IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2009 MTWCC 17

WCC No. 2008-2053

JOHN DEWEY

Petitioner

vs.

MONTANA CONTRACTOR COMPENSATION FUND

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Petitioner's left wrist was injured in an industrial accident on August 7, 2007. He continued working with restrictions and subsequently reported pain and numbness in his right wrist. Electrodiagnostic testing indicated that Petitioner had bilateral carpal tunnel syndrome. Respondent obtained an IME and denied liability on causation grounds.

Held: Although the Court believes from the medical evidence presented that Petitioner has bilateral carpal tunnel syndrome, Petitioner has not proven it was causally related to his employment with Respondent's insured.

Topics:

> **Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-604.** Under § 39-71-604(2), MCA, a signed claim for workers' compensation or occupational disease benefits authorizes disclosure of information relevant to the claimant's condition, which may include past history of the complaints or of the treatment of a condition that is similar to that presented in the claim, conditions for which benefits are subsequently claimed, other conditions related to the same body part, or conditions that may affect recovery. In a 2007 claim for benefits relating to carpal tunnel syndrome, the insurer requested and received medical records which included a bout of pneumonia in 1970 and a sore throat in 1974, and forwarded those records to an independent medical examiner for his review. The examiner further found "appropriate" and "important" to include in his

report things he learned from these records such as: Petitioner was “born illegitimately”; Petitioner felt suicidal after the death of his grandfather several years before the onset of his alleged occupational disease; and that Petitioner’s father was a drug user. The Court found that Respondent and the examiner misused Petitioner’s medical records in an attempt to malign Petitioner’s character and the Court specifically excluded this information in considering Petitioner’s credibility.

Medical Records: Relevance. Under § 39-71-604(2), MCA, a signed claim for workers’ compensation or occupational disease benefits authorizes disclosure of information relevant to the claimant’s condition, which may include past history of the complaints or of the treatment of a condition that is similar to that presented in the claim, conditions for which benefits are subsequently claimed, other conditions related to the same body part, or conditions that may affect recovery. In a 2007 claim for benefits relating to carpal tunnel syndrome, the insurer requested and received medical records which included a bout of pneumonia in 1970 and a sore throat in 1974, and forwarded those records to an independent medical examiner for his review. The examiner further found “appropriate” and “important” to include in his report things he learned from these records such as: Petitioner was “born illegitimately”; Petitioner felt suicidal after the death of his grandfather several years before the onset of his alleged occupational disease; and that Petitioner’s father was a drug user. The Court found that Respondent and the examiner misused Petitioner’s medical records in an attempt to malign Petitioner’s character and the Court specifically excluded this information in considering Petitioner’s credibility.

Proof: Conflicting Evidence: Medical. While the Court found a family nurse practitioner who had treated Petitioner to be a credible witness, it further found her medical testimony entitled only to limited weight. She did not diagnose or treat Petitioner for his alleged occupational disease beyond prescribing Ibuprofen for his subjective reports of pain. Although she ultimately examined Petitioner and concluded that he had carpal tunnel syndrome, she did so with an inaccurate description of his accident and without access to his previous medical records. Therefore, her opinion provides scant evidence as to whether Petitioner’s carpal tunnel syndrome is work-related.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-407. Although the objective medical evidence established that the claimant had bilateral carpal tunnel syndrome, the claimant failed to prove under § 39-71-407(9), MCA, that events occurring on more than a

single day or work shift are the major contributing cause of his carpal tunnel syndrome where the only medical provider who found a causative link had incomplete and inaccurate information and no access to older medical records.

Causation: Medical Condition. Although the objective medical evidence established that the claimant had bilateral carpal tunnel syndrome, the claimant failed to prove under § 39-71-407(9), MCA, that events occurring on more than a single day or work shift are the major contributing cause of his carpal tunnel syndrome where the only medical provider who found a causative link had incomplete and inaccurate information and no access to older medical records.

Occupational Disease: Causation. Although the objective medical evidence established that the claimant had bilateral carpal tunnel syndrome, the claimant failed to prove under § 39-71-407(9), MCA, that events occurring on more than a single day or work shift are the major contributing cause of his carpal tunnel syndrome where the only medical provider who found a causative link had incomplete and inaccurate information and no access to older medical records.

Occupational Disease: Occupational Disease Versus Injury. If the claimant's left wrist condition is attributable to an industrial accident in which a stack of stair risers fell onto it, then his condition is an industrial injury and not an occupational disease.

¶ 1 The trial in this matter was held on May 28, 2008, in Great Falls, Montana. Petitioner John Dewey was present and was represented by Richard J. Martin. Respondent was represented by Kelly M. Wills.

¶ 2 Exhibits: Exhibits 1 through 15, 21 through 23, 33 through 35, and 37 were admitted without objection. No exhibits numbered 16 through 19 were offered. Petitioner withdrew his objections to Exhibits 20, 24, and 25 and they were admitted. Exhibits 26 through 32 and Exhibit 36 were admitted after no objections to them were raised during trial. Exhibits 38 through 40 were introduced as impeachment exhibits and were admitted. At trial, Petitioner's counsel requested that the record be left open so that a stipulation regarding Petitioner's average weekly wage could be filed. The Court agreed to leave the record open until June 6, 2008. As of July 11, 2008, no wage stipulation was filed and the matter was deemed submitted.

¶ 3 Witnesses and Depositions: The deposition of Gregg Singer, M.D., was taken and submitted to the Court, and can be considered part of the record. Petitioner, Chuck Olson, and Deanna Babb, FNP, were sworn and testified at trial.

¶ 4 Issues Presented: The Pretrial Order states the following contested issues of law:[1]

> ¶ 4a Whether Petitioner acquired an occupational disease to his left and right wrists while performing his duties as a laborer/carpenter for James Talcott Construction.
>
> ¶ 4b Whether Petitioner is entitled to wage loss and medical benefits as a result of his occupational disease claim.

FINDINGS OF FACT

¶ 5 Petitioner was cutting stair treads and risers as part of his job duties for James Talcott Construction on August 7, 2007, when a stack of risers fell over, landing on his left hand. He reported the accident to his supervisors and then continued to work for about 90 minutes, when he sought medical treatment. Petitioner returned to work after the incident and continued to work with the same job duties for the next few weeks.[2]

¶ 6 Petitioner was seen by Timothy W. Urell, D.O., on August 7, 2007, complaining of pain in his left wrist after getting hit in the left forearm with a stack of risers. Dr. Urell performed a physical examination, diagnosed the injury as a wrist sprain, and prescribed narcotic medication.[3] Dr. Urell saw Petitioner for follow-up treatment the next day, and Petitioner requested stronger pain medication. Dr. Urell prescribed Percocet and suggested that Petitioner might consider an MRI of his wrist to rule out the possibility of a fracture.[4] At a follow-up visit on August 13, 2007, Dr. Urell found that, while Petitioner continued to experience pain in his left hand and wrist, there was no evidence of a dislocation or fracture.[5]

¶ 7 On August 17, 2007, Dr. Urell terminated Petitioner from his practice because he believed Petitioner was exhibiting drug seeking behavior, and Dr. Urell saw no findings

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[1] Pretrial Order at 2.

[2] Trial Test.

[3] Ex.12 at 1-7.

[4] Ex. 12 at 8-14.

[5] Ex. 12 at 15.

which could account for Petitioner's subjective complaints of pain. Dr. Urell suggested that Petitioner's wrist pain could be factitious.[6]

¶ 8 After being terminated from Dr. Urell's practice, Petitioner was treated at Monarc Clinic. Steven E. Ziegler, PA-C, initially examined Petitioner and diagnosed the injury as a left wrist sprain.[7] A radiology report of films taken of Petitioner's left wrist on August 16, 2007, were negative.[8] Films were also taken of Petitioner's right wrist on that date for reasons that are unclear from the record. Those films were likewise negative.[9] On August 16, 2007, Petitioner was released to return to work with restrictions.[10]

¶ 9 Petitioner returned to Monarc Clinic on August 17, 2007, reporting an acute increase in pain which Petitioner stated occurred after a particular arm movement during an occupational therapy appointment earlier that day. Chadley Runyan, M.D., examined Petitioner and diagnosed left wrist tenosynovitis. Dr. Runyan prescribed Percocet and recommended an MRI and follow-up care with PA-C Ziegler.[11]

¶ 10 Respondent's claims adjuster Mel Pozder authorized the MRI on August 21, 2007.[12] An MRI of Petitioner's left wrist was performed on August 28, 2007. The findings included a large area of marrow edema/contusion within the capitate, but no evident fracture lines, and a small area of marrow edema along the volar aspect of the lunate.[13] Petitioner returned to Monarc Clinic for a follow-up appointment on August 30, 2007, and reported continuing left wrist pain. PA-C Ziegler examined Petitioner and continued his work restrictions, with a slight increase in activity levels and an increase in lifting allowed. PA-C Ziegler recommended that Petitioner continue to wear a wrist splint and resume occupational therapy.[14]

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[6] Ex. 12 at 16-22.

[7] Ex. 12 at 23-25.

[8] Ex. 12 at 26.

[9] Ex. 12 at 27.

[10] Ex. 12 at 31.

[11] Ex. 12 at 38.

[12] Ex. 12 at 44.

[13] Ex. 12 at 46.

[14] Ex. 12 at 47-48.

¶ 11 Petitioner testified that he suffered an injury to his right wrist while performing his job duties on September 27, 2007. Petitioner was laying cross bands on a floor when he alleges both his hands went numb and he could no longer grip the staple gun he had been using. Petitioner informed his supervisor and again sought medical treatment, returning to work immediately afterward. Petitioner testified that his supervisors put him back to work doing the same job duties he had been performing, but he protested that these duties exceeded the work restrictions his doctor had placed on him. Petitioner testified that one of his supervisors ordered him not to violate his work restrictions, but the other supervisor ordered him to continue with the same job duties. Petitioner asserted that he continued to complain that his job duties exceeded his work restrictions and he was eventually assigned different duties.[15]

¶ 12 On September 27, 2007, Petitioner went to the emergency room at Benefis Healthcare complaining of upper extremity pain. The report noted that Petitioner began to experience pain in his right forearm, wrist, and hand which began several days previously. The clinical impression was acute right upper extremity pain with paresthesias and cervical radiculopathy. Petitioner was told to limit lifting, stay home from work, and to rest for two days.[16]

¶ 13 Chuck Olson has been Vice President of James Talcott Construction since 1998. Olson's job duties include signing and reviewing contracts, and performing some human resources tasks. He is also the company's safety director.[17] I found Olson to be a credible witness.

¶ 14 Olson testified that before someone is hired at James Talcott Construction, the prospective employee fills out a job application and completes an interview with Gary Richardson, the general superintendent of the company. If the company's representatives are interested in hiring the prospective employee, he or she reports to Olson's office for preemployment drug screening. If the prospective employee passes the screening, James Talcott Construction extends an offer of employment. If the prospective employee accepts, he or she is then sent to a company representative who provides an employee packet which describes the company's health insurance and retirement plan. The new employee then completes the paperwork, including tax withholding forms and a beneficiary packet.[18]

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[15] Trial Test.

[16] Ex. 12 at 54-57.

[17] Trial Test.

[18] Trial Test.

¶ 15 Olson asserts that Petitioner worked for James Talcott Construction from May 2007 until late September 2007. At trial, Olson identified Petitioner's application for employment which would have been part of Petitioner's personnel file. Olson described Petitioner as a good employee who performed his job duties well and in a timely manner and who had a good attendance record.[19]

¶ 16 Olson testified that Petitioner and James Talcott Construction are currently engaged in litigation over Petitioner's filing for unemployment benefits. He maintains that Petitioner stopped showing up for work when work was available for him, and therefore Petitioner quit his job. Olson explained that James Talcott Construction has an early return-to-work program, and the company's policy is to avoid having injured workers miss work, if possible. An injured employee's tasks are assigned to accommodate whatever restrictions are placed upon the employee by the treating physician.[20]

¶ 17 Olson explained that when Petitioner injured his left hand on August 7, 2007, he was working in a medium-duty job position and therefore, even with work restrictions, he was able to continue his regular job duties. Olson further stated that the stapler Petitioner was using at the time of the alleged injury to his right hand was a small pneumatic stapler which weighed about four or five pounds. Olson testified that Petitioner never returned to work after he sought medical care for his right hand on September 27, 2007. After the company made multiple attempts to contact Petitioner and Petitioner continued to fail to show up for his assigned shifts, his employment ended. Olson asserted that Petitioner never requested to return to work after September 27, 2007, and that the company could have and would have accommodated the additional restrictions which were placed on him by his treating physician on December 13, 2007, and the restrictions which were issued March 5, 2008, as well.[21]

¶ 18 Petitioner returned to Monarc Clinic on October 1, 2007, complaining of right hand and foot numbness. X-rays were taken of Petitioner's cervical spine and were interpreted as unremarkable by Dr. Runyan.[22] Petitioner was released to return to work with restrictions from October 1 through October 11, 2007.[23]

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[19] Trial Test.

[20] Trial Test.

[21] Trial Test.

[22] Ex. 12 at 58-59.

[23] Ex. 12 at 63.

¶ 19 On October 2, 2007, Petitioner returned to Monarc Clinic and reported that his hand had curled up overnight and that he had been unable to open it. However, he was able to do so prior to coming into the clinic. Dr. Runyan diagnosed Petitioner as having right-hand paresthesias and ordered an EMG/nerve conduction study.[24] Dr. Runyan again released Petitioner to return to work with restrictions.[25] Petitioner attended a follow-up appointment on October 11, 2007, where his condition remained about the same.[26] He was again released to return to work with restrictions.[27] Petitioner returned on October 16, 2007, and requested to be taken off work, but the clinic denied his request.[28] On October 23, 2007, his return to work with restrictions was renewed.[29]

¶ 20 K. Allan Ward, M.D., performed electrodiagnostic testing on Petitioner's wrists on October 31, 2007. Dr. Ward found bilateral slowing of the median nerves across Petitioner's wrists, severe on the right and moderate-to-severe on the left. Dr. Ward found these results to be consistent with carpal tunnel syndrome and recommended surgery.[30]

¶ 21 Alexander N. Chung, M.D., examined Petitioner on December 7, 2007, after Dr. Ward diagnosed bilateral carpal tunnel syndrome. Dr. Chung reviewed Petitioner's medical history and conducted a physical examination. Dr. Chung recommended that Petitioner pursue a right carpal tunnel release surgery with a left-sided surgery to follow in five to six weeks if Petitioner was satisfied with the results obtained on the right side. Dr. Chung renewed Petitioner's prescription for wrist splints but declined to prescribe narcotic pain medication, opining that Petitioner would get equivalent relief from over-the-counter medications.[31] Dr. Chung's notes state that Petitioner was not at maximum medical improvement (MMI) at that time, and stated that he could not work until after having surgery on both wrists.[32]

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[24] Ex. 12 at 67.

[25] Ex. 12 at 68.

[26] Ex. 12 at 74.

[27] Ex. 12 at 78.

[28] Ex. 12 at 79.

[29] Ex. 12 at 81.

[30] Ex. 3.

[31] Ex. 12 at 89-90.

[32] Ex. 12 at 92.

¶ 22 Although Petitioner was taken off work by Dr. Chung on December 7, 2007, his last day of work was sometime prior to then. Evidence indicates that Petitioner never returned to work after he sought medical care for his right hand on September 27, 2007. Petitioner denies this, asserting that he worked at least two days after that, but that he then quit because he could not hold tools and his supervisors told him not to report to work if he could not hold tools.[33]

¶ 23 I do not find Petitioner to be a credible witness. The medical records in evidence indicate that Petitioner was inconsistent in relating his medical history. His demeanor at trial convinced me that he is not a reliable historian, and I found his testimony that he continued to work after September 27, 2007, and that he ceased to report to work because his supervisors told him not to report to work to be completely incredible.

¶ 24 A request for authorization for the carpal tunnel surgery was sent to Respondent on December 10, 2007, and denied by Pozder on the same day. Pozder noted that an IME had been scheduled.[34]

Dr. Gregg Singer

¶ 25 Gregg Singer, M.D., is board-certified in physical medicine and is also board-certified as an impairment evaluator.[35] Dr. Singer worked as a physiatrist at the Billings Clinic from 1991 until 2003, after which he opened his own practice. Dr. Singer primarily performs independent medical examinations (IMEs), and only occasionally treats patients.[36] Dr. Singer testified that he received "a huge stack" of medical records for Petitioner, and that he reviewed those records prior to seeing Petitioner for an IME.[37] The records sent to Dr. Singer went as far back as the 1970s.[38]

¶ 26 Dr. Singer testified that he spent more than 10 hours working on Petitioner's case, including reviewing the medical records, conducting the examination, and writing a report.[39] Dr. Singer's IME report, dated January 9, 2008, has been at the center of the acrimony in

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[33] Trial Test.

[34] Ex. 12 at 96.

[35] Singer Dep. 6:3-17.

[36] Singer Dep. 7:1-8.

[37] Singer Dep. 8:18-21.

[38] Singer Dep. 8:22-25.

[39] Singer Dep. 9:22-25.

the present case. Petitioner's counsel characterized Dr. Singer's report as "a 35-page diatribe" that is simply an attempt to "assassinate the character" of Petitioner.[40]

¶ 27 Under § 39-71-604(2), MCA, a signed claim for workers' compensation or occupational disease benefits authorizes disclosure of information relevant to the claimant's condition to the workers' compensation insurer or its agent. The statute explains, "Health care information relevant to the claimant's condition may include past history of the complaints of or the treatment of a condition that is similar to that presented in the claim, conditions for which benefits are subsequently claimed, other conditions related to the same body part, or conditions that may affect recovery." In Petitioner's case, Respondent requested and received medical records which, in addition to the records discussed below, also included a treatment note concerning a bout of pneumonia in December 1970[41] and a sore throat in March 1974.[42] Respondent then forwarded those records, apparently in their entirety, to Dr. Singer for his review.

¶ 28 In his deposition, Dr. Singer testified that he believes that at least 50% of the cause of carpal tunnel syndrome is genetic and, except in cases of extreme repetitive motion with vibration, carpal tunnel syndrome is never caused by work-related activities. Since Petitioner's employment did not involve extreme repetitive motion with vibration, it would seem that Dr. Singer's opinion that Petitioner's carpal tunnel syndrome was not caused by his employment would be a fairly straightforward conclusion. Nonetheless – and despite the fact that Dr. Singer testified that he selected what he thought was appropriate and important to put in his report – much of his report has no discernable relationship to Petitioner's claim. A ***small*** sampling of the items Dr. Singer found "appropriate" and "important" to include in his report is the following:[43]

- Petitioner was "born illegitimately."
- Petitioner felt suicidal after the death of his grandfather several years ***before*** the onset of his alleged occupational disease.
- Petitioner's ***father*** was a drug-user.

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[40] Petitioner's closing argument, Trial Test.

[41] Ex. 30 at 16.

[42] Ex. 30 at 25.

[43] Ex. 35 at 6, 17, and 26, respectively.

¶ 29 When asked to explain how these items were relevant to Petitioner's carpal tunnel syndrome claim, Dr. Singer testified that they pointed to Petitioner's social history and spoke to a certain "social chaos" in Petitioner's life. When asked whether the "social chaos" related to Petitioner's veracity, Dr. Singer responded, "Yeah, ***I guess so***."[44]

¶ 30 As noted above, I did not find Petitioner to be a credible witness. In light of this finding, I feel obligated to address the use of irrelevant medical records to gratuitously malign Petitioner's character. To my knowledge, there has yet to be a peer-reviewed study establishing a causal link between carpal tunnel syndrome and out-of-wedlock birth, parental drug use, or mourning the loss of a grandparent. Moreover, I find Dr. Singer's testimony that he included these items in his report because he "guessed" they related to Petitioner's veracity to be disingenuous at best. I am convinced that these items, as well as numerous others which are not detailed here, were presented to the Court to cast Petitioner in an unfavorable light, wholly independent of the ***legitimate*** challenges to Petitioner's credibility. I feel it necessary, therefore, to emphasize that I reached my finding that Petitioner was not a credible witness exclusive of Respondent's misuse of the medical records it obtained in this case.

Dr. Chung's Opinion

¶ 31 As noted above, Dr. Chung first examined Petitioner on December 7, 2007, after Dr. Ward diagnosed bilateral carpal tunnel syndrome. Dr. Chung recommended that Petitioner pursue a right carpal tunnel release surgery with a left-sided surgery to follow in five to six weeks if Petitioner was satisfied with the results obtained on the right side. Dr. Chung renewed Petitioner's prescription for wrist splints but declined to prescribe narcotic pain medication, opining that Petitioner would get equivalent relief from over-the-counter medications.[45] Dr. Chung stated that Petitioner was not at MMI at that time, and stated that he could not work until after having surgery on both wrists.[46]

¶ 32 On January 28, 2008, Pozder wrote to Dr. Chung to solicit his opinion regarding Petitioner's condition. Pozder enclosed a copy of Dr. Singer's report with her letter. On January 30, 2008, Dr. Chung responded to Pozder's letter, stating that he had reviewed Dr. Singer's report, that he agreed with Dr. Singer's opinion, and that he had no reason to refute or disagree with Dr. Singer's findings.[47]

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[44] Singer Dep. at 68:1-4 (emphasis added).

[45] Ex. 12 at 89-90.

[46] Ex. 12 at 92.

[47] Ex. 12 at 98.

¶ 33 Dr. Chung did not testify at trial or by deposition. His January 30, 2008, letter is therefore his final word regarding Petitioner's condition. Although I found Dr. Singer's report to be singularly unpersuasive, Dr. Chung states in his letter that he agrees with Dr. Singer's opinion that Petitioner's alleged carpal tunnel syndrome could not have been caused by his employment and has no reason to refute or disagree with his findings. I therefore must find that Dr. Chung's opinion is that Petitioner's alleged carpal tunnel syndrome was not caused by his employment.

Deanna Babb, FNP

¶ 34 The only medical provider to testify on Petitioner's behalf was Deanna Babb, a family nurse practitioner who practices at Innovative Medicine, and also teaches for Montana State University in the college of nursing. She practices independently and not under the supervision of a doctor. She has seen many patients who have carpal tunnel syndrome or symptoms of carpal tunnel syndrome. Babb testified that she understands carpal tunnel syndrome to be caused by pregnancy, repetitive hand movements or repetitive work using one's hands, and it may also be caused by an injury. She stated that she does not know of any reasonable disagreement in the medical community regarding repetitive hand movement as a possible cause of carpal tunnel syndrome.[48]

¶ 35 Babb saw Petitioner on December 14, 2007. She testified that on a previous occasion, she saw him for a shoulder injury while she was working in an emergency room, but she did not provide any ongoing treatment. When Petitioner came to Babb on December 14, 2007, it was to seek treatment for difficulties he was experiencing with attention deficit. Babb testified that she never determined whether Petitioner actually had Attention Deficit Disorder; he had some of the symptoms and he was terminated from her practice prior to being referred to a mental health center for diagnosis. During the course of her examination of Petitioner, Babb noticed that he was wearing braces on his hands and she questioned him about it. Petitioner informed her that he had injured his hands at work and that he was scheduled to have surgery on his hands.[49]

¶ 36 Babb provided Petitioner with Ibuprofen, which has a therapeutic effect for carpal tunnel syndrome. She saw him for a follow-up visit for his attention deficit on December 26, 2007, and also refilled his prescription for Ibuprofen on that date.[50]

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[48] Trial Test.

[49] Trial Test.

[50] Trial Test.

¶ 37 Babb next saw Petitioner on January 31, 2008, and on that day she conducted a physical examination of Petitioner to explore his carpal tunnel syndrome symptoms. Based on the examination and Petitioner's medical history, Babb diagnosed Petitioner with bilateral carpal tunnel syndrome. Babb testified that she did not see any indication that Petitioner was magnifying his carpal tunnel symptoms when she treated him, and she opined that his reported symptoms correlated with objective findings in a way that would be typical for similar patients.[51]

¶ 38 Babb eventually terminated her relationship with Petitioner because Petitioner violated his treatment contract concerning his Ritalin prescription from Babb. Babb explained that Petitioner's "significant other" was found with Petitioner's Ritalin in her possession and was incarcerated. Prior to that incident, Petitioner had attempted to get his prescription filled when he should have had some of the previous prescription remaining, and he became angry when Babb switched him to a slower-release version of the medication. Babb explained that the slower-release version has fewer problems with "diversion," meaning that its street value is diminished because it does not have the same recreational appeal.[52]

¶ 39 Babb testified that she became involved in Petitioner's workers' compensation claim "reluctantly." She wrote a "To Whom It May Concern" letter on January 31, 2008, at Petitioner's request, and because she believes that he has carpal tunnel syndrome.[53] The letter states:

> [Petitioner] is a primary care patient of mine . . . being seen for another problem but at that time presented with bilateral wrist splints for complaint of carpal tunnel. . . .
>
> [Petitioner] reports that his symptoms started in July 2007 after a stack of 45 risers fell on his hands. . . .
>
> . . . His physical exam reveals weak grips bilaterally, positive Tinel's and Phalen's test. . . .

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[51] Trial Test.

[52] Trial Test.

[53] Trial Test.

> He is currently unable to work due to inability to hold tools. It is my belief that the carpal tunnel is directly related to the repetitive nature of his work and was exacerbated by his injury.[54]

¶ 40 Babb testified that at the time she wrote the letter, she believed from Petitioner's description of the industrial accident that both his hands had been crushed by falling risers on August 7, 2007. She was unaware that Dr. Chung had retracted his opinion after reviewing Dr. Singer's report. She testified that Petitioner informed her that he needed the letter for workers' compensation purposes. Babb explained that none of her treatments except for the last appointment on January 31, 2008, were sent to Petitioner's workers' compensation insurer because all the other appointments concerned his attention deficit issues and not his carpal tunnel complaints. On that day, she evaluated Petitioner solely for the purpose of writing the letter he requested and, aside from prescribing Ibuprofen, she never treated him for his carpal tunnel condition.[55]

¶ 41 Babb stated that she disagreed with both Dr. Singer and Dr. Chung in that she believes Petitioner has bilateral carpal tunnel syndrome which stems from his August 7, 2007, industrial accident. She admitted that she has not seen Petitioner's medical records aside from her own treatment notes for his attention deficit issue, and that she bases her opinion on the examination she performed on January 30, 2008, and the history Petitioner provided. However, she added that the medical records she has since reviewed were all consistent with that history.[56]

¶ 42 While I find Babb to be a credible witness, I find that her medical testimony is entitled only to limited weight. Babb did not diagnose or treat Petitioner for carpal tunnel syndrome beyond prescribing Ibuprofen for the pain he described to her. When Babb ultimately examined Petitioner and concluded that he had carpal tunnel syndrome, she did so with an inaccurate description of his industrial accident and without access to his previous medical records. Therefore, while I do find her opinions entitled to some consideration, standing alone they provide scant evidence as to whether Petitioner has work-related carpal tunnel syndrome.

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[54] Ex. 4 at 9.

[55] Trial Test.

[56] Trial Test.

CONCLUSIONS OF LAW

¶ 43 This case is governed by the 2007 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Petitioner's industrial accident.[57]

¶ 44 Petitioner bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.[58]

¶ 45 Under § 39-71-407(9), MCA, occupational diseases are considered to arise out of employment or be contracted in the course and scope of employment if the occupational disease is established by objective medical findings, and the events occurring on more than a single day or work shift are the major contributing cause of the occupational disease in relation to other factors contributing to the occupational disease. In the present case, I am satisfied that objective medical findings have established that Petitioner has bilateral carpal tunnel syndrome. However, Petitioner has not proven that events occurring on more than a single day or work shift are the major contributing cause of his carpal tunnel syndrome. The only medical provider who opined that Petitioner's carpal tunnel syndrome was related to his employment with Respondent's insured was Babb, and her opinions were based on an inaccurate description of Petitioner's industrial accident and without access to his previous medical records.

¶ 46 Although I did not find Petitioner's testimony to be credible, that does not preclude the possibility that he nonetheless has a real medical condition.[59] However, to prevail in an occupational disease claim, Petitioner must not only prove the existence of a condition, but also must prove that it was caused by his employment. I conclude that Petitioner has failed to carry his burden of proof in this case.

¶ 47 The medical evidence suggests that Petitioner's left wrist condition ***may*** be attributable to an industrial accident. The only provider who opined that Petitioner's right wrist condition was attributable to his job duties was Babb, who believed his right wrist was injured in the same manner as his left – getting hit with a stack of risers in August 2007. Clearly, Petitioner's right wrist condition could not stem from this incident as it was not involved in the accident. If Petitioner's left wrist condition is attributable to this incident, then it is an industrial injury and not an occupational disease. However, Petitioner has not argued that his left wrist condition is attributable to an industrial accident, but only to an

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[57] *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

[58] *Ricks v. Teslow Consol.,* 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wickens Bros. Constr. Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

[59] *See Peterson v. Montana Schools Group Ins. Auth.*, 2006 MTWCC 14, ¶ 46.

occupational disease, and ultimately has presented inadequate evidence of causation to support a determination that Respondent is liable for his wrist conditions. While objective medical findings exist to support a diagnosis of bilateral carpal tunnel syndrome, Petitioner has not proven that his condition is work-related.

JUDGMENT

¶ 48 Petitioner did not acquire an occupational disease to his left and right wrists while performing his duties as a laborer/carpenter for James Talcott Construction.

¶ 49 Petitioner is not entitled to wage-loss and medical benefits as a result of his occupational disease claim.

¶ 50 Pursuant to ARM 24.5.348(2), this Judgment is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

DATED in Helena, Montana, this 16th day of May, 2009.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Richard J. Martin
Kelly M. Wills

Submitted: July 11, 2008