IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2000 MTWCC 64

WCC No. 9911-8365

LOUIS NIELSON

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

TNT WELL SERVICING, INCORPORATED

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

REVERSED AND REMANDED 4/23/03

Summary of Case: During April 1995, claimant sought treatment for numbness, tingling, and pain in both arms, but primarily in his left arm. He ceased working in May 1995. Claimant's *right* arm condition was accepted by State Fund as an injury under the Workers' Compensation Act (WCA), but his *left* arm condition was accepted as an occupational disease. In *Nielson v. State Compensation Ins. Fund*, 1999 MTWCC 49, this claimant sought permanent total disability benefits, which were denied. He now seeks permanent *partial* disability benefits on the basis of the record presented in the prior case. He alleges the debilitating pain in both arms prevents his return to his time-of-injury job (servicing oil wells) or other positions involving heavy physical demands.

Held: Because permanent partial disability benefits are not available under the Occupational Disease Act (§ 39-72-703, MCA), the relevant inquiry is whether claimant is permanently partially disabled from his *right* arm condition which State Fund did accept as an injury under WCA. His claim is governed by the 1993 version of the WCA, which defines permanent partial disability as a condition, after MMI, in which a worker (a) has a medically determined physical restriction as the result of an injury which (b) impairs his ability to work. Claimant did not prove he has a medically determined physical restriction impairing work. Having found claimant's subjective reports of pain not credible, the Court finds expert opinions supporting claimant's case unpersuasive since they rely upon claimant's

subjective claims. The Court credits other medical providers who found claimant's reports of disability exaggerated and without objective basis and who did not place any physical restrictions on claimant.

Topics:

Benefits: Permanent Partial Benefits: Generally. Where claimant sought PPD benefits on the basis of disability in both arms, but only the right arm condition was accepted as an injury by the insurer, the relevant inquiry was whether claimant was permanently partially disabled due to his right arm condition. Because PPD benefits are not available under the Occupational Disease Act (§39-72-703, MCA), claimant's left arm condition, accepted by the insurer as an occupational disease, could not give rise to a claim for PPD benefits on the record presented.

Benefits: Permanent Partial Benefits: Generally. Under the 1993 version of the WCA, PPD claimant failed to prove that, after MMI, he had a medically determined physical restriction as the result of an injury which impaired his ability to work (§39-71-116(19), MCA). Having found claimant's subjective reports of pain not credible, the Court was not persuaded by expert opinions relying on those subjective reports, but credited other experts finding claimant's reports of disability without objective basis and refusing to place physical restrictions on claimant.

Disability: Permanent Partial. Under the 1993 version of the WCA, PPD claimant failed to prove that, after MMI, he had a medically determined physical restriction as the result of an injury which impaired his ability to work (§39-71-116(19), MCA). Having found claimant's subjective reports of pain not credible, the Court was not persuaded by expert opinions relying on those subjective reports, but credited other experts finding claimant's reports of disability without objective basis and refusing to place physical restrictions on claimant.

Impairment: Generally. Under the 1993 version of the WCA, PPD claimant failed to prove that, after MMI, he had a medically determined physical restriction as the result of an injury which impaired his ability to work (§39-71-116(19), MCA). Having found claimant's subjective reports of pain not credible, the Court was not persuaded by expert opinions relying on those subjective reports, but credited other experts finding claimant's reports of disability without objective basis and refusing to place physical restrictions on claimant.

Medical Conditions (by specific condition): Carpel Tunnel Syndrome. Particular tests used by one physician as providing evidence of carpel tunnel syndrome questioned by other medical providers as not based on valid methodology and not found persuasive by Court regarding alleged permanent partial disability.

Medical Evidence: Functional Capacity Evaluations. Court not persuaded by conclusions of Functional Capacity Evaluation where record suggested symptom magnification by claimant during testing and failure of claimant to participate in work conditioning program associated with FCE.

Witnesses: Credibility. Having found claimant's subjective reports of pain not credible, Court found expert opinions relying on claimant's subjective reports not persuasive.

¶1 This matter is before the Court on a stipulated record based on proceedings in *Louis Nielson v. State Compensation Ins. Fund*, 1999 MTWCC 49, WCC No. 9902-8158. In that case, petitioner Louis Nielson (claimant) sought permanent total disability benefits. His request was denied. In the present case, claimant seeks permanent *partial* disability benefits on the basis of the same record presented in the prior case. The parties have **not** presented new or additional evidence.

¶2 I incorporate the prior decision, a copy of which is attached, and make the following additional findings of fact and conclusions of law.

Additional Findings of Fact

¶3 As set forth in the conclusions of law which follow, to prove permanent partial disability the claimant must show he has "a medically determined physical restriction as a result of an injury" and that the restriction impairs his ability to work. Since there is no provision under the Occupational Disease Act (ODA) for permanent partial disability benefits, and claimant's left arm complaints were accepted as an occupational disease, any physical restriction and impaired ability to work must arise, if at all, from claimant's right arm condition.

¶4 In my prior decision I analyzed the persuasiveness of the medical and vocational opinions, along with claimant's credibility. I reaffirm that analysis.

¶5 As I found previously, claimant was not a credible witness. I am persuaded he has exaggerated his pain in his testimony and in his reports to the physicians and other medical professionals who have examined or treated him.

¶6 In determining whether claimant suffers a "medically determined physical restriction," I initially note a lack of persuasive objective medical evidence verifying physical restrictions of claimant's use of **either** of his arms impairing his ability to work. Objective medical evidence relating to the right arm is particularly lacking. The following is significant:

a. The initial medical record of Dr. Lofti Ben-Youssef states:

> The patient is a 45 year old hot oil truck driver, who has been complaining of three weeks history of sudden onset of numbness of the left hand, radiating

> upward to the posterior medial aspect of the left elbow, present during the day and at night, to the point where the patient now cannot trust his left. The patient states that the only way he could sleep at night is with his hand overhead and he has to sleep on his back, which is something he hasn't been used to. **The patient is worried because the same problem is starting on the right hand after he pulled on a hot oil hose**.

(Ex. 9 at 9, emphasis added.) At this point claimant's primary complaint was with his left hand. (*Id*.)

b. Dr. Williams, who examined claimant and did nerve conduction studies in 1995, wrote that "no abnormalities were found on neurophysiological testing." (Ex. 13 at 2.)

c. While Dr. Ben-Youssef initially diagnosed bilateral cubital tunnel syndrome, his focus in July 1995, was overuse syndrome of the **left** wrist and forearm. (Ex. 19 at 3; Ex. 9 at 10.)

d. In 1995, Dr. Settergren diagnosed "**left** lateral epicondylitis and some signs and symptoms of cubital tunnel syndrome." (Ex. 16. at 2.)

e. During 1997, Dr. Bill Rosen could not find support for any particular diagnosis other than right extensor pollicis tendonitis and possible chronic pain syndrome. (Ex. 10 at 6-7.)

f. Electrodiagnostic studies conducted of claimant by Dr. Donald H. See during 1997 were normal. (Ex. 12 at 1-2.)

g. Electrodiagnostic studies of claimant during 1998, by Dr. Patrick Cahill, a neurologist, were also normal. (Ex. 14 at 8.) While Dr. Cahill suggested "possible mild **bilateral** medial epicondylitis," (*id*. at 9, emphasis added) Dr. Ross testified he did not find support even for a diagnosis of epicondylitis. (Transcript in WCC No. 9902-8158 at 139; hereinafter referred to as Tr.)

h. Dr. Robert Schultz, who examined claimant in 1998, found no obvious weakness or atrophy in the muscles of either arm. (Ex. 14 at 4-5.) While "not sure of the etiology of this patient's overall complaints," Dr. Schultz stated claimant "does not obviously have a motor nerve injury without demonstrable weakness." (*Id*. at 5.) Dr. Schultz also commented upon obvious "psychiatric over lay." (*Id*.)

i. Dr. Scott Ross, who examined claimant in 1998, found no objective findings to support claims of right or left upper extremity pain. (Ex. 14 at 16.)

j. While Dr. Gaddy's 1995 EMG, and nerve conduction testing found "electrical evidence" of right and left carpal tunnel syndrome, her findings are not supported by

the other studies. More recent testing and the opinions of other physicians cast serious doubt on the validity of her studies and diagnoses. Moreover, Dr. Ross testified that the methodology used by Dr. Gaddy is questioned in mainstream medical circles. (Tr. at 139.) I am not persuaded by Dr. Gaddy's findings.

¶7 Claimant has failed to persuade me that he suffers a physical restriction of his right arm which impairs his ability to work.

a. The opinions of Dr. Ben-Youssef and physical therapist Ron O'Neill (O'Neill), which support claimant, were based upon claimant's subjective complaints, which I do not credit. Both experts opined claimant could not even perform jobs as sales clerk, video rental clerk, and auto salesman. My rejection of their opinions was implicit within my finding that claimant is not permanently totally disabled.

b. Dr. Schumann's work restrictions for claimant were "subjectively based." Moreover, Dr. Schumann noted that a period of work hardening would be necessary before it could be determined whether some jobs were within claimant's abilities. (Ex. 15 at 4.)

c. While Dr. Rosen only approved positions which were less demanding than claimant's time-of-injury job, he did not exclude other more demanding jobs or opine that any particular physical restrictions were medically supported. Indeed, his September 17, 1997 letter to Todd Jones suggests otherwise:

> Based on my evaluation of January 10, 1997 and review of Dr. See's reports the only diagnoses I am comfortable in claiming in Mr. Neilsen's [sic] case is that of right extensor pollicis tendonitis noted by positive Finkelstein's maneuver. I note that Dr. See did note significant tenderness over the medial epicondyles bilaterally however, to my recollection the patient had diffuse tenderness throughout his entire forearms which I cannot contribute to any specific syndrome, disease or injury. Therefore, the only problem I can identify based on my evaluation of Mr. Neilsen [sic] and my review of his electrodiagnostic studies is right extensor pollicis tendonitis.
>
> Without actually examining Mr. Neilsen [sic], I cannot determine if he is at maximum medical improvement for this latter problem. Otherwise, with regard to his other complaints of pain, I do feel that he is at maximum medical improvement. **Furthermore, based on my examination of January 10 he would have no impairable [sic] rating given the normal nerve conduction studies and absence of other objective findings which could contribute to a ratable impairment.**

(Ex. 10 at 15, emphasis added.)

d. Dr. See is similarly on record as approving specific jobs, but, like Dr. Rosen, he did not exclude more physically demanding jobs, nor did he impose any particular physical restrictions. Indeed, Dr. See made clear he did not believe claimant "ever had any peripheral nerve entrapment and certainly didn't on the occasion of these studies." (Ex. 12 at 6.)

e. The Schultz - Cahill - Ross medical panel did not exclude any jobs, instead recommending a two-week work conditioning program followed by an exit functional capacity examination. (Ex. 14 at 2.) The panel consensus recognized the "possibility that the functional capacity evaluation repeat would be indicative of the ability of the patient to return to his previous job." (*Id*.)

f. Dr. Ross testified at trial that he placed no physical restrictions on claimant. (Tr. at 158.)

¶8 The two functional capacity evaluations (FCE) of claimant also do not persuade me he has a physical restriction which impairs his ability to work. The first FCE was conducted during February 1997. Drs. Ross, Schultz, and Cahill were not comfortable relying on this report during their 1998 examination, noting the lapse of time since the evaluation and their preference for an evaluation which included testing both before and after a work conditioning program. (Ex. 14 at 2.) Implicit within their rejection of the 1997 FCE, was the concern that claimant had not accurately represented his abilities. (*Id*.)

¶9 At trial, Dr. Ross was explicit in his reasons for not relying on the second FCE, conducted by physical therapist O'Neill. Dr. Ross explained:

> First of all, Mr. Nielson had participated minimally in the functional capacity evaluation and the work conditioning program, or at least in the work conditioning program. I believe he attended four out of ten days, and worked approximately an hour, hour and a half on each day, which in my view was inadequate in terms of trying to make an objective evaluation.
>
> A second concern I had was basically that Mr. O'Neill had reported as bjective what I felt were subjective complaints, which I had found on my evaluation as well, basically subjective complaints without objective correlation.

(Tr. at 141.) Dr. Ross opined the FCE conducted by O'Neill was "essentially invalid" because "[t]here wasn't enough participation in the work conditioning program." (*Id*. at 143.)

¶10 Dr. Ross was even more specific in his December 27, 1998 letter to the claims adjuster regarding the O'Neill FCE. Dr. Ross wrote:

> In the FCE notes, Mr. O'Neill describes objective findings which are primarily subjective complaints of pain, pins and needles and numbness reported by the patient. There are few reliable objective findings noted during the FCE. **Of importance, Mr. O'Neill notes moderate symptom magnification on page two of**

> **the FCE dated 11/02/98.** In addition, Mr. O'Neill questions the benefit of work hardening due to the patient's constant complaints of irritability and aggravation with any type of activity. It should be noted, however, that the FCE was recommended because the only previous FCE was over one year old and the panel evaluation (Drs. Cahill, Schultz and Ross) did not demonstrate any objective findings whatsoever. Indeed, during the panel evaluation, the patient exhibited subjective complaints of pain without any objective correlation.
>
> In the FCE done on exit from the work conditioning program (11/16/98) Mr. O'Neill lists objective findings which are, in reality, subjective complaints. **He again notes moderate to maximal symptom magnification by the patient.** Of interest, the patient was able to tolerate only one-half hour per day of work conditioning activities and missed four of 10 scheduled visits due to pain complaints. He also reported poor sleep and increased pain medication during this period of time despite his minimal participation in the program. Mr. O'Neill notes that the patient did demonstrate some improvement regarding walking, squatting and lifting, but no significant changes insofar as functional abilities. He opined that Mr. Nielson was not a likely candidate for further work conditioning and stated that holding a job of any sort is questionable according to findings from the FCE and attempts at work conditioning.

(Ex. 14 at 20-21, emphasis added.) In the letter, as at trial, Dr. Ross found "the FCE results are essentially invalid." (*Id.* at 21.)

¶11 At trial, Dr. Ross also noted inconsistencies between measures obtained by O'Neill and measures he obtained in his own examination of claimant. In particular, he noted that claimant's grip strength decreased from the time of his examination of claimant to the first measure by O'Neill, then decreased further by the time of O'Neill's second measure. (Tr. at 143-144.) Dr. Ross did not believe there was a medical explanation for this decrease, testifying he had never seen such decreases. (*Id.* at 145.)

¶12 Having reviewed the FCE report, listened to Dr. Ross's explanation at trial, and observed claimant's own testimony, I am persuaded by Dr. Ross's evaluation of the O'Neill FCE. I am also persuaded that the earlier FCE is of little value in assessing claimant's abilities for the reasons noted by Dr. Ross, including concern that the earlier FCE was also infused with claimant's symptom magnification. Thus, I find no objective medical basis for concluding claimant suffers any particular physical restriction resulting from injury to his right arm.

¶13 The only impairment rating given claimant was by Dr. Ben-Youssef:

> 5-11-98. The patient comes back still complaining of bilateral hand pain with use, and in the past, the patient's neuro evaluation, by Dr. Gaddy, on 08/03/95 showed

> that the patient had bilateral carpal tunnel syndrome and bilateral cubital tunnel syndrome with electrical changes that are significant. The patient has not improved much in the past three years. I think that he has reached maximum healing and using the AMA Guides for the Evaluation of Permanent Impairment, due to entrapment neuropathy, page 57, table 16, with severe carpal tunnel syndrome giving the patient 40% impairment of the upper extremity, severe ulnar nerve entrapment, giving the patient 50% impairment of the upper extremity, which equals **90% impairment of the upper extremity, which equals 50% of whole person impairment and that is using table 3, page 20. The evaluation is for each upper extremity.**

(Ex. 9 at 15, emphasis added.) At deposition, Dr. Ben-Youssef testified his impairment rating was based upon claimant's reports of pain and "a diagnosis made in the past by the neurologist." (Ben-Youssef Dep. at 25.) Because I do not credit claimant's pain reports or Dr. Gaddy's findings, I am unpersuaded by Dr. Ben-Youssef's impairment rating.

¶14 I also find no reliable vocational evidence indicating claimant has suffered a wage loss.

¶15 The record contains the report and trial testimony of Dennis McLuskie (McLuskie), a senior vocational consultant for Crawford & Company. In his initial employability assessment, McLuskie concluded claimant "was medically precluded at that time from returning to his time of injury position based on the opinion from Dr. Ben-Youssef, the treating physician." (Tr. at 99-100.) Subsequently, McLuskie learned that Dr. Ross, after the panel evaluation, believed claimant may be able to return to his time of injury job. (*Id*. at 116.) At trial, McLuskie testified that returning to the time-of-injury job **was** a reasonable vocational option for claimant. (*Id*. at 117.) Thus, evidence from McLuskie does **not** support claimant's contention he suffers a wage loss.

¶16 Bob Zadow (Zadow), a certified rehabilitation counselor, testified by deposition. He reviewed medical reports and rehabilitation materials regarding claimant. (Zadow Dep. at 7.) During April 1999, Zadow spoke for an hour by telephone with claimant about his vocational history, his perceptions for rehabilitation, and "what he perceived his most recent medical status to be." (*Id*. at 10-11.) Claimant talked about his restrictive range of motion and the discomfort he experienced once he engaged in any kind of significant physical activity. (*Id*.) He told Zadow he "felt [that he] could not return to work at this point." (*Id*.) There is no indication Zadow questioned the accuracy of claimant's report of his abilities.

¶17 Zadow relied upon the opinions of Dr. Ben-Youssef and the functional capacity evaluation performed by O'Neill. (*Id*.) While he reviewed the opinions of medical providers other than Dr. Ben-Youssef, he gave "a fair amount of weight" to Dr. Ben-Youssef's opinions because he was the treating physician and had the most contact with claimant. (*Id*. at 17.) Zadow also relied upon claimant's own reports of pain. (*Id*. at 19-20.) Based on this

understanding of claimant's medical condition, Zadow opined claimant could not return to his time-of-injury work. (*Id.* at 13.) He further concluded: "If I take a look at Dr. Ben-Youssef's report, Mr. O'Neill's report, and Mr. Nielson's reports of his restrictions and pain, it would be my opinion that the Montana labor market would be extremely limited as far as what he could return to." (*Id.* at 19-20.) Zadow testified he was aware of no work that claimant could perform given those limitations. (*Id.* at 20.)

¶18 Since Zadow's opinions are based on claimant's subjective reports of pain and medical evidence I find unpersuasive, I find his opinions unpersuasive.

CONCLUSIONS OF LAW

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

¶20 Permanent partial disability benefits are **not** available under the Occupational Disease Act. Section 39-72-703, MCA (1993), provides:

> **No compensation for partial disability.** No compensation as provided in 39-72-701 is payable to an employee who is partially disabled from an occupational disease.

Thus, claimant's request for a permanent partial disability award must be based on his right arm condition.

¶21 Permanent partial disability benefits are governed by section 39-71-703, MCA (1993), which provides in relevant part:

> **Compensation for permanent partial disability.** (1) If an injured worker suffers a permanent partial disability and is no longer entitled to temporary total or permanent total disability benefits, the worker is entitled to a permanent partial disability award.
>
> (2) The permanent partial disability award must be arrived at by multiplying the percentage arrived at through the calculation provided in subsection (3) by 350 weeks.

As set forth in the section, to qualify for the benefits the claimant must be permanently partially disabled, as defined in the Act.¶22 "Permanent partial disability" is defined by section 39-71-116(18), MCA (1993), of the WCA as follows:

> "Permanent partial disability" means a condition, after a worker has reached maximum medical healing, in which a worker:
>
> (a) has a medically determined physical restriction as a result of an injury as defined in 39-71-119[(1)]; and

(b) is able to return to work in some capacity but the physical restriction impairs the worker's ability to work. [Emphasis added.]

¶23 In *Williams v. Plum Creek Timber Co.*, 270 Mont. 209, 214, 891 P.2d 502, 505 (1995), the Supreme Court considered the 1991 definition of "permanent partial disability," which is identical to the 1993 definition, applicable in this case. It said:

> Section 116(15) requires a claimant to meet a two prong test in order to be eligible for permanent partial disability benefits under Section 703. To meet the two prongs, the claimant (1) must have a medically determined physical restriction as a result of an injury; and (2) must be able to return to work in some capacity but the physical restriction must *impair the worker's ability to work*. Therefore, according to the 1991 Act, if the physical restriction does not impair the claimant's ability to work, then he or she is not permanently partially disabled under Section 116(15), and is not entitled to a permanent partial disability benefit award under Section 703.

¶24 Claimant bears the burden of persuading me, by a preponderance of the evidence, that he is permanently partially 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). He has not carried his burden of persuasion. I am not persuaded that he has a medically determined physical restriction as a result of an injury to his right arm. I am also unpersuaded that his right arm condition impairs his ability to work or is causing a wage loss.

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

JUDGMENT

¶26 1. Claimant is not entitled to permanent partial disability benefits. His petition is **dismissed**.

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

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

¶29 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 20th day of September, 2000.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Marvin L. Howe
Mr. David A. Hawkins
Date Submitted: May 10, 2000

Attached: *Nielson* 1999 MTWCC 49

1. Section 39-71-119, MCA (1993) in turn provides in relevant part:

Injury and accident defined. (1) "Injury" or "injured" means:
(a) internal or external physical harm to the body;
(b) damage to prosthetic devices or appliances, except for damage to eyeglasses, contact lenses, dentures, or hearing aids; or
(c) death.
(2) An injury is caused by an accident. An accident is:
(a) an unexpected traumatic incident or unusual strain;
(b) identifiable by time and place of occurrence;
(c) identifiable by member or part of the body affected; and
(d) caused by a specific event on a single day or during a single work shift.
(3) "Injury" or "injured" does not mean a physical or mental condition arising from:
(a) emotional or mental stress; or
(b) a nonphysical stimulus or activity.
(4) "Injury" or "injured" does not include a disease that is not caused by an accident.