IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1999 MTWCC 50

WCC No. 9608-7588

TIMOTHY T. WALL

Petitioner

vs.

NATIONAL UNION FIRE OF PITTSBURGH

Respondent/Insurer for

CBI INDUSTRIES

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: 52-year old mechanic/laborer was injured while operating grinder. Insurer accepted liability for shoulder condition, but denied liability for neck condition and that claimant was PTD.

Held: WCC found insurer not liable for alleged neck condition where claimant not a credible witness. Although he claimed to have told medical providers about neck problems after the accident, he did not mention the neck in a statement recorded by the insurer and evidence from medical providers indicated he did not complain about his neck. Where several jobs recommended by vocational providers were approved by physicians, and claimant's testimony led WCC to conclude he was merely unmotivated to seek employment, PTD claim denied.

Topics:

Benefits: Permanent Total Benefits: Generally. 52-year old mechanic/laborer was injured while operating grinder. Insurer accepted liability for shoulder condition, but denied liability for neck condition and that claimant was PTD. Where several jobs recommended by vocational providers were approved by physicians, and claimant's testimony led WCC to conclude he was merely unmotivated to seek employment, PTD claim denied.

Disability: Permanent Total. 52-year old mechanic/laborer was injured while operating grinder. Insurer accepted liability for shoulder condition, but denied

liability for neck condition and that claimant was PTD. Where several jobs recommended by vocational providers were approved by physicians, and claimant's testimony led WCC to conclude he was merely unmotivated to seek employment, PTD claim denied.

Evidence: Credibility. 52-year old mechanic/laborer was injured while operating grinder. Insurer accepted liability for shoulder condition, but denied liability for neck condition and that claimant was PTD. WCC found insurer not liable for alleged neck condition where claimant not a credible witness. Although he claimed to have told medical providers about neck problems after the accident, he did not mention the neck in a statement recorded by the insurer and evidence from medical providers indicated he did not complain about his neck. Where several jobs recommended by vocational providers were approved by physicians, and claimant's testimony led WCC to conclude he was merely unmotivated to seek employment, PTD claim denied.

Injury and Accident: Generally. 52-year old mechanic/laborer was injured while operating grinder. Insurer accepted liability for shoulder condition, but denied liability for neck condition and that claimant was PTD. WCC found insurer not liable for alleged neck condition where claimant not a credible witness. Although he claimed to have told medical providers about neck problems after the accident, he did not mention the neck in a statement recorded by the insurer and evidence from medical providers indicated he did not complain about his neck.

¶1 The trial in this matter was held on May 7, 1999, in Missoula, Montana. Petitioner, Timothy T. Wall (claimant), was present and represented by Ms. Rachel Wright. Respondent, National Union Fire of Pittsburgh(National), was represented by Mr. Peter J. Stokstad. A transcript of the proceedings was not prepared.

¶2 Witnesses and Depositions: Claimant, Michaele Lucier, Debra A. Peterson and Stephen F. Johnson, M.D. were sworn and testified. The parties also submitted for the Court's consideration the depositions of Timothy T. Wall, James R. Burton, M.D., Robert F. Moseley, M.D., Chriss A. Mack, M.D., Margaret "Peggy" Dancer, PAC, and Danny J. Browning, PAC. Additionally, the records depositions of Shawna Medlar (for Martin Cheatle, Ph.D.), Denise Hammersley (for Gary Cooney, M.D.), and Jennifer Stout (for Mark F. Rotar, M.D.) were also submitted.

¶3 Exhibits: Exhibits 1 through 3 and 6 through 33 were admitted without objection. Exhibits 4 and 5 were not offered.

¶4 Issues: The issues as set forth in the Final Pretrial Order are:

1. Whether Petitioner injured his cervical spine or neck on October 6, 1992 during the same accident that caused the injury to his left shoulder.

2. Whether Petitioner is permanently and totally disabled as a result of his industrial injury on October 6, 1992.

¶5 Having considered the Final Pretrial 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

¶6 At the time of trial the claimant was 52 years old. He has a GED and has received training as a welder. (Wall Dep. at 7.)

Work History

¶7 Claimant served in the Army in the mid-1960s, working as a vehicle mechanic. Thereafter, he worked as an apprentice mechanic in Anaconda for eight to ten years. He then became a boilermaker and worked in that capacity for 25 years. (*Id*. at 11, 12.) He worked throughout the United States, sometimes as a high rigger, a job that involved connecting steel in high places. (*Id*. at 14, 15.)

¶8 While working as a boilermaker, claimant also owned and operated an automobile repair business, TW's Ace Auto, in Anaconda, Montana. The business opened in 1986 and closed in 1994. (*Id*. at 17, 18.)

October 6, 1992 Injury

¶9 In the fall of 1992, claimant was hired by CBI Industries to work at the Fort Peck Dam. His job included operating a "9 inch grinder" (ex. 6) to grind down the edges of skull casings (large tubes through which water runs to the turbines in the dam) so they would fit together. (*Id*. at 20, 21.)

¶10 While grinding, the grinder bound, wrenching claimant's left arm. He described the accident in his claim for compensation as follows:

I was operating a 9" air grinder within a 1½ inch gap. The wheel grab[bed] a hold and the grinder went to the left very fast. I lost my grip with my right hand but my left hand kept hold. My left arm was extended out away from my body, **I felt pain in my shoulder right after I heard a pop sound in my shoulder**. The grinder flew out of my left hand. It all happened in about 1 or 2 seconds. [Punctuation and emphasis added.]

(Ex. 6.)

¶11 Claimant completed his shift on October 6, 1992, but did not return to work. He has not been employed in any capacity since that date.

Claim for Compensation

¶12 At the time of claimant's October 6, 1992 injury, CBI was insured by National. Claimant submitted a Claim for Compensation with respect to his accident. National accepted liability for the claim and has paid compensation and medical benefits.

The Present Dispute

¶13 National admits that claimant suffered a left shoulder injury in the accident and has paid medical benefits with respect to the shoulder. In this proceeding, claimant alleges that he also suffered a neck injury, an allegation which National denies. He also alleges that he is permanently totally disabled (PTD) as a result of the accident, an allegation that National also denies.

¶14 Claimant has been treated for his left shoulder injury and had rotator cuff surgery on that shoulder on February 6, 1994. The shoulder injury itself is not at issue. Therefore, discussion of the shoulder injury and claimant's treatment for it is limited to facts relevant to his alleged neck injury and his disability status.

Alleged Neck Injury - The Evidence

¶15 Claimant testified that at the time of the accident he heard a pop in his neck and that he experienced neck pain shortly after the accident. (Wall Dep. at 28, 31-36.) According to claimant, by the day after the accident neck pain and stiffness "really hit me." (*Id*. at 34.) He characterized the pain as follows:

> Sharp pain. Like now as I tip my head back, I've got a sharp - right there, I've got a pain behind my ear that goes right down into the shoulder blade through the muscles down through that way.

(*Id*.) He said that he also had ringing in his ear. (*Id*. at 34-35.) And, according to claimant, within two weeks of the accident,

> If I turn to the left, turn my neck to the left quickly and far enough, I'd get a pain from the back of my head all the way down to the bottom of my left foot, and it makes the left foot go numb instantly and I fall down, I loose [sic] my balance at that point.

(*Id*. at 36.)

¶16 Claimant also testified during his deposition that he told all of the medical providers treating him about his neck pain. (Wall Dep. at 56.) He repeated that testimony at trial but expressed some uncertainty as to whether he told the two physician assistants who initially saw him on October 7 and 8, 1992.

¶17 Notwithstanding his testimony, the medical records and testimony fail to disclose any reports of neck pain until May 5, 1993.

¶18 On October 7, 1992, claimant was seen by Margaret "Peggy" Dancer (Dancer), in Glasgow, Montana. Dancer is a physician's assistant (PA) and is trained in the taking of an accurate and complete history from patients. She testified that it is her practice to record every complaint that a patient reports. (Dancer Dep. at 13.)

¶19 Dancer took a history of the claimant which is noted as subjective (S.) findings.

> S.) While @ work pushing a 90# grinder Pt. lost control of machine & pulled (L) arm (hyperextension, ext. rotation) injury (L) shoulder. Immediate pain & swelling, heard a "pop", some numbness w/certain positions & others improves.

(Dancer Dep. Ex. 1.) Dancer recalled that the pop was in the left shoulder. (*Id*. at 14.) Claimant did not report or complain of neck pain. If the claimant had mentioned his neck, Dancer would have considered it to be "very significant" and would have included his complaint in her office note. (*Id*. at 20.)

¶20 The following day, October 8, 1992, claimant was seen by Danny J. Browning (Browning), who is also a physician's assistant. Browning works for Dr. Michael J. Fay in Glasgow. Dr. Fay is an orthopedic surgeon.

¶21 At the time of Browning's examination, claimant filled in a Patient Information Sheet. In the section of that document entitled "Reason for Seeking Care," the claimant wrote in "[l]eft shoulder." (Browning Dep. Ex. 1 at 2.) When asked to describe his symptoms, he wrote, "sore sholder [sic] pain when reaching over head." (*Id*.) Browning's office note reflects that claimant told him he had experienced a "pop in his shoulder" and severe excruciating pain. (Browning Dep. Ex. 2.) He did not record any neck complaints.

¶22 Like Dancer, Browning considers it critical to write down complete notes of the history given to him by a patient. When queried about the protocols he uses for an examination, Browning responded:

> A [W]hat you attempt to start out with is a complaint-oriented examination. . . . [T]he history is related to me, I go back over the history with the patient; are you having any other problems? No, none whatsoever. And then it's basically a problem-oriented examine [sic].
>
> . . . .
>
> Q So the history of the injury or the history of the problems that's relayed to you by the patient is really critical to your evaluation?
>
> A Yes, sir.

(*Id*. at 16-17.) Browning testified that since the claimant was complaining of a shoulder injury, he would have routinely inquired about the neck and the other shoulder. (*Id*. at 17-19.) As a part of his routine examination he also palpated the claimant's neck area, as well

as his shoulder. (*Id.* at 24-25.) Browning does not necessarily include notes of "negative" findings, and he made no record of the claimant relating any complaints about his neck. He agreed with claimant's counsel when she inquired if it was "safe to assume that Mr. Wall did not report to you [Mr. Browning] any neck problems?" (*Id.* at 22.)

¶23 On October 9, 1992, claimant was examined by Dr. Robert F. Moseley, a board certified orthopedic surgeon practicing in Missoula. Dr. Moseley recorded:

> 45 YO male sustained a traction injury to the L shoulder at work three days ago when using a grinder which bound up and jerked his arm. Has pain now with elevation and rotation of the arm.

(Moseley Dep. Ex. 1 at 3.) When asked if he would have included an examination of the claimant's neck area given this history, the doctor responded: "Not if he did not complain about those areas. If he complained of his shoulder, the physical exam would pretty much be restricted to the shoulder." (*Id.* at 11.) However, had the claimant complained about his neck/cervical area Dr. Moseley would have made note of the fact and found those complaints to be significant:

> A. If he had complained about his neck, I would have - I would have put that in the note.
>
> Q. Would you have found that significant?
>
> A. Oh, yes. I mean - and I put - I try to put all complaints in, whether I think they're significant or not. I try to list all the patient's complaints. I do not list routinely the negative, like, in the complaints - either in the history or in the physical exam. I list just the positive complaints, assuming that if I don't list it, that means it's normal or has not occurred.

(*Id.* at 14.)

¶24 Dr. Moseley treated the claimant in follow-up visits on October 28, 1992, November 25, 1992, December 29, 1992, and March 24, 1993. The doctor's notes for these four visits do not indicate any complaints or problems with claimant's neck/cervical area. Dr. Moseley testified that since he did not make note of any neck/cervical complaints voiced by the claimant, none were made. (*Id.* 15.)

¶25 At the insurer's request, claimant was seen by Dr. James R. Burton, who is board certified in orthopedic medicine, on January 12, 1993.

¶26 At the time of the initial visit in January 1993, Dr. Burton recorded:

> **Present Complaint:** Anterior shoulder discomfort and inability to fully raise and (patient demonstrates forward flexion and lateral abduction) maneuver his left arm. Incidentally, patient is left-handed.

(Ex. 15 at 1.) When questioned during his deposition about the initial evaluation which he made of the claimant, he responded:

> Q. I wanted to know whether your evaluation would be limited to a particular body part or whether the evaluation would involve the whole person.
>
> A. Well, normally it would include the entire body. I do notice in this report that I examined all of the areas that could conceivably be related to the upper extremity. That is I examined his neck, his upper extremity and his chest area. I did not examine his low back or his lower extremities.

(Burton Dep. at 9.) Dr. Burton described his examination of the cervical area:

> A. Cervical means the neck. This examination of the area between the head and the shoulders. It consists of seven vertebrae, and we normally examine this area by moving the neck through a -- what we consider a normal range of motion. That is through a range of motion to determine whether the motion is normal or not. I determined that Mr. Wall **did have a normal range of motion without any spasm and also without any complaint during the examination.** This involves turning the head to the left and right, tilting the head to the left and the right, and having the patient look up as far as he can and look down as far as he can. And also doing this examination, I palpate or push on the back and side of the neck. [Emphasis added.]

(*Id*. at 14-15.) As a result of this exam, Dr. Burton recorded the claimant's cervical exam as "[f]ull norm ROM [range of motion] without spasm or complaint." (Ex. 15 at 2.) The doctor testified that ***if*** the claimant had complained of pain, numbness or any other complaint with regard to his neck he would have considered it a significant fact in light of the information he had received about the accident.

> A. Well, I would have recorded it -- I may not have made a determination as to whether or not it was related to the accident, but I would have recorded whether or not I felt there was an injury or complaints or any sort of disease or trauma related to the neck. I probably would -- if I did not feel it was part of the accident, I would have commented to that effect, I think.

(*Id*. at 16-17.)

¶27 Dr. Burton saw claimant again on May 11 and June 14, 1993, and on neither occasion did claimant mention his neck. On May 11, 1993, claimant had a new problem involving "posterior lateral shoulder pain" on the **right** side, the result of pulling a hose the previous week. (*Id*. at 21.) On June 14, 1993, the only complaint which the claimant reported at that time was "posterior deltoid discomfort in the **right** shoulder with extreme abduction actively." (*Id.* Ex. 2, emphasis added.)

¶28 Claimant cites treatment by Patrick R. Montgomery, D.C., as proof that he sought care for his neck shortly after his October 6, 1992 injury. The Court has reviewed Dr. Montgomery's records and correspondence and is unpersuaded. (Dr. Montgomery did not testify.)

¶29 As early as 1990, the claimant sought the services of a chiropractor. Claimant began treatments with Dr. Montgomery on April 5, 1990. (Ex. 22 at 2.)

¶30 Dr. Montgomery treated claimant prior to his injury. His records show that beginning on April 20, 1990, he provided a "rotational manipulation C1-4" (*Id.* at 6.). During four subsequent visits between September 1990 and September 1991, the treatment was repeated. In 1992, prior to the injury, Dr. Montgomery treated claimant three times, during two of which he performed C1-4 manipulation. (*Id*.) On September 23, 1994, in a letter to counsel for the insurer, Dr. Montgomery explained his neck treatments.

> Mr. Wall always entered our clinic with the primary complaint of low back pain. While in the office, he also requested that we loosen up his upper back and neck. However it never appeared to be a very serious problem and most of the treatment focused on the low back.

(*Id*. at 5.) Of note, Dr. Montgomery's letter covered treatments in 1993. A typewritten copy of his office notes for April 4, 1990 through July 12, 1993, were enclosed with his letter. (*Id*. at 6-7.)

¶31 On December 4, 1992, approximately two months following the accident, claimant returned to Dr. Montgomery, complaining of "[g]eneralized spinal discomfort, gradual onset." (*Id*. at 6.) The notes from this treatment on December 4th, only reference the low back and mid back, there is no indication of any treatment for the cervical area.

¶32 Dr. Montgomery treated claimant six times in 1993. The notes reflect treatment of the low back or thoracic region. In addition, as before October 6, 1992, they reflect cervical rotation treatment. The notes reflect "rotational manipulation C1-3" was done on four occasions, rotational manipulation at C3-4 on one occasion, and no cervical manipulation on the remaining occasion. The notations for the cervical treatments are virtually identical to the notations made for the preinjury treatments. (*Id*. at 6-7.)

¶33 On each treatment occasion, Dr. Montgomery recorded claimant's complaints. Beginning with December 4, 1992, they were:

> 12/4/92 Generalized spinal discomfort, gradual onset. Tore left rotator cuff muscle group at work 2 months ago; on workers [sic] compensation.
>
> 1/11/93 Strained low back moving wrong.
>
> 2/8/93 Mild low back pain from working out.

> 5/5/93 Left scapular pain 10 day duration, especially when turn head; gradual onset no trauma; good improvement following treatment Saturday.
>
> 6/16/93 Left T3 trigger point extending to cervical spine and shoulder.
>
> 7/2/93 Thoracic and cervical strain on the left from lifting weights yesterday. Generalized low back pain.
>
> 7/12/93 Felt much better until physical therapy.

(Ex. 22 at 6-7.) Several significant things appear from the notes. First, until May 5, 1993, there is no mention of anything remotely resembling a neck complaint. Second, even if scapular pain triggered by turning the head, as reported on May 5, 1993, is construed as neck pain or neck related, the note indicates that the pain was of recent and gradual onset. Third, the July 2, 1993 note, which for the first time specifically records "cervical strain" relates the pain to "lifting weights yesterday."

¶34 In response to a letter from claimant's then counsel, Dr. Montgomery offered the following summary and opinion regarding claimant's condition:

> Prior to 12-4-92, Mr. Wall sought care in our office for a chronic low back condition. During these sessions we also loosened up the upper back and neck. Low back pain can cause compensatory changes in the upper back and neck leading to muscular tension. It's ridiculous to assume this constitutes a preexisting condition.

(*Id*. at 9.) Even if the letter is construed as indicating that claimant's neck problems arose on account of his low-back condition, nothing in this letter supports claimant's claim that he suffered a neck injury on October 6, 1992; he suffered a shoulder injury, not a low-back injury on that date.

¶35 On January 6, 1996, Dr. Montgomery wrote yet another letter addressed "To Whom It May Concern." (Ex. 22 at 10.) Who requested the letter and why is not in evidence. In any event, the letter attempts to establish a connection between claimant's neck complaints and his October 6, 1992 injury:

> As my office records indicate I occasionally treated Mr. Wall for neck stiffness before the left upper extremity traction injury of 10/06/96. [sic] However it was different type of problem at that time. After the traction injury, the neck problem was much more persistent and severe. This would be due in part to the trauma itself and also in part to muscle spasms from the shoulder region secondarily affecting neck function. This could account for the lack of immediate symptoms plus the fact that the acute shoulder injury could initially mask the neck pain.
>
> Therefore, I believe Mr. Wall's continuing neck problem is mostly due to the trauma.

(*Id*.) I give this letter, and the opinion therein little weight. Dr. Montgomery's treatment records do not support his statement and he did not testify. He does not make a diagnosis. Mustered against other evidence, including Dr. Montgomery's own recordings of prior cervical manipulation and the lack of neck complaints, the letter fails to persuade me that there is a connection between the October 6, 1992 injury and claimant's neck complaints.

¶36 The first indication that claimant was asserting that he suffered a neck injury was on July 12, 1993, when claimant was seen by Dr. Gary Cooney, a neurologist. The appointment was set up by claimant's attorney.

¶37 Dr. Cooney took a lengthy history, in which he recorded, "The patient notes that he sustained an injury to his neck and left shoulder on October 6, 1992 . . . ." (Ex. 21 at 1.) There is no mention of "lifting weights" on July 1st, as reported to Dr. Montgomery.

¶38 Claimant's neck-related symptoms at the time of his exam by Dr. Cooney on July 12, 1993, were neck pain, particularly on the left side, headaches, numbness, and tingling in his second, third, and fourth fingers of his left hand. (Ex. 21 at 1.) Based on the history reported by claimant, Dr. Cooney's impressions with respect to claimant's neck complaints were:

> 1. Cervical strain/sprain secondary to a work related injury on October 6, 1992. This appears to be persistently symptomatic.
>
> 2. Possible left C6-C7 disc herniation secondary to injuries sustained in October of 1992. The patient has evidence of a probable left C7 radiculitis with slightly diminished triceps strength, absent triceps reflex, numbness of the left third digit, all of which are characteristic of a left C7 nerve root injury. Some of the patient's left dorsal trapezius symptoms may be secondary to this, as well.

(Ex. 21 at 4.) Dr. Cooney began the claimant on a course of outpatient cervical traction and recommended he discontinue his chiropractic cervical manipulations for the time being. He ordered nerve conduction studies, an MRI, and cervical x-rays. All were normal except for mild spurring at the C6-7 level. (*Id*. at 5, 8, 12.)

¶39 On November 29, 1993, Dr. Cooney once again saw the claimant. He reported symptoms of intermittent tingling in the fingers of the left hand, intermittent pain in left axilla, pain in the left dorsal cervical and adjacent trapezius region. Dr. Cooney's impressions were essentially the same. Dr. Cooney recommended that cervical traction was to be continued on an as needed basis and commented that claimant's symptoms were probably not related to cervical nerve root irritation. (Ex. 21 at 9-10.)

¶40 Dr. Cooney saw claimant one more time on May 1, 1996. His note on that date reports that claimant was complaining of balance problems and neck and shoulder discomfort. (Ex. 21 at 11.) Dr. Cooney reaffirmed his diagnosis of cervical strain/sprain secondary to

claimant's October 6, 1992 injury. (*Id*.) He recommended no further treatment or testing. (*Id*.)

¶41 Dr. Mark Rotar, who began treating claimant's left rotator cuff tear on June 25, 1993 (ex. 28 at 1), became aware of claimant's neck complaints on November 18, 1993. Based on claimant's report that he suffered neck pain and sought chiropractic treatment for his neck shortly after his October 6, 1992 industrial accident, Dr. Rotar weighed in on the side of a causal relationship between his neck complaints and the accident. In an April 22, 1994 letter to the claims adjuster, Dr. Rotar explained his understanding regarding the neck/cervical condition.

Correct me if I am wrong, but I was informed that Mr. Wall had come up with this "cervical business" in the last six months. **In talking with Mr. Wall, it is my understanding that he saw a chiropractor because of cervical pain initially and immediately following his injury. He was followed by a chiropractor for a number of months**. When this did not improve, he eventually was seen by Dr. Robert Moseley for his left shoulder problem and eventually ended up seeing Dr. Cooney. [Emphasis added.]

(Ex. 28 at 29.) On July 21, 1994, Dr. Rotar responded to an inquiry by claimant's attorney about claimant's cervical problems:

> I told Tim when he was in last month that his shoulder injury alone could have aggravated a cervical problem even if there had not been a cervical problem in the first place. It's very common in orthopaedic surgery to have a person with a shoulder injury develop cervical spasm and pain secondary to the biomechanic relationship between the shoulder and the neck. **In Mr. Wall's case I think his medical records indicate that his neck was injured at the time of his accident.** I think his shoulder injury would only worsen that situation and the delay in treatment of that injury certainly would not help. [Emphasis added.]

(Ex. 28 at 33.)

¶42 Dr. Stephen Johnson performed an IME on March 24, 1995. Dr. Johnson is board certified in neurology, internal medicine, and sleep medicine.

¶43 After examining claimant and obtaining and reviewing his medical records, Dr. Johnson reached the following medical conclusions:

> 1) Claimant's wide-spread complaints suggest somatization. Although the symptoms are consistent with a cervical injury, they are not diagnostic of a cervical injury, nor are they typical of a cervical injury and they suggest a number of other factors may be operative.
>
> 2) There are no objective medical findings which show claimant suffered from an acute cervical injury other than the history given by the claimant.

> 3) Claimant's MRIs are normal, his x-rays are normal and there is no evidence of cervical radiculopathy on examination.
>
> 4) The nine-month period between the injury and the first time the claimant reported the problems with his neck to a medical provider is significant. If there was an acute injury to the claimant's neck it is unlikely that he would not have reported pain or symptoms to one of his providers, which included three physicians, two physician assistants and a chiropractor, at some time within that nine-month period.

(Ex. 24 at 3-5.)

¶44 Dr. Johnson testified at trial. He confirmed his written findings that imaging and other studies of claimant's neck were normal, noting that the spurring evident on the MRI was common among 20% of the general population over the age of 40 and that in any event the spurring was an unlikely source of claimant's subjective complaints. He found no evidence of a pinched nerve or radiculopathy and concluded that claimant did not have a serious neck condition.

¶45 Based on the description of the October 6, 1992 industrial accident, Dr. Johnson conceded that claimant could have suffered a muscle strain of his neck. However, he found no objective evidence to support such a finding and noted that if claimant did not complain of neck pain shortly after the accident then it was less likely that his neck pain was related to the accident.

¶46 On September 20, 1995, Chriss A. Mack, M.D., a neurosurgeon, performed a neurological examination of the claimant. (Ex. 25 at 1-3.) Dr. Mack's impression was that the claimant suffered from a "myofascial cervical sprain." (*Id.* at 3.) X-rays taken at the time were normal. (*Id.* at 4.)

¶47 Two and a half years later, on April 1, 1998, claimant again was examined by Dr. Mack. The neurological examination was normal. (*Id.* at 5.) Dr. Mack commented that the claimant's complaints do "not follow a creditable neurologic pattern of disease." (*Id.*) In his deposition, he expanded on his comment:

> A. When a doctor says that, he's kind of communicating to his colleagues that this doesn't make any sense. If it doesn't make any sense, it's probably not real. I mean, my sense was is that this was - this was totally subjective and there was no objective foundation to - . . .
>
> . . . .
>
> So basically the description of what was troubling him, I documented it just doesn't follow a creditable neurological disease process. Meaning I didn't feel like it was a creditable complaint.

(Mack Dep. at 17.) Dr. Mack agreed that it was possible that the force applied by the grinder at the time of the accident could have caused an injury to claimant's neck. However, any cervical injury should result in pain within twelve hours. (*Id*. at 29-31.)

Resolution of Neck Injury Allegation

¶48 After considering the medical evidence, the exhibits, and the testimony, I am unpersuaded that claimant suffered a neck injury on October 6, 1992, or that his subsequent neck pain and other symptoms are related to his industrial accident. My determination is based in large part upon my view of claimant's credibility. I did not find his testimony credible.

¶49 Claims adjuster Wallace took a recorded statement of the claimant on October 19, 1992. At that time when asked about what happened on the day of the accident, the claimant stated that his injury was to his left shoulder and that he had heard a pop in his **shoulder** at the time of the accident. (Ex. 7 at 2.) He reported a pop in his **shoulder** to Dancer the day after the injury. (¶ 19.) In this litigation he now claims that the pop was in his neck. (Wall Dep. at 27-28; Trial Test.) His testimony is not believable.

¶50 Claimant testified during his deposition that he told all the medical providers treating him about his neck pain. (Wall Dep. at 56.) He repeated that testimony at trial but expressed some uncertainty as to whether he told the two physician assistants who initially saw him on October 7 and 8, 1992. Claimant's testimony was refuted by the testimony of the two physician assistants and Drs. Moseley and Burton. And the records of chiropractor Montgomery fail to record any neck complaints. I found claimant's testimony concerning his reports of neck pain **not** credible.

¶51 The claimant's testimony at trial concerning chiropractic treatment of his neck also does not comport with the record before the Court. Claimant testified that within two weeks following the injury he sought chiropractic treatment for his neck/cervical area. The records of Dr. Montgomery show the first appointment following the injury was two months after claimant's accident, that claimant did not mention any neck pain, and that treatment did not extend to the neck. (Ex. 22 at 6.)

¶52 Claimant's filings with the Social Security Administration are also inconsistent with his testimony. On April 14, 1993, approximately six months after the injury, claimant filed a disability report in connection with an application for Social Security disability benefits. Nowhere in his report did the claimant mention any problems with his neck. (Ex. 8, 40-45.) In contrast, he specifically mentioned his torn rotator cuff, a left leg disability, constant pain in his left foot, flat feet, hearing loss, a right shoulder dislocation in 1978, and low-back pain. (*Id*.) In October 1993, in a statement filed with Social Security, the claimant lists as a **change** in his condition that "I'm not only suffering from a rotator cuff tear, but also from a cervical strain/sprain and possible left C6-7 disc herniation." (Ex. 8 at 32.)

¶53 I find it more probable that claimant's neck pain and associated symptoms did not arise until June or early July 1993, several months after his industrial accident. In light of that finding, and testimony by Drs. Johnson and Mack that any cervical injury would have surfaced shortly after the accident, I find that claimant's neck complaints are not caused or related to his industrial accident.

¶54 Moreover, I find that his neck complaints are not supported by any objective medical evidence. The only objective evidence of cervical abnormality was bone spurring. None of the physicians correlated that finding with his symptoms. Dr. Johnson commented that claimant's subjective symptoms were unlikely related to the spurring. (¶ 44.) Dr. Mack commented that the claimant's complaints do "not follow a creditable neurologic pattern of disease." (¶ 47.)

Disability

¶55 The second issue to be determined is whether the claimant is permanently totally disabled as a result of the industrial injury on October 6, 1992.

¶56 Claimant has not worked since the accident. Immediately following the accident he was offered and refused a sedentary duty job as a stationary engineer supervisor with the employer. (Ex. 9 at 1-2.) At trial he testified he does not plan to return to work as he does not believe he is capable of working.

¶57 Prior to his left-shoulder surgery in February 1994, various job analysis prepared by a vocational consultant as appropriate for claimant were medically approved by Drs. Moseley and Burton and by Richard Smith, a physical therapist. (*See* Exs. 16,18, and 20.)

¶58 On June 10, 1993, Dr. Moseley reviewed and approved auto repair service advisor, auto parts clerk, and property manager, without restrictions. He also approved a combination welder/diesel mechanic position with the restriction of no lifting of 30 pounds overhead. (Ex. 18; Moseley Dep. Ex. 2) At the time of his deposition on March 18, 1999, Dr. Moseley was asked whether he still approved the jobs in light of the claimant's 1994 rotator cuff surgery. He did. (Moseley Dep. at 17.)

¶59 On June 14, 1993, Dr. Burton approved three job analyses: that of auto repair service advisor, auto parts clerk, and property manager, all without restrictions. He disapproved the job analysis for combination welder/diesel mechanic.

¶60 On August 30, 1994, Dr. Rotar was asked to review and comment on six job analyses provided by Crawford and Company. He was specifically asked to base his approval or disapproval on the claimant's shoulder condition only. Claimant's counsel then wrote to the doctor and suggested that the claimant's cervical condition should be considered by the doctor in his review of the job analyses. (Ex. 28 at 36.) With modifications, Dr. Rotar approved all but the welder/diesel mechanic and stationery engineer positions.

¶61 Dr. Johnson addressed claimant's ability to work in light of his neck complaints. He testified that he had no reason to disapprove the various jobs presented by the vocational consultant based on the neck condition. (Trial Test.)

¶62 Deborah Grube Peterson (Peterson), a vocational consultant, conducted an employability assessment analyzing the claimant's return to work potential. Based on his prior work history, transferrable skills, and physical restrictions, she identified the positions of auto repair service estimator, auto parts clerk, and property manager as jobs the claimant is vocationally qualified to perform. (Ex. 9 at 13-16.) Peterson did a labor market survey in Missoula and determined that there were positions available in Missoula for all of these jobs. (Ex. 9 at 18-20.) Claimant did not present vocational evidence to the contrary.

¶63 Based on all the evidence, I find that neither claimant's shoulder injury nor his subjective neck complaints disable him from regular employment. It is clear to the Court that the claimant is unmotivated to seek employment and does not intend to do so, but it is equally clear that he is employable and capable of returning to work if motivated.

CONCLUSIONS OF LAW

¶64 Claimant's industrial injury occurred on October 6, 1992, thus his claim is governed by the 1991 version of the Workers' Compensation Act (WCA). *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶65 The claimant must prove by a preponderance of the evidence that he is entitled to compensation. *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).

¶66 The claimant petitions the Court for a determination that he injured his neck in his October 6, 1992 industrial accident. The fact that he suffered a shoulder injury in an industrial accident on that date is uncontested. But he must prove that he suffered a neck injury as a result of the accident. *Brown v. Ament,* 231 Mont. 158, 752 P.2d 171 (1988). As set forth in the findings of fact, I am not persuaded that claimant injured his neck.

¶67 Claimant alleges that he is permanently totally disabled. The benefits are governed by section 39-71-702, MCA (1991), 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.
>
> (2) The determination of permanent total disability must be supported by a preponderance of medical evidence.

The Workers' Compensation Act defines PTD as follows:

> (16) "Permanent total disability" means **a condition resulting from injury as defined in this chapter,** after a worker reaches maximum healing, in which a worker has no 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. [Emphasis added.]

§ 39-71-116(16), MCA (1991). Claimant has failed to persuade me that he is permanently totally disabled.

¶68 In seeking PTD benefits, claimant concedes that he has reached maximum medical improvement with respect to his industrial injuries. Therefore, I must determine whether he "has no reasonable prospect of physically performing regular employment."

¶69 The evidence concerning claimant's physical capacity as it relates to his shoulder injury shows that he can return to work in sedentary and light positions. Subsequent to his 1994 surgery, Dr. Moseley reaffirmed his approval of three of the positions identified by the insurer's vocational consultant. Dr. Rotar also approved three of the positions with a note being made of certain problems which might present in specific circumstances. The vocational consultant determined that the jobs are available in the Missoula area. Claimant presented no contrary evidence.

¶70 Other than his own testimony claimant has not provided any medical or vocational evidence to support his claim for PTD benefits as a result of his shoulder injury on October 6, 1992.

JUDGMENT

¶71 1. Claimant did not injure his neck on October 6, 1992, and National is not liable for medical treatment of his neck complaints.

¶72 2. Claimant is not permanently totally disabled as a result of his industrial injury on October 6, 1992.

¶73 3. Petitioner is not entitled to attorney's fees and costs.

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

¶75 5. 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 16th day of August, 1999.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Ms. Rachel Wright
Mr. Peter J. Stokstad
Date Submitted: May 7, 1999