IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2011 MTWCC 19

WCC No. 2010-2503

RICHARD FORD

Petitioner

vs.

SENTRY CASUALTY COMPANY

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT AND ORDER RESOLVING RESPONDENT'S MOTION IN LIMINE

APPEALED TO MONTANA SUPREME COURT - 07/26/11
AFFIRMED – 07/24/12

Summary: Petitioner suffered a work-related injury to his neck for which Respondent accepted liability. Petitioner argues that Respondent should be liable for his cervical disk condition, which Respondent denies is related to the industrial accident. Petitioner further argues that Respondent should be liable for ongoing TTD benefits, and that it unreasonably adjusted his claim. Respondent contends Petitioner is at MMI and has been released to return to work without restrictions, and that it has reasonably adjusted Petitioner's claim.

Held: Although Petitioner suffers from ongoing headaches, neck pain, and tingling sensations in his fingers as a result of his industrial accident, Petitioner has not proven that his cervical disk condition was caused or aggravated by his industrial accident. Petitioner's subjective complaints associated with his industrial injury do not correlate with the objective medical findings for which he seeks surgery. Petitioner has not proven that he is entitled to TTD benefits because no doctor has disputed that he is able to return to work without restrictions. Since Petitioner is not the prevailing party, he is not entitled to his costs, attorney fees, or a penalty.

Topics:

Physicians: Treating Physician: Weight of Opinions. Although an IME doctor opined that an industrial accident caused Petitioner's cervical disk condition, Petitioner's treating physician was unable to state so with a reasonable degree of medical certainty. The Court found no grounds to assign greater weight to the IME doctor's opinion than to that of Petitioner's treating physician and therefore the Court concluded Petitioner had not proven that an industrial accident caused his cervical disk condition.

Proof: Conflicting Evidence: Medical. Although an IME doctor opined that an industrial accident caused Petitioner's cervical disk condition, Petitioner's treating physician was unable to state so with a reasonable degree of medical certainty. The Court found no grounds to assign greater weight to the IME doctor's opinion than to that of Petitioner's treating physician and therefore the Court concluded Petitioner had not proven that an industrial accident caused his cervical disk condition.

Medical Evidence: Subjective Complaints of Pain. Where Petitioner's subjective complaints of pain did not correlate with the objective medical findings regarding his cervical disk condition, the Court concluded that a proposed surgery would be unlikely to address Petitioner's ongoing complaints.

Benefits: Temporary Total Disability Benefits. Although Petitioner may not be at MMI, no one disputed his treating physician's opinion that Petitioner could return to work without restriction. Therefore, Petitioner is not entitled to TTD benefits under § 39-71-701(1), MCA.

Benefits: Termination of Benefits: Release to Return to Work. Although Petitioner may not be at MMI, no one disputed his treating physician's opinion that Petitioner could return to work without restriction. Therefore, Petitioner is not entitled to TTD benefits under § 39-71-701(1), MCA.

¶ 1 The trial in this matter occurred on January 28, 2011, in Billings, Montana. Petitioner Richard Ford was present and was represented by Patrick R. Sheehy. Kelly M. Wills and Jeffrey B. Smith represented Respondent Sentry Casualty Company (Sentry).

¶ 2 Exhibits: I admitted Exhibits 1, 2, 5 through 8, and 10 through 12 without objection. The parties withdrew Exhibits 3 and 4 prior to trial. I excluded Exhibit 9. I admitted pages 1 through 35 of Exhibit 13.

¶ 3 Witnesses and Depositions: Pursuant to ARM 24.5.322(9), I admitted the depositions of Ford and Jaimie Ford over Sentry's objection, subject to the consideration of any objections Sentry may raise within 10 days regarding any specific objections to specific portions of the depositions. On February 7, 2011, Sentry filed a motion in limine to exclude specific portions of these depositions, which is resolved below. Ford and Jaimie Ford were sworn and testified at trial.

¶ 4 Issues Presented: The Pretrial Order sets forth the following issues:[1]

> Issue One: Whether Respondent is liable for medical bills and treatment involving Petitioner's cervical disk condition;
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> Issue Two: Whether Respondent is liable for temporary total disability (TTD) benefits subsequent to May 18, 2010, and if so, the duration of those benefits; and
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> Issue Three: Whether Respondent is liable for payment of attorney fees and costs and the 20% penalty.

MOTION IN LIMINE

¶ 5 Sentry moved post-trial to exclude portions of the depositions of Ford and Jaimie Ford. As these findings of fact reflect, I have neither cited to nor relied upon any of this testimony. Therefore, Sentry's objections are moot.

FINDINGS OF FACT

¶ 6 Ford testified at trial. I found Ford to be a credible witness.

¶ 7 Ford began working as a yard worker for Pacific Hide and Fur (Pacific) in September 2008. His job duties included loading and unloading trucks, running the baler, and performing other yard duties.[2] On September 29, 2009, Ford was working when the baler jammed. Ford attempted to clear the jam by pulling on the jammed material with a chain attached to a small truck. Ford testified that when he accelerated,

[1] Pretrial Order at 2.

[2] Trial Test.

the chain tightened with enough force to lift the truck off the ground, causing Ford to hit his hard hat on the rear window of the pick-up. Ford made a few more unsuccessful attempts to clear the jam with the truck. Ford tried to clear the jam with a second truck. When his attempt with the second truck was unsuccessful, he did not make any more attempts because he thought he hurt himself from snapping the truck back against the chain. Near the end of Ford's shift, he and his co-workers freed the jam with a loader.[3]

¶ 8 On his way home after his shift, Ford felt an ache in the back of his neck down into his shoulders and he felt stiff and sore. The next morning, he still felt stiff and sore and he had a headache. At Pacific, he informed his supervisor that his neck was bothering him from the previous day and that he needed to seek medical care. His supervisor sent him to Occupational Health and Wellness at the Billings Clinic.[4]

¶ 9 Ford testified that prior to this incident, he had occasional headaches but never had neck problems or numbness and tingling in his fingers. He never sought medical treatment for headaches or neck pain prior to his industrial injury.[5] Ford admitted that he had been addicted to methamphetamine in the past. Ford testified that he completed treatment for his addiction and has not used methamphetamine since 2003.[6]

¶ 10 On September 30, 2009, Ford saw Adam R. Mattingly, PA, at the Billings Clinic. Mattingly examined Ford, noting that he held his head "quite s[t]ill" and had limited range of motion, reporting pain with Spurling's maneuver, but no radicular symptoms.[7] Mattingly recommended physical therapy and released Ford to return to work with restrictions on lifting, twisting and bending of the neck, and instructions to avoid holding prolonged neck positions.[8]

¶ 11 On October 20, 2009, Ford underwent a cervical MRI. The most significant findings were: degenerative narrowing of the interspace with some degenerative edema in the adjacent vertebral bodies, greater on the left; diffuse posterior bony ridging and disk bulge greater on the right where foraminal disk herniation contributes to rather marked compromise right-sided neural foramen; moderate narrowing left-sided neural foramen with moderate cord deformity at C5-6; and mild degenerative narrowing of

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[3] Trial Test.

[4] Trial Test.

[5] Trial Test.

[6] Trial Test.

[7] Ex. 2 at 82-83.

[8] Ex. 2 at 84.

interspace, diffuse posterior bony ridging and disk bulge contributing to moderate spondylotic compromise of the neural foramina bilaterally at C6-7.[9]

¶ 12 On November 3, 2009, Eric B. Schubert, M.D., saw Ford on referral from Mattingly. Dr. Schubert took Ford's history, conducted a neurological examination, and reviewed his cervical MRI films and radiologist's report. Dr. Schubert noted that the MRI showed degenerative changes most significantly at C5-6 and C6-7 with disk desiccation, narrowing, and osteophyte complexes. Dr. Schubert also noted a right foraminal disk herniation/osteophyte at C5-6 compromising the right neural foramen.[10] Dr. Schubert discussed his diagnoses with Ford. They agreed to try an epidural steroid injection.[11]

¶ 13 On November 30, 2009, Dr. Schubert noted that Ford did not appear to be symptomatic prior to his industrial accident and that the fairly prominent diffuse disk protrusion or herniation at C5-6 may have occurred from the accident. Dr. Schubert theorized that Ford may have had an underlying asymptomatic degenerative lesion which became symptomatic from the industrial accident. Dr. Schubert opined that the degenerative changes, "barring the disc protrusion I think," were present prior to the industrial accident.[12] Dr. Schubert saw a "mismatch" of Ford's radicular symptoms with his cervical pathology. Dr. Schubert explained to Ford and his wife Jaimie that he wanted to exhaust non-surgical treatment options before considering surgery. He noted that Ford's pain management had been "sporadic" and offered to prescribe pain medication while evaluating Ford's condition.[13] Dr. Schubert recommended that Ford undergo bilateral EMG/NCV studies and a cervical epidural steroid injection.[14]

¶ 14 On December 4, 2009, Ford underwent an EMG to investigate his reports of paresthesia in some fingers of both hands. Scott Riggins, M.D., interpreted the EMG results and found a mild abnormality at the left wrist, but no evidence of radiculopathy or other neuropathies in either arm.[15]

¶ 15 On December 16, 2009, Scott K. Ross, M.D., saw Ford at Mattingly's request to investigate "Ford's persistent/recalcitrant subjective complaints of neck pain without

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[9] Ex. 2 at 16.

[10] Ex. 2 at 13-14.

[11] Ex. 2 at 15.

[12] Ex. 2 at 10.

[13] Ex. 2 at 10-11.

[14] Ex. 2 at 11.

[15] Ex. 2 at 112-14.

objective correlation on physical examination." Dr. Ross noted that Mattingly requested that he become Ford's treating physician.[16] Dr. Ross reviewed Ford's available medical records and questioned Ford about his current status. Dr. Ross noted that Ford was taking narcotic pain medication, and that he requested additional pain medication. Dr. Ross denied Ford's request. Dr. Ross could not discern a pattern or frequency to Ford's complaints of neck pain and headaches.[17] Dr. Ross noted that he observed Ford "freely and fully moving his head and neck" throughout the appointment.[18] Dr. Ross assessed Ford as having a cervical strain with subjective complaints of diffuse or generalized posterior neck pain without objective correlation. Dr. Ross also found subjective complaints of numbness and aching dysesthesias into Ford's fingers without electrodiagnostic abnormality. Dr. Ross concluded that Ford was not at maximum medical improvement (MMI) and requested authorization for Ford to undergo a psychological evaluation with Joseph McElhinny, Psy.D. Dr. Ross recommended that Ford continue with medication as prescribed by Dr. Schubert. Dr. Ross released Ford to temporary work restrictions to minimize continuous twisting or bending of the neck and to perform primarily sedentary job duties.[19] Dr. Ross further noted that he discussed Ford's case with Dr. Schubert, who concurred that Ford should undergo a psychological evaluation with Dr. McElhinny.[20]

¶ 16 On December 23, 2009, Dr. Schubert reported that Ford was not improving with non-operative treatments, and it was appropriate to suggest surgery. Dr. Schubert informed Ford that he believed surgery would provide a 60% chance of improvement in his neck symptoms, but would be unlikely to improve his hand numbness.[21] Dr. Schubert's impression was that Ford suffered from persistent cervicalgia, bilateral hand symptoms with unclear etiology, degenerative disk disease at C5-6 and C6-7, and a prominent disk protrusion at C5-6 producing moderate to moderately severe central canal stenosis and bilateral neuroforaminal stenosis.[22]

¶ 17 On December 30, 2009, Dr. McElhinny saw Ford on referral from Dr. Ross for a psychological evaluation. Dr. McElhinny reviewed Ford's post-injury medical records. Dr. McElhinny also conducted a clinical interview and history with Ford, as well as a behavioral observation and mental status evaluation, Personality Assessment Inventory,

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[16] Ex. 2 at 40.

[17] Ex. 2 at 52.

[18] Ex. 2 at 53.

[19] Ex. 2 at 55.

[20] Ex. 2 at 55-56.

[21] Ex. 2 at 4.

[22] Ex. 2 at 5.

and Survey of Pain Attitudes. Dr. McElhinny's impression was that Ford had a somatoform pain disorder fueled by depression. Dr. McElhinny opined that Ford is likely to exhibit physical symptomatology, such as high pain levels, in lieu of emotional distress. Dr. McElhinny opined that Ford was an unhappy individual who focused on external causes and had "very low self-insight into his own affective functioning." Dr. McElhinny further opined that Ford has "antisocial personality features which come into play when he is seeking medical care and treatment. He is prone to manipulative behaviors . . . ." Dr. McElhinny cautioned that medical providers should use only objective medical evidence when prescribing treatment for Ford. Dr. McElhinny further noted that he informed Ford that Ford's previous methamphetamine use gave him an exaggerated response to pain-producing stimuli.[23]

¶ 18 In an undated letter, Dr. Schubert wrote to Leslie Connell at Intermountain Claims and stated:

> Mr. Ford has been evaluated by me through referral from Workman's compensation for a work related injury. While I do understand that he has many secondary issues and is deemed a poor surgical candidate based on neuropsychiatric testing; he still has real cervical pathology that may very well be the cause of his neck pain. While he has no objective findings on examination, many surgical candidates with significant axial skeletal pain with significant degenerative pathology unresponsive to medical or non-operative therapy do not have objective findings on examination and very often do well with surgery in terms of symptom relief. Despite his other issues, I think that this gentleman has surgical pathology; he has a large disc/osteophyte complex that results in significant central canal stenosis. Another reason this lesion is surgical other then [sic] for alleviation of pain is because this lesion causes a near critical degree of stenosis, with near obliteration of the CSF signal around the cord. It therefore puts this young gentleman at a higher risk of significant spinal cord injury from a relatively minor trauma. Two other neurosurgeons in my practice have seen Mr. Ford's films and think that he has significant operative pathology.
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> I recommend that Mr. Ford be referred for a second Neurosurgical opinion outside of our group. He should also in my opinion be referred to chronic pain management in the interim.[24]

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[23] Ex. 2 at 139-45.

[24] Ex. 2 at 2.

¶ 19 Ford testified that he was willing to undergo the surgery Dr. Schubert recommended, but Sentry refused to authorize it. Ford testified that his prescription pain medication lessened his symptoms, but his pain never entirely resolved. Ford testified that he was unable to function without his medication and steroid injections did not improve his pain.[25] Ford testified that he has consistently been compliant with his medications and takes them as directed.[26]

¶ 20 On January 26, 2010, Dr. Ross filled out a medical status report in which he indicated that Ford was not at MMI. Although Dr. Ross indicated that Ford could return to work with no restrictions, he further indicated that Ford should minimize continuous twisting or bending of his neck and that he should perform a sitting job "mainly."[27] On January 30, 2010, Dr. Ross faxed Connell a note which stated, "Here's a copy of the 'revised' MSR . . . that indicates Mr. Ford is not to use narcotic pain meds or muscle relaxants at work or when driving."[28] The revised medical status report no longer stated that Ford could return to work with no restrictions, but rather indicated that Ford should minimize continuous twisting or bending of his neck, perform a sitting job "mainly," and should not take narcotic pain medication or muscle relaxants at work or while driving.[29]

¶ 21 On January 28, 2010, Ryan Schwanke, M.D., saw Ford for an initial examination. Dr. Schwanke observed that Ford moved slowly as if he had a stiff neck. Dr. Schwanke reviewed some of Ford's medical records, including notes from Dr. Ross and Dr. McElhinny's psychological evaluation. Dr. Schwanke noted that he agreed with Dr. McElhinny that Ford likely has some depression which contributes to his symptoms. Dr. Schwanke adjusted Ford's medications, noting that his goal was to eventually discontinue Ford's use of narcotics.[30]

¶ 22 Ford testified that Dr. Schwanke was willing to write him a prescription for pain medication on his first visit, but when he returned for a second appointment, Dr. Schwanke refused to write him another prescription. Ford testified that Dr. Ross had convinced Dr. Schwanke not to refill the pain medication prescription.[31]

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[25] Trial Test.

[26] Trial Test.

[27] Ex. 2 at 19a.

[28] Ex. 2 at 19-1. (Emphasis in original.)

[29] Ex. 2 at 19.

[30] Ex. 2 at 162-65.

[31] Trial Test.

¶ 23 On January 29, 2010, Ford was terminated from his employment at Pacific.[32]

¶ 24 On February 15, 2010, Gregg Singer, M.D., wrote to Sentry's medical case manager after a records review of Ford's case. Dr. Singer concluded that: Ford is not a surgical candidate; Ford's complaints do not have an anatomic basis attributable to the industrial accident; the recommended treatment of antidepressants and a home exercise program "may not be helpful" and Ford "may choose to be noncompliant;" and the objective findings on the MRI either predate the industrial injury or are age-related.[33]

¶ 25 Ford eventually began to treat with Douglas A. Woerner, D.O. However, he continued to see Dr. Ross as well. Ford testified that he currently receives prescriptions from Dr. Woerner. Ford has refused Dr. Ross' requests for authorization to receive Dr. Woerner's records because Ford does not want Dr. Ross to speak with Dr. Woerner and possibly jeopardize Ford's ability to receive prescriptions through Dr. Woerner.[34]

¶ 26 On May 3, 2010, Steven R. Speth, M.D., wrote to Sentry's medical case manager after evaluating Ford. Dr. Speth diagnosed Ford with cervical spondylosis and congenital and acquired stenosis at C5-6 with significant cord flattening but no obvious myelopathy. Dr. Speth recommended that Ford obtain Dr. Schubert's recommended surgery. Dr. Speth further noted that he found objective evidence for surgery because of significant cord flattening and some subtle signal change within the cord. Dr. Speth stated that he had no opinion regarding the cause of Ford's conditions and that he would defer to the other doctors who had treated Ford after his industrial injury. Dr. Speth noted that Ford had some risk factors for a poor surgical outcome, as outlined by Dr. McElhinny, and that Ford's tobacco use put him at risk of a non-union. Dr. Speth opined that these concerns did not outweigh the need for surgery. He further stated, "The literature would suggest Mr. Ford has approximately a 50% chance of overcoming his subjective pain complaints." Dr. Speth recommended a post-operative multidisciplinary approach including cognitive behavioral therapy.[35]

¶ 27 On May 21, 2010, Dr. Ross examined Ford and found him to be at MMI with no permanent impairment or work restrictions. Dr. Ross opined that Ford had a temporary aggravation of preexisting cervical spondylosis and congenital/acquired spinal stenosis from his industrial accident. Based on his examination of Ford on that day, Dr. Ross

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[32] Ex. 11 at 5, 19.

[33] Ex. 2 at 120-24.

[34] Trial Test.

[35] Ex. 2 at 116-18.

concluded that Ford had "returned to his baseline status."[36] Dr. Ross signed a medical status report which released Ford to return to work with no restrictions.[37]

¶ 28 On July 20, 2010, Henry H. Gary, M.D., evaluated Ford for an independent medical examination (IME). Dr. Gary reviewed available medical records and took Ford's history. He noted that Ford complained of daily headaches which were often present in the morning and worsened throughout the day, but lessened somewhat with the use of Percocet. Ford reported recently developing a different type of headache which Dr. Gary believed might be migrainous. Ford reported neck pain and numbness in certain fingers. Dr. Gary examined Ford.[38] In response to questions posed, Dr. Gary diagnosed Ford with:

> Chronic cervical strain secondary to injury of 9/29/09 with neck pain headache. The tingling in the fourth and fifth digits that was episodic is most likely due to cervical muscle spasm affecting the lower segments of the brachial plexus, which is commonly seen in these injuries.[39]

Dr. Gary further diagnosed Ford with cervical spondylosis and congenital spinal stenosis predating the injury, probable depression, and other conditions.[40] Dr. Gary stated that the objective medical findings include the cervical MRI. Dr. Gary conceded that Ford's subjective complaints do not correlate well with the MRI. However, he found no exaggerated or embellished pain responses or non-organic findings. Dr. Gary opined with a reasonable degree of medical certainty that Ford suffered a chronic cervical strain injury on September 29, 2009, with symptoms of neck pain, headache, and intermittent tingling of the lower brachial plexus levels. However, Dr. Gary opined that the MRI findings preceded Ford's industrial accident; he stated that some disk herniation could have occurred with the accident, but that he could not state this with a reasonable degree of medical certainty.[41]

¶ 29 Dr. Gary further opined that Ford needs the surgery recommended by Dr. Schubert, noting that Ford has a significant spinal stenosis and opining that Ford is at risk for developing more severe conditions. Dr. Gary stated:

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[36] Ex. 2 at 17R-17Z.

[37] Ex. 2 at 17Z-1.

[38] Ex. 2 at 126-37.

[39] Ex. 2 at 134.

[40] Ex. 2 at 134.

[41] Ex. 2 at 135.

> The surgery is necessary to treat the radiographic findings. His pain is likely the result of cervical strain and certainly the relief of chronic headaches secondary to cervical muscle spasm is very poorly treated by surgery. It is my opinion that his surgery is necessary because of the radiographic findings and not because of the symptoms that he is complaining of. . . .[42]

¶ 30 Dr. Gary opined that he was "not optimistic" that Ford's pain complaints would improve with surgery. Dr. Gary noted that Ford's tobacco use, depression, and narcotic use could exacerbate his headaches.[43] Dr. Gary agreed with Dr. Ross' 0% impairment rating and stated that he would defer to Dr. Ross or a functional capacity evaluation as to whether Ford had any permanent work restrictions. Finally, Dr. Gary opined that Ford's current pain complaints were related to his industrial injury, and recommended that Ford receive re-evaluation and chronic pain management.[44]

¶ 31 On September 29, 2010, Dr. Ross wrote to Connell in response to a letter and IME report from Dr. Gary which she had sent to Dr. Ross. Dr. Ross opined that any cervical spine surgery would be attributable to preexisting conditions and degenerative changes and not to the industrial accident. Dr. Ross further opined that Ford had reached MMI on May 17, 2010, with no impairment rating and no permanent work restrictions.[45]

¶ 32 On October 1, 2010, Dr. Ross wrote to Connell, stating that he had reviewed the medical records from Dr. Woerner which Connell had provided. Dr. Ross noted that Connell had sent the medical records for Dr. Ross' review because Ford had refused to provide a release to Dr. Ross for the records. Dr. Ross opined that Dr. Woerner's recommendation that Ford be referred to Dr. Michael Schabacker to not be causally related to Ford's industrial injury. Dr. Ross further opined that Ford did not require narcotic pain medication or muscle relaxants for ongoing affects from his industrial injury.[46]

¶ 33 On October 7, 2010, John I. Moseley, M.D., MS, PC, wrote to Ford's counsel to report his findings from an IME. Dr. Moseley's impression was that Ford suffered from cervical radiculopathy and post-traumatic headache secondary to cervical spine trauma.

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[42] Ex. 2 at 136.

[43] Ex. 2 at 136.

[44] Ex. 2 at 137.

[45] Ex. 2 at 17H-17Q.

[46] Ex. 2 at 17A-17G.

Dr. Moseley agreed with Dr. Schubert's recommendation for surgery. Dr. Moseley opined that Ford's cervical radiculopathy at C5-6 and bulging disk at C6-7 were both secondary to his September 29, 2009, industrial accident. He further stated:

> In my opinion, it is within a reasonable degree of medical probability that Mr. Ford had a cervical spine condition which preexisted his injury of 09/29/09. . . . I think the trauma aggravated his preexisting problem and/or created disk protrusion at C5-6.

Dr. Moseley noted that Ford had been asymptomatic prior to September 29, 2009, and that he promptly sought treatment following the industrial accident. Dr. Moseley further noted that the nature of Ford's industrial accident – rapid hyperextension and flexion of the cervical spine – is a common method for aggravating cervical disks.[47]

¶ 34 On December 22, 2010, Dr. Gary wrote to Sentry's counsel following his review of medical records from Drs. Moseley, Ross, and Schubert. Dr. Gary stated that although Dr. Moseley diagnosed cervical radiculopathy, he did not describe a true radiculopathy and that Dr. Gary saw no objective findings of radiculopathy. Dr. Gary stated that he did not understand why Dr. Moseley found a radiculopathy given the discrepancy in sensory findings. Dr. Gary thought that any current reflex change would be unrelated to the industrial injury and more likely related to Ford's underlying cervical spondylitic changes.[48]

¶ 35 In an undated letter, Dr. Schubert wrote to Sentry's counsel in response to questions which counsel had posed to Dr. Schubert regarding Ford's condition. Dr. Schubert could not state with a medical probability that Ford's C6 radiculopathy was caused by his industrial accident, but only that it was a possibility. Dr. Schubert further opined that the MRI findings were primarily degenerative although they could have become symptomatic from the industrial accident. Dr. Schubert further opined that it was very likely that Ford suffered a cervical strain from his industrial accident. He further stated:

> While I believe that surgery is effective in some cases of neck pain refractory to non-operative treatments and without radicular symptoms but with significant degenerative changes, I think that it's [sic] success rate for significant improvement is in the 50% range at best and this without confounding factors. I think that sometimes headaches from muscle spasm compensatory or secondary to degenerative spine conditions can

[47] Ex. 2 at 154-58.

[48] Ex. 2 at 137A.

> sometimes improve however . . . if this occurs this is an extra "bonus" of the procedure, but not something that can be expected. . . . I think in the majority of cases, headaches associated with neck pain do not respond to surgical treatment. . . . Surgery for essentially axial neck pain in the face of degenerative changes is at best a 50/50 chance of improvement in symptoms without confounding factors. . . . I think given that Mr. Ford does have confounding issues and particularly in light of his neuropsychological evaluation by Dr. McElhinny, I think he would be a very poor candidate for surgery and would very unlikely to have [sic] significant relief of his symptoms.[49]

¶ 36 Ford testified that his ongoing physical complaints since his industrial accident are daily headaches, stiffness and soreness in his neck, and numbness and tingling in some of his fingers.[50] Ford testified that he wants surgery on his neck and understands that doctors have predicted a 50% chance that the procedure would improve his headaches.[51]

¶ 37 Ford testified that he does not believe he can work presently because he does not believe he could find a job which would allow him to take frequent breaks and lie down as much as is necessary. He currently receives unemployment benefits and has conducted job searches as required to maintain those benefits.[52]

CONCLUSIONS OF LAW

¶ 38 This case is governed by the 2009 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Ford's industrial accident.[53]

¶ 39 Ford bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.[54] Ford has not met his burden.

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[49] Ex. 2 at 16a-16c.

[50] Ford Dep. 47:18-24.

[51] Trial Test.

[52] Trial Test.

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

[54] *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).

ISSUE ONE: Is Respondent liable for medical bills and treatment involving Petitioner's cervical disk condition?

¶ 40 Causation is an essential element to an entitlement to benefits and the claimant has the burden of proving a causal connection by a preponderance of the evidence.[55] Under § 39-71-407(2), MCA, an insurer is liable for an injury if the injury is established by objective medical findings and if the claimant establishes that it is more probable than not that the claimed injury either occurred or aggravated a preexisting condition. In this case, Sentry accepted liability for Ford's September 29, 2009, industrial accident. However, the parties disagree whether the industrial accident caused or aggravated the cervical disk condition which was identified after Ford underwent an MRI on October 20, 2009. They have asked the Court to determine whether Sentry is liable for medical bills and treatment for that disk condition.

¶ 41 As set forth in my findings above, Drs. Schubert and Gary both opined that Ford's cervical disk herniation may have been caused by his industrial accident, but neither could do so with a reasonable degree of medical certainty. Dr. Moseley, however, opined that he could determine with a reasonable degree of medical certainty that Ford's herniation occurred from the industrial accident.

¶ 42 As a general rule, the opinion of a treating physician is accorded greater weight than the opinions of other expert witnesses. However, a treating physician's opinion is not conclusive. To presume otherwise would quash this Court's role as fact-finder in questions of an alleged injury.[56] Drs. Gary and Moseley saw Ford for IMEs, while Dr. Schubert treated Ford for his cervical condition following his industrial accident. In determining whether the weight of conflicting medical opinions outweighs the opinion of a treating physician, this Court has considered such factors as the relative credentials of the physicians,[57] and the quality of evidence upon which the physicians based their respective opinions.[58] In the present case, no evidence has been presented which gives me grounds to assign greater weight to the opinion of Dr. Moseley than to that of Dr. Schubert. Since Dr. Schubert was unable to state with a reasonable degree of medical certainty that Ford's industrial accident caused his cervical disk condition, I conclude that Ford has not proven that his industrial accident caused his cervical disk condition.

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[55] *Grenz v. Fire and Cas. of Conn.*, 250 Mont. 373, 380, 820 P.2d 742, 746 (1991). (Citation omitted.)

[56] *EBI/Orion Group v. Blythe*, 1998 MT 90, ¶¶ 12-13, 288 Mont. 356, 957 P.2d 1134. (Citation omitted.)

[57] *See Barnea v. Ace Am. Ins. Co.*, 2007 MTWCC 58, ¶ 43.

[58] *See Durham v. State Compen. Ins. Fund*, 1998 MTWCC 87, ¶¶ 19, 44.

¶ 43 Ford further argues that if the industrial accident did not cause his cervical disk condition, it must have aggravated his underlying, previously asymptomatic, cervical disk condition. Ford argues that his case is on point with *Narum v. Liberty Northwest Ins. Corp.*,[59] in which the Montana Supreme Court affirmed this Court's determination that an insurer was liable for a claimant's hip condition. Although this Court determined that the insurer was liable primarily because of the terms of the parties' settlement agreement, the Montana Supreme Court based its affirmation of this Court's decision on the underlying facts of the case, holding that ample factual findings existed to support a determination that the claimant's industrial accident had aggravated a preexisting hip condition.[60]

¶ 44 In *Narum*, the claimant suffered an industrial injury to his left hip when he fell while exiting a delivery truck.[61] Subsequent medical treatment revealed that he suffered from a preexisting degenerative joint disease in his hip which had been asymptomatic prior to his industrial accident.[62] The Montana Supreme Court concluded that Narum had demonstrated that his need for hip surgery and other treatments for his left hip were caused by an aggravation of a preexisting degenerative condition.[63]

¶ 45 Ford is correct that an aggravation of a preexisting condition is compensable. The distinction between *Narum* and the present case, however, is that in *Narum*, the claimant's subjective complaints of pain correlated with objective medical findings. In the present case, Ford's subjective complaints of pain do not correlate with the objective medical findings regarding his cervical disk condition. While Ford's industrial accident has caused him to suffer ongoing headaches, neck pain, and tingling sensations in some of his fingers, he has not established that his industrial injury aggravated his cervical disk condition because the medical evidence does not indicate that his subjective complaints correlate with his cervical disk condition. Although Ford clearly has ongoing problems from the industrial injury, the medical opinions in evidence indicate that the problems from the industrial injury would not be addressed by the proposed surgery Ford seeks. From the medical evidence before me, all I can conclude is that Ford had an asymptomatic cervical disk condition before his industrial injury and continues to have an asymptomatic cervical disk condition after his industrial injury.

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[59] *Narum*, 2008 MTWCC 30 (*aff'd* 2009 MT 127, 350 Mont. 252, 206 P.3d 964).

[60] *Narum*, 2009 MT 127, ¶ 31.

[61] *Narum*, 2009 MT 127, ¶ 2.

[62] *Narum*, 2009 MT 127, ¶ 4.

[63] *Narum*, 2009 MT 127, ¶ 31.

ISSUE TWO: Is Respondent liable for TTD benefits subsequent to May 18, 2010, and if so, what is the duration of those benefits?

¶ 46 Under § 39-71-701(1), MCA, a worker is eligible for TTD benefits when the worker suffers a total loss of wages as a result of an injury and until the worker reaches maximum healing, or until the worker has been released to return to the worker's time-of-injury employment. As set forth in the findings above, Ford's treating physician Dr. Ross found him to be at maximum healing, or MMI, as of May 17, 2010, and released him to return to work with no permanent impairment or work restrictions. After an IME on July 29, 2010, Dr. Gary agreed with Dr. Ross' impairment rating and stated that he would defer to Dr. Ross or a functional capacity evaluation as to whether Ford had any permanent work restrictions. Dr. Gary further opined that, while he agreed with Dr. Schubert that Ford needed surgery, he did not think the surgery would improve Ford's headaches and neck pain. Dr. Gary recommended re-evaluation and chronic pain management.

¶ 47 Although no doctor has specifically opined that Ford is not at MMI, doctors have recommended additional treatment for Ford's symptoms that are indisputably related to his industrial injury: the neck pain, headaches, and tingling in his fingers. This Court has held previously, under the statutory definition of MMI, it is impossible for an injured worker to be simultaneously at MMI and expected to improve with further treatment.[64] However, under § 39-71-701(1), MCA, if a worker is not at MMI, but has been released to return to his time-of-injury employment, he is not eligible for TTD benefits. Although Ford may not be at MMI, no doctor has disputed Dr. Ross' opinion that Ford can return to work without restriction. Therefore, he is not entitled to TTD benefits under § 39-71-701(1), MCA.

ISSUE THREE: Is Respondent liable for payment of attorney fees and costs and the 20% penalty?

¶ 48 Since Ford is not the prevailing party, he is not entitled to his costs, attorney fees, or a penalty.[65]

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¶ 49 Respondent is not liable for medical bills and treatment involving Petitioner's cervical disk condition.

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[64] *Hale v. Liberty Mut. Middle Market*, 2010 MTWCC 28, ¶ 35.

[65] *See* §§ 39-71-611, -2907, MCA.

¶ 50 Respondent is not liable for TTD benefits subsequent to May 18, 2010.

¶ 51 Respondent is not liable for payment of attorney fees and costs and the 20% penalty.

¶ 52 Respondent's motion in limine is moot.

¶ 53 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 20th day of July, 2011.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Patrick R. Sheehy
Kelly M. Wills/Jeffrey B. Smith
Submitted: February 22, 2011