a diagnostic dilemma with possible cubital tunnel syndrome versus carpal syndrome versus other soft tissue pain syndrome. No specific diagnoses were obvious based on today's examination however.
- 2) Right extensor pollicis tendonitis by Finkelstein's test, but otherwise no complaints of pain in this region, thus this is considered mild.

(*Id.* at 8.) Dr. Rosen also noted that claimant was severely deconditioned. Among other things, Dr. Rosen recommended further EMG testing and medications appropriate for chronic pain syndrome. (*Id.* at 9.)

¶26 In follow-up to Dr. Rosen's recommendation, Dr. Donald H. See, who specializes in electromyography and IMEs, examined claimant on February 26, 1997, and did electrodiagnostic studies of both arms. (Ex 12 at 1.) His impressions as a result of the tests were as follows:

1. All of the nerve conduction studies for the right and left median and ulnar nerves had values well within the normal ranges without evidence for slowing or blocking at any level.
2. Specifically, no evidence on the studies today for compression neuropathy of the ulnar nerves at the elbows and no evidence for carpal tunnel syndrome.
3. Please see the accompanying EMG tracings revealing remarkably fast conduction velocities at all levels and with completely normal evoked sensory and motor action potentials.

(*Id.* at 1-2.)

¶27 Finally, on September 4, 1998, the claimant was seen by a medical panel consisting of Dr. Patrick Cahill, a neurologist; Dr. Robert S. Schultz, an orthopedic surgeon; and Dr. Scott Ross, who specializes in occupational medicine. A consensus report was prepared along with the individual reports of each doctor.

¶28 Dr. Cahill preformed additional electrodiagnostic tests (EMG/NCV). The studies were normal. (Ex. 14 at 8.) Dr. Cahill's overall findings are summarized in his impression, as follows:

IMPRESSION: Possible mild bilateral medial epicondylitis. There is no evidence of any neurologic disease, damage or injury. There is no EMG/NCV evidence of median or ulnar nerve entrapments. Basically the patient's neurologic examination is normal.

(*Id.* at 9.)

¶129 Dr. Schultz reported his findings as follows:

[H]e has normal range of motion both actively and passively of shoulders, elbow, and wrists. He does have a palpable snapping of the ulnar nerve at the elbow which appears to be secondary to subluxation of the ulnar nerve out of the cubital tunnel. He also is very tender over the medial epicondyle left elbow without particular pain on resisted wrist flexion. **He has no obvious weakness or atrophy of any of the muscles in his upper extremities and actually has some calloses on his hands indicative of continued use and work activities.** He has negative Tinel's over the elbow and the wrist bilaterally at both the median and ulnar nerves. **No intrinsic weakness in either hand. No sensory changes noted.**

....

IMPRESSION: I am not sure of the etiology of this patient's overall complaints although I do think that he has ulnar nerve subluxation syndrome with some discomfort secondary to cubital tunnel syndrome from this. He does not obviously have a motor nerve injury without demonstrable weakness. I do not think, however, that this would entirely explain all of his symptoms and discomfort. He obviously at this point has some psychiatric overlay to his underlying problem and I think that there is some anger involved but I don't see any signs of him being a hysterical type of personality.

(*Id.* at 4-5, emphasis added.) Dr. Schultz further commented that he "would be interested in knowing the outcome of the nerve conduction studies." (*Id.*)

¶130 Dr. Ross' physical examination of claimant was essentially normal. His diagnosis was:

Subjective complaints of right and left upper extremity pain without objective findings.

(*Id.* at 16.)

¶131 The consensus report noted that claimant's "neurological examination showed no objective abnormalities." (*Id.* at 1.) It then repeated the separate findings of the three physicians without further resolution. (*Id.* at 2.)

Medical Opinions Regarding Return to Work

¶132 While initially recommending that claimant be retrained for sedentary work (Office notes of 8/22/95 and 2/8/97, ex. 9 at 11 and 13), claimant's treating physician, Dr. Ben-Youssef, opined that claimant is incapable of working. His opinion is based on claimant's

reports of his pain. On May 11, 1998, he disapproved proposed jobs as a salesperson, video store rental clerk, and auto salesperson. He wrote:

The patient has intermittent pain of the upper extremity with any activity, and all the jobs that you sent me do include that. I do not think the patient will be able to do them **based on his subjective complaints.**

(Ex. 9 at 7, emphasis added; *and see also Id.* at 5-6.) In his deposition, Dr. Ben-Youssef testified:

A. Again, it's what I've been saying in all the letters that I sent, is he could perform work, but that the suddenness and the unpredictability of the pain symptoms that he gets from the use of the upper extremity makes the employment difficult."

Q. Impossible?

A. At the present time, impossible.

(Ben-Youssef Dep. at 32-33.)

Q. Your diagnosis is based on the subjective findings?

A. Yes.

Q. What is the severity of your diagnosis based on?

....

A. Well, the severity of the diagnosis are based on his subjective complaints.

(*Id.* at 35-36.)

Q. When you disapproved the three jobs, the sales clerk, the video rental clerk and the auto sales position, why did you disapprove those? Were you afraid that Louie would be injured by performing those jobs or

A. No, it's based, again, **about his subjective complaints of pain of the upper extremity with use of the upper extremities. So it's all based on the pain complaints.**

(*Id.* at 38, emphasis added.)

¶133 At Dr. Ben-Youssef's request, Ron O'Neill (O'Neill), a physical therapist in Sidney, performed a functional capacities evaluation (FCE) and oversaw a work hardening program in November 1998. He was skeptical of claimant returning to work but, as did Dr. Ben-

Youssef, based his opinions on claimant's reports of pain. In his initial note on November 2, 1998, O'Neill observed:

Mr. Nielsen [sic] is to undergo a two weeks of daily Work Hardening. At the end of that time he is to have a followup FCE done. The benefit of the Work Hardening at this time is questionable as **Mr. Nielsen's [sic] condition appears to be very irritable and aggravated with any type of activity.**

(Ex. 20 at 2, emphasis added.) On November 16, 1998, at the end of the work hardening program, O'Neill wrote:

Mr. Nielsen [sic] was able to tolerate only approx. ½ hour per day of Work Conditioning activities and missed 4 of 10 scheduled visits due to pain from activities. Mr. Nielsen [sic] reported poor sleep and increased pain med use.

....

Mr. Nielsen [sic] demonstrated a maximal effort with moderate to maximal symptom magnification. Overall pain complaints were relatively the same as the Entry FCE of 11/02/98, and very irritable. He falls into the Light ERIC Demands Scale at this time.

(*Id.* at 11.) He concluded:

Mr. Nielsen [sic] is not a likely candidate for further Work Conditioning. Holding a job of any sort is questionable according to findings from the FCE and attempted Work Conditioning.

(*Id.*) Mr. O'Neill was given the job analyses for the positions of sales clerk, video rental clerk, and auto salesman and asked to compare the description of each job with the actual performance by Mr. Nielson at the time of the FCE. He isapproved all three jobs. (*Id.* at 18-22.)

¶134 In April 1996, Dr. Schumann reviewed job analyses for several positions, approving only the job of video rental clerk. He disapproved the jobs of front-end loader and heavy equipment operator, and the jobs of customer service employee and sales clerk stating the need for a work hardening program to explore what accommodations would be needed in the performance of those jobs. (Ex. 15 at 4.) However, the Court notes that in evaluating the proposed jobs, Dr. Schumann relied on claimant's subjective reports concerning his pain and restrictions:

Current work restrictions are subjectively based and would be avoid repetitive grasping, holding, or manipulating with either hand as comfortable, task rotation would also be advised. Also, it is his opinion that he would need accommodation of might have to leave work early or miss days of work if he was experiencing increase in pain based on his experience over the last year, this would be estimated to be from 3 to 6 days per year.

Review of job analyses, the above mentioned work restrictions or accommodations would apply for all job analyses reviewed.

(*Id.* at 4, emphasis added.)

¶135 On March 25, 1997, Dr. Rosen approved claimant's return to work as a video rental clerk (ex. 5 at 83), sales clerk (*id.* at 85), heavy equipment operator (*id.* at 87), customer service employee (*id.* at 89), and front-end loader operator (*id.* at 91). On September 17, 1997, he responded to the claims adjusters request that he review three jobs. He wrote:

I have reviewed the three alternative job analysis forwarded to me through your office that were identified by VRI. Based on my independent medical examination of Mr. Lewis [sic] Nielsen [sic] from January 10, 1997 I do feel hat Mr. Nielsen [sic] could perform the three jobs described in your letter, that is, the sales clerk position, the video store clerk and the car sales position.

(Ex. 10 at 15.)

¶136 Todd Jones, claims adjuster for the insurer, sent Dr. See copies of three alternative jobs to review based on his examination of the claimant. On September 15, 1997, Dr. See approved without restriction the positions of sales clerk, video rental clerk, and automobile sales person. (Ex. 5 at 92-122.) Dr. See emphasized in his letter of September 15th that:

As you know, my electrodiagnostic studies on February 26, 1997 were absolutely normal without evidence of any peripheral nerve entrapment to include carpal tunnel syndrome and entrapment of the ulnar nerves at the elbows. Based on those studies, I do not believe that the examinee ever had any peripheral nerve entrapment and certainly didn't on the occasion of these studies.

(Ex. 12 at 6.)

¶137 The Schumann - Cahill - Ross medical panel did not specifically release claimant to return to work in any job, however, they recommended a two week work conditioning program. (Ex. 14 at 16-17.) Their expectation was that with an aggressive work hardening program, claimant might even be able to return to his time-of-injury job. At the time of their evaluation, Dr. Ross wrote:

The target levels of physical capability performance would be his job of injury as a truck driver, oiler. . . . Alternative jobs could be considered following the work conditioning program and the exit functional capacity evaluation. At this time, I would recommend waiting for the exit functional capacity evaluation as it is entirely possible that this gentleman could return to his job of injury in my opinion.

(*Id.* at 17.) Dr. Ross' recommendation and evaluation were adopted by the full panel. (*Id.* at 2.) On October 31, 1998, Dr. Ross approved sales clerk, auto sales person, and video rental

clerk based on the information available at that time. (*Id.* at 18.) At trial he testified that he placed no physical restrictions on claimant.

MMI

¶138 Both claimant and the insurer agree that claimant has reached maximum medical improvement (MMI) and that agreement is supported by the medical opinions set forth in claimant's medical records.

Resolution

¶139 This case comes down to a matter of claimant's credibility regarding his pain. After evaluating all of the testimony, the exhibits, and claimant's demeanor, I find that claimant's reports of pain are exaggerated and not credible. I simply do not believe that he hurts as much as he claims, or that he is as disabled as he claims, or that he cannot work.

¶140 My decision is based in part on my observation and perception of claimant when he testified. He struck me as inappropriately angry and aggressive. On the morning of the trial he drove 270 miles from Sidney to Billings, a trip of about four hours, but exhibited few signs of real discomfort. One piece of his testimony struck me as pure fabrication, deliberately calculated to undermine Dr. Ross' opinions. Claimant testified that during Dr. Ross' examination, Dr. Ross told him that the EMG results from the testing to be done by Dr. Cahill would come back negative. Dr. Ross flatly denied claimant's assertion and I believed Dr. Ross. Claimant also impressed me as unmotivated to find and hold employment.

¶141 In evaluating claimant's credibility, I have not relied solely on my perception of his testimony at trial. I have looked at all the evidence for indicators which would support or undermine my perception. Especially, I have considered the medical testimony and the fact that it is conflicting. While I note that three of the four electrodiagnostic tests fail to confirm either carpal tunnel syndrome, cubital tunnel syndrome, or any other neurological disease or injury of claimant's arms, I need not make a final diagnosis in deciding this case as the case for disability rests on subjective pain.

¶142 In reviewing other evidence, I have found numerous indicators that claimant reports regarding his pain which are not credible.

- a. Dr. Rosen reported that claimant's "**subjective complaints of pain do not fit the objective findings noted on examination.**" (Ex. 10 at 9, emphasis added.)
- b. Dr. Ross found that claimant's subjective complaints were not supported by objective findings. (Ex. 14 at 16.)
- c. Dr. Schultz commented that "at this point [claimant] has some psychiatric over lay to his underlying problem and I think that there is some anger involved but I don't see any signs of him being a hysterical type of personality." (*Id.* at 5.)

d. Drs. Ross and Schultz both reported that claimant had no atrophy or weakness in his hands and arms. (*Id.* at 5, 16.) Dr. Schultz further noted that claimant "**actually has some callosoes on his hands indicative of continued use and work activities.**" (*Id.* at 5, emphasis added.)

e. Dr. Ross testified at trial that claimant was able to perform physical tasks inconsistent with his reported pain level.

f. Dr. Ross testified that his physical examination of claimant was inconsistent with what he expected based on claimant's subjective complaints.

g. Dr. Ross testified that differences in grip strength measurements he made in September 1998 and those made thereafter by Mr. O'Neill in November 1998 were not only highly unusual but that he had never seen a similar result. Dr. Ross measured 110 pounds right and 105 pounds left in September. Mr. O'Neill measure 75 pounds right and 90 pounds left on November 2, 1998 and 56 right and 75 left on November 16, 1998. (Ex. 14 at 16; Ex. 20 at 5, 13.)

h. Dr. Ross testified that given the claimant's reports of long-term subjective pain reports he would expect to see muscle wasting and a significant decrease in strength. He observed neither. Dr. Ross' testimony was credible and persuasive.

¶43 In summary, claimant has failed to persuade me that his pain is so severe as to preclude him from holding regular employment, including jobs as a video rental clerk, retail sales person, and auto sales person.

Insurer's Conduct

¶44 The insurer's refusal of claimant's demand for PTD benefits was reasonable. Even had I held for claimant, the refusal was reasonable as there is substantial evidence supporting the insurer's denial.

CONCLUSIONS OF LAW

¶45 Claimant's request for PTD benefits is governed by the 1993 versions of the Workers' Compensation Act and Occupational Disease Act. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶46 Permanent total disability benefits are governed by section 39-71-702, MCA (1993), which provides in relevant part:

39-71-702. Compensation for permanent total disability. (1) 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. Permanent total disability benefits must be paid for the duration of the worker's permanent total disability, subject to 39-71-710.

Permanent total disability is defined as:

(19) "Permanent total disability" means a 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.

§ 39-71-116(19), MCA.

¶147 Claimant bears the burden of persuading me, by a preponderance of the evidence, that he is permanently totally disabled. *See Ricks v. Teslow Consolidated*, 162 Mont. 469, 483-84, 512 P.2d 1304 (1973); *Dumont v. Aetna Fire Underwriters*, 183 Mont. 190, 201, 598 P.2d 1099 (1979). Claimant has failed to carry his burden. I am not persuaded that he cannot return to regular employment.

¶148 Claimant is not entitled to attorney fees or a penalty. Both require proof that the insurer has unreasonably delayed or refused benefits. §§ 39-71-611, -612, 2907, MCA (1993). The insurer's denial of PTD benefits was reasonable.

¶149 Since he has not prevailed, claimant is not entitled to costs.

JUDGMENT

¶150 1. Claimant is not entitled to PTD benefits. His petition is **dismissed with prejudice**.

¶151 2. Claimant is not entitled to attorney fees, a penalty, or costs.

¶152 3. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.

¶153 4. 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 13th day of August, 1999.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. Marvin L. Howe

Mr. David A. Hawkins

Date Submitted: July 27, 1999