IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWCC 93

WCC No. 9506-7322

EDWARD KILLOY, JR.

Petitioner

vs.

RELIANCE NATIONAL INDEMNITY

Respondent/Insurer for

RHONE-POULENC BASIC CHEMICALS COMPANY

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

REVERSED

See, *Killoy v.Reliance National Indemnity*, 278 Mont. 88, 923 P.2d 531 (1996) (No. 95-551)

Summary: Claimant sought permanent total disability benefits, testifying that jobs identified by the insurer would increase his pain and make him a "cranky" employee.

Held: While the Court was persuaded claimant does have pain and that activity increases his pain, it was not convinced that claimant's pain physically prevents him from working as either a motel clerk or cashier.

The trial in this matter was held on August 30, 1995, in Butte, Montana. Petitioner, Edward Killoy, Jr. (claimant), was present and represented by Mr. Bernard J. Everett. Respondent, Reliance National Indemnity (Reliance National), was represented by Mr. Brendon J. Rohan. The claimant testified on his own behalf. Patricia Hink, a certified rehabilitation counselor, also testified. Exhibits 1 through 6 were admitted by stipulation. Exhibit 7 was admitted without objection. The parties agreed that the depositions of claimant and Dr. Richard C. Dewey may be considered by the Court.

A partial trial transcript has been prepared. Unless otherwise noted, the facts found herein are based on the trial testimony or on claimant's deposition.

Issues: Claimant seeks permanent total disability benefits, attorney fees and costs, and a penalty. Respondent contends claimant is not permanently totally disabled and that he is not entitled to fees, costs, or a penalty.

* * * * *

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

FINDINGS OF FACT

1. Claimant was 58 years old at the time of trial. He did not graduate from high school but obtained a GED when he was in the Navy. He has no further formal education. He served two years active duty in the Navy and eight years in the Naval Reserves.

2. Since 1956 claimant has principally worked as a mechanic. He was trained as a heavy-duty automotive mechanic in an apprenticeship program beginning in 1962. He is certified by the State of Montana as a heavy-duty mechanic. Since 1962 he has worked for various employers, primarily as a heavy-duty mechanic.

3. He worked for Rhone-Poulenc Basic Chemicals Company (then known as "Stauffer") for a few months in both 1986 and 1987 as a mechanic. He then went to work for the company full-time in April 1991.

4. Claimant was injured in the course and scope of his employment with Rhone-Poulenc on August 20, 1993. He was injured when a large, heavy shaker screen, which he and three other employees were lifting, fell and struck him on the head, jamming his neck.

5. At the time of claimant's injury, Rhone-Poulenc was insured by Reliance National Indemnity, which accepted liability for claimant's injury. Reliance has paid medical benefits and paid claimant temporary total disability benefits until May 27, 1995, when it converted his benefit status to permanent partial disability. Since May 27, 1995, it has paid claimant permanent partial disability benefits at the rate of $181 per week.

6. Following his industrial accident, claimant was initially examined by Dr. Bruce Knutsen on August 23, 1993. At that time claimant was complaining of severe neck pain with radiation of the pain into his shoulders. He also complained of numbness in his

fingers. X-rays showed "[d]egener-ative disc changes, spurring, and some narrowing of the lower foramina." Dr. Knutsen prescribed physical therapy and medication, directed that claimant be placed on light duty, and ordered an MRI scan of the neck. (Ex. 4 at 1.)

7. On August 27, 1993, claimant told Dr. Knutsen that his light-duty work was aggravating his neck pain. Dr. Knutsen advised him to take a full week off of work. (*Id.* at 2.)

8. Dr. Knutsen continued to treat claimant conservatively. He prescribed rest, physical therapy, cervical traction, and medication. Claimant remained off work. Although he initially reported his condition as improving with physical therapy, his condition then deteriorated and he was referred to Dr. Richard Dewey for a second opinion. (Killoy Dep. at 25-26; Ex. 4 at 2-6.)

9. Claimant was examined by Dr. Dewey on October 14, 1993. Dr. Dewey interpreted the MRI as showing "significant cervical canal stenosis at L4-5, 5-6 and 6-7 [sic]. There is degenerative disc disease at these levels, some neuroforaminal encroachment." (Ex. 1 at 2.) The reference to lumbar disks appears to be in error, and should refer to the cervical level. (Dr. Dewey was interpreting a cervical, not a lumbar MRI. An L-6 vertebra is an oddity, and the Court has never heard of an L-7 vertebra.) There were no radicular findings. Dr. Dewey advised claimant to engage in an aggressive stretching program and requested that he return in three or four weeks. (*Id*.)

10. Claimant returned to see Dr. Dewey on November 9, 1993. Dr. Dewey reported that claimant was much improved. He felt that decompression surgery was unwarranted and advised claimant to continue his stretching exercises and return for a yearly examination to determine whether his spinal stenosis was progressing. (*Id*. at 4.)

11. Claimant was released to full-duty work on November 16, 1993 by both Dr. Dewey and Dr. Knutsen. (Ex. 4 at 7.) Dr. Knutsen advised claimant to avoid any trauma to or hyperextension of his neck. (*Id*.)

12. Claimant returned to work but experienced increasing pain in his neck. Dr. Knutsen took claimant off work on December 14, 1993, due to his increased neck pain. (*Id.*) Over the next two weeks, claimant's condition improved and he was again released to work on January 3, 1994. (*Id.* at 8, 11.)

13. Claimant was taken off work for a final time on February 18, 1994, after he aggravated his neck condition when pulling a cable. The cable slipped and hit him in the face. This incident resulted in a violent jolting of his head and lacerated his lip. (*Id.* at 9-10.)

14. Following the February 1994 aggravation, claimant felt he could no longer perform his heavy labor position at Rhone-Poulenc. Dr. Knutsen was inclined to agree and referred claimant back to Dr. Dewey for a second opinion. (*Id.*)

15. On March 4, 1994, Dr. Dewey wrote Dr. Knutsen a report regarding his examination of claimant. He noted muscular symptoms in claimant's neck, shoulder area, and base of the skull. He pointed out that claimant had been inappropriately stretching and recommended a month of very aggressive stretching supplemented by deep heat, ultrasound, and massage by a physical therapist. Dr. Dewey was unable to state whether claimant would be able to return to his time-of-injury job. (Ex. 1 at 6.)

16. Dr. Dewey saw claimant again on April 18, 1994. Claimant's condition had not improved. Dr. Dewey concluded that claimant could not return to his time-of-injury position and identified his problems as follows:

> Cervical spondylosis, radiculopathy not identified; cervical stenosis, possible but not proven cervical radiculopathy; bilateral ulnar entrapment neuropathies; significant cervical myospasm. I do not feel he will get any better. He may worsen as time goes on and he cannot return to his usual occupation.

(Ex. 1 at 7.)

17. Claimant has not worked since February of 1994.

18. Patricia Hink, a certified rehabilitation counselor, was retained by respondent on August 20, 1993, to perform medical case management services relative to claimant's injury. She interviewed claimant, reviewed medical records, and consulted a representative of Rhone-Poulenc and a claims representative of the insurer. On June 23, 1994, she submitted a report in which she stated that she had encouraged claimant to apply for social security benefits, which in fact he had. (Ex. 3 at 9.) She also suggested that return-to-work guidelines be obtained from either Dr. Knutsen or Dr. Dewey to detemine if claimant was employable at light or sedentary, unskilled work. (*Id*. 3 at 9-10.)

19. Claimant applied for and was awarded social security disability benefits.

20. On August 23, 1994, Dr. Dewey wrote to Hink, telling her that claimant was "certainly not permanently disabled from all working." Dr. Dewey gave claimant a 7% impairment rating attributable to the claimant's neck condition. (Ex. 1 at 10-11.)

21. Hink identified several jobs as possibly suitable for claimant and submitted job analyses of them to Dr. Dewey for his review. The positions she identified were lubrication

technician, sewer, shoe repair person, cashier, motel clerk, lumber salesperson and meter reader. Dr. Dewey expressed doubt regarding claimant's ability to perform the lubrication technician position but determined that all the other positions could be "safely attempted without risk" to the claimant. (Dewey Dep. at 19-21.) Hink testified that the types of jobs she identified for claimant are available to persons his age. She testified credibly that the labor market for older persons is more favorable than generally assumed. Finally, in her opinion, claimant should be able to perform full-time employment, although she could not say whether he would in fact be able to tolerate his pain. The jobs she identified are also available on a part-time basis.

22. Dr. Dewey testified that claimant could safely attempt the jobs identified by Hink. On the other hand, he was unable to say whether claimant could actually perform the jobs. In response to counsel's inquiry regarding his approval of the job descriptions submitted by Hink, he testified:

> **Q:** So as of May 18,1995 it was your opinion that Mr. Killoy was physically capable of performing -
>
> **A:** No, I didn't say that. I said he could. I didn't know if he was capable of doing it. I very clearly caged myself on that record. I said, "Can safely be attempted without risk."
>
> There was no risk in doing any of those. If the patient said he wanted to do them, I'd say fine. If he could do them, that's fine. But if he was capable of doing them, I can't answer that. That's a question that doctors can't answer; only the patient can answer that.

(Dewey Dep. at 20-21.)

23. Claimant testified that he experiences pain from the base of the skull, down the middle of the back and through his shoulders. He described his pain as constant. He has headaches and muscle spasm, which are aggravated by increased activity. He obtains temporary pain relief by using a stretching apparatus for his neck and performing stretching exercises on a daily basis. He has his "bad days" once or twice a week. On those days, he seeks relief through hot showers and a heating pad. His level of pain increases if he is stationary for any length of time. Claimant's testimony regarding his pain was credible.

24. Claimant spends a typical day reading, going for a walk, watering his lawn, and watching television. He is able to drive, mow his lawn, and participate in limited outdoor recreational activities.

25. He is willing to return to work if a position within his physical capabilities is available. However, he does not want to work in a minimum wage job or give up his social security entitlement. He has not made any attempt to find employment since his injury.

26. Claimant does not believe he is able to perform any of the positions identified by Hink and approved by Dr. Dewey. Dr. Dewey, as noted before, approved these positions based on the fact that they would cause no harm and made no determination concerning claimant's ability to cope with pain.

27. I find that three of the five positions are incompatible with claimant's physical condition.

(a) With respect to the lubrication technician position, claimant testified that he would have difficulty lifting his hands over his head. In light of his testimony, which I found credible, and Dr. Dewey's reservations regarding this position, I find that he is unable to perform the duties of a lubrication technician.

(b) Regarding the shoe repair position, claimant was concerned about the standing requirements (85%) and testified he needed to sit more than that. He also expressed reservations about the pushing and pulling requirements of the job. I find that his concerns are real and that it is unlikely that he could perform this position. Up to 62.5% of the shoe repairman's job is spent pushing and pulling, "[s]ewing boots or shoes by hand or machine; Tearing boots & shoes apart; pulling heels off; working at shoe last." (Ex. 2 at 7.) The amount of physical activity is incompatible with his condition.

(c) I also find that the duties of a lumber salesperson are incompatible with claimant's condition. This position also requires a great deal of physical activity. It requires lifting and carrying of up to 15 pounds continuously, and occasional lifting of 50 pounds. Bending to retrieve stock from lower shelves or desk drawers is required during 50% of the shift.

I find it likely that any of these three positions would increase claimant's pain beyond what he could reasonably endure.

28. Claimant also feels he is unable to work as a cashier or motel clerk because his pain makes him "cranky." He also believes it would be difficult for him to carry luggage if employed as a motel clerk and that it would be difficult to be confined in a limited space as a cashier. While I do not discount his beliefs, I do not find them persuasive. Regarding his "crankiness," I perceived claimant to be a positive and upbeat person. He expressed a desire to work if he is physically able to do so. He has worked all his life and has a good work ethic, and I am persuaded that he would cope with his pain if he was forced to do so.

Moreover, he indicated that the level of his pain and crankiness is related to the amount of his activity, so crankiness will occur only after having worked for some period of time. We have all encountered "cranky" workers. I am not persuaded that his pain or resulting crankiness is so severe as to preclude his employment in these positions on a full-time basis. I am even more certain that claimant could work at least part time. Finally, I am not persuaded that he is unable to provide "occasional" assistance helping guests with their luggage, or that the limited space available to cashiers would be intolerable.

29. Hink testified, and the Court is persuaded, that appropriate jobs exist for the claimant and that the claimant has a reasonable opportunity for regular employment. Hink testified persuasively that although claimant may initially have difficulties in returning to work, work may ultimately prove therapeutic in the sense that it will take his mind off his condition and pain. Respondent has met its burden of establishing that claimant has a reasonable prospect of physically performing regular employment.

30. The insurer's conduct in this case was not unreasonable. Although its vocational consultant recommended that claimant apply for social security disability benefits, her testimony established that the qualifying standard for social security disability benefits for a person claimant's age is less rigorous than for permanent total disability benefits under the Montana Workers' Compensation Act. Her testimony at trial shows that she has sufficient experience to understand the different criteria for disability under the Social Security Act and the Montana Workers' Compensation Act. She testified that under the Social Security Act claimant's ability to perform unskilled, light or sedentary work would not be considered given his age and previous work history. Her testimony was buttressed by claimant's counsel's legal expertise in this area. Moreover, the Court's own research shows that under the Social Security Act a high school graduate of advanced age (55 or older), with a medically determinable impairment, whose previous work experience does not provide readily transferable skills, is presumptively unable to perform light or sedentary work. 20 C.F.R. § 404, Subpt. P, App.2 (1995). Hink did not prepare or submit any job analyses to Dr. Dewey until he had indicated that claimant was employable. (Ex. 1 at 10-11.)

CONCLUSIONS OF LAW

1. The law in effect at the time of the injury governs the claimant's entitlement to benefits. *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 730 P.2d 380 (1986). Thus, the 1993 version of the Workers' Compensation Act governs this case.

2. The claimant has the burden of proving 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).

3. Initially, claimant has failed to carry his burden of proof under section 39-71-702(2), MCA. Subsection (2) provides that a "determination of permanent total disability must be supported by a preponderance of medical evidence." The medical evidence concerning permanent total disability was provided by Dr. Dewey, who **approved** five positions. While Dr. Dewey left it up to claimant to determine whether he can tolerate his pain while working, his opinion does not constitute positive medical evidence satisfying claimant's burden under subsection (2).

4. Even assuming that claimant is not required to establish permanent total disability by a preponderance of medical evidence, he has nonetheless failed to satisfy his burden of proving disability by a preponderance of all evidence.

Permanent total disability is defined under the Montana Workers' Compensation Act as

> . . . 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 (1993) (emphasis added). Where "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." § 39-71-702(1), MCA.

Although section 39-71-116(19), MCA (1993), does not set forth any requirement that the claimant be qualified and capable of performing the employment based on his or her education, training, work history, and skills, *compare § 39-71-116(13), MCA (1985)* and *Spooner v. Action Sales, Inc.,* WCC Docket No. 1309 (January 24, 1983*),* such a requirement is inherent. Otherwise, if a claimant could physically perform the duties of a lawyer, he would be deemed as having a "reasonable prospect of <u>physically</u> performing regular employment" as a lawyer even though he has not graduated from law school or been admitted to the bar.

I have reviewed and carefully considered *Brurud v. Judge Moving & Storage Co., Inc.,*172 Mont. 249, 563 P.2d 558 (1977), which was proffered by claimant as controlling precedent. That case, however, is distinguishable. The Supreme Court held that a decision finding claimant permanently totally disabled was not clearly erroneous where claimant was 62 years of age, had a high school education, had worked as a meat cutter for 25 years and a laborer for 15 years, and had a back injury. His physicians concluded

he was 60% to 75% disabled. The Court rejected an argument by the insurer that the decision below was erroneous because the claimant had not made a reasonable effort to find regular employment. It held that an actual but unsuccessful attempt to find regular employment was not a prerequisite to a finding of permanent total disability finding, and that such a search may in some cases be foreseeably futile. 172 Mont. 252, 563 P.2d 560.

A job search in this case is not foreseeably futile as it was in *Brurud.* The claimant in this case is five years younger than Mr. Brurud. Vocational testimony in this case established that age is not as negative a factor in employment as it used to be. That testimony is not surprising in light of laws prohibiting age discrimination and discrimination based physical disabilities. See e.g., § 49-2-303, MCA (1995). Claimant's work history is in more skilled positions than Mr. Brurud and he has an impairment rating of only 7%.

Citing *Metzger v. Chemetron Corp*., 212 Mont. 351, 356-57, 687 P.2d 1033, 1036-37 (1984), Reliance National argues that claimant cannot satisfy his burden of proof in light of his failure to look for work. In *Metzger* the Supreme Court held that claimant's "uncertainty" of his physical ability to return to work "coupled with a minimal job search cannot combine to support a claim of no reasonable prosect of employment," at least where the claimant's treating physician and a therapist were affirmatively urging him to return to work. *Metzger*, 212 Mont at 356, 687 P.2d at 1036. In this case claimant testified positively that he could not return to work, and Dr. Dewey was not positively urging him to return to work.

A job search in this case might well have been helpful. A good faith but unsuccessful effort to find a job might be evidence that claimant's age, work history and physical condition make him uncompetitive and unemployable. If Killoy had obtained employment, he might have found himself able to do the work and might have discovered it actually took his mind off his pain. On the other hand, if despite his best efforts and intentions the pain were so severe as to prevent his continued employment even on a part-time basis, that fact would be strong evidence of permanent total disability. However, I decline to decide this case based on claimant's failure to undertake a job search.

In old law cases, pain is a factor the Court must consider in determining whether claimant is permanently totally disabled; however, it is not the only factor. *Metzger* 212 Mont. 355, 687 P.2d 1035 (1984*); See also Robins v. Anaconda Aluminum Co.*, 175 Mont. 514, 575 P.2d 67 (1978). The new law provision, as quoted above, requires claimant to prove that he have "no reasonable prospect of **physically performing** regular employment." Pain, however, may be so severe for some individuals that it renders them physically incapable of performing their job duties, so it still must be considered in new law cases.

Claimant testified that both the cashier and motel clerk jobs would increase his pain and make him a "cranky" employee. While I am persuaded that he does have pain and that

activity increases his pain, I am not convinced that it physically prevents him from working as either a motel clerk or a cashier. I am persuaded that claimant could work full-time after acclimating himself to a job, although I am persuaded of this by a bare preponderance of the evidence and recognize that there is a substantial chance that he would be unable to work full-time. I am, however, firmly convinced that he is able to work at regular and significant part-time (20 hours or more per week) employment. In *Ness v. Anaconda Minerals Co.,* 257 Mont. 335, 849 P.2d 1021 (1993), the Supreme Court held that the physician's release to part-time work was sufficient to change claimant's status from temporary total disability to permanent partial disability. Similarly, this Court has held that the ability to engage in regular part-time work is substantial evidence claimant is not permanently totally disabled. *Wilde v. State Fund,* WCC No. 8903-5189 (December 21, 1989); *Marron v. Intermountain Ins. Co.,* WCC No. 8812-5034 (November 6, 1989).

I am unpersuaded that claimant's crankiness would be so severe as to make claimant unable to work with customers or render him an unacceptable employee. For full-time work, my conviction in this regard is, again, by a bare preponderance of the evidence. On the other hand, I am firmly persuaded that claimant's pain is not so severe as to preclude him from acceptably performing part-time work.

Claimant has a reasonable prospect of employment. Hink testified persuasively that age is not as great a factor in employability as in the past. The positions claimant is able to perform are
minimum wage positions. His age and stable work history may work to his advantage in competing for these jobs.

5. The social security disability finding is not binding on this Court. The criteria utilized by the Social Security Administration are not the same as those specified by the Montana Workers' Compensation Act. Because of claimant's age and historical occupation, the Social Security Administration gives no consideration to his ability to perform and compete for unskilled sedentary and light work.

I fully recognize the dilemma created by the different disability standards. On the one hand, claimant is entitled to social security disability benefits and is deemed to be totally disabled under the Social Security Act. If he secures significant employment, he will become disqualified from receiving benefits to which he is entitled. On the other hand, I must apply Montana law which requires that "determination of permanent total disability must be supported by a preponderance of medical evidence," § 39-71-702(2), MCA (1993), and which also requires claimant to prove that he is unable to physically perform jobs for which he is qualified.

6. Since claimant has not prevailed in this case, he is not entitled to costs or attorney fees. In any event, the insurer has acted reasonably in the handling of this case.

JUDGMENT

1. Petitioner is not permanently totally disabled and is not entitled to permanent total disability benefits.

2. Petitioner is not entitled to attorney fees, costs or a penalty.

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

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 7th day of November, 1995.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Bernard J. Everett
Mr. Brendon J. Rohan
Submitted: August 30, 1995