IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2006 MTWCC 22

WCC No. 2005-1222

JASON HARRISON

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION
and STILLWATER MINING COMPANY

Respondents/Insurers.

APPEALED MAY 26, 2006
AFFIRMED APRIL 1, 2008

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Petitioner petitioned the Court to determine whether Stillwater Mining Company or Liberty Northwest Insurance Corporation, insurer for Derek Brown Construction Company, was responsible for payment of his medical costs and disability benefits.

Held: Stillwater Mining Company (Stillwater) is responsible for the payment of Petitioner's medical costs and disability benefits. Dr. Varnavas, one of Petitioner's treating physicians, opined that Petitioner's back injury sustained while on the job at Derek Brown Construction Company (Derek Brown) occurred as a direct result of a previous occupational disease Petitioner suffered while working for Stillwater. Dr. Varnavas's opinion was not disputed by Petitioner's other treating physician, Dr. Quenemoen, who was unable to opine whether Petitioner's injury sustained while on the job at Derek Brown was a result of his occupational disease suffered while working for Stillwater. Liberty Northwest Insurance Corporation (Liberty) paid Petitioner temporary total disability benefits and also paid for Petitioner's back surgery. Stillwater must indemnify Liberty for these medical and disability benefit payments. Stillwater should continue to pay Petitioner's disability and medical benefits. Petitioner is also entitled to receive his costs from Stillwater.

Topics:

Injury and Accident: Aggravation: Generally. The case law is well established regarding a temporary aggravation of a preexisting occupationally-caused condition after MMI. *See MCCF v. Liberty Northwest Ins. Corp.*, 2003 MTWCC 10, ¶35 (*citing Burglund v. Liberty Mutual Fire Ins. Co.,* 286 Mont. 134, 950 P.2d 1371 (1997)).

Injury and Accident: Aggravation: Temporary Aggravations. The case law is well established regarding a temporary aggravation of a preexisting occupationally-caused condition after MMI. *See MCCF v. Liberty Northwest Ins. Corp.,* 2003 MTWCC 10, ¶35 (*citing Burglund v. Liberty Mutual Fire Ins. Co.,* 286 Mont. 134, 950 P.2d 1371 (1997)).

Physicians: Treating Physician: Who may be the treating physician. Where Petitioner had two treating physicians from two different claims, both are considered treating physicians for purposes of the Court's decision.

Physicians: Treating Physician: Weight of Opinions. Where Petitioner had two treating physicians and one treating physician offered an opinion as to whether Petitioner's injury arose from his earlier injury, and the other treating physician was silent on the issue, the Court is left with the uncontroverted testimony of the treating physician offering an opinion.

Settlements: Reopening: Materiality of Mistake. Where Petitioner and insurer both operated under the mistake that Petitioner's injury would not require surgical intervention when they entered into their settlement, the mistake is material when, as it turned out, Petitioner *was* required to have surgery to address his injury. The Court concluded Petitioner was entitled to reopen the settlement.

¶ 1 The trial in this matter was held on December 19, 2005, in Helena, Montana. Petitioner Jason Harrison, was present and represented by Andrew J. Utick. Respondent Stillwater Mining Company (Stillwater) was represented by James R. Hintz. Respondent Liberty Northwest Insurance Corporation (Liberty)[1] was represented by Larry W. Jones.

¶ 2 Exhibits: Exhibits 1 through 39 were admitted without objection. Exhibit 40 was objected to and excluded. Exhibit 41 was withdrawn.

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[1] Liberty is the insurer for Derek Brown Construction Company.

¶ 3 Witnesses and Depositions: The depositions of Petitioner, Dr. Gus Varnavas, and Dr. Lowell R. Quenemoen were taken and submitted to the Court. The parties agreed all depositions would be part of the record. Petitioner was sworn and testified at trial.

¶ 4 Issues Presented: The Court restates the following contested issues identified in the Pretrial Order and amended at trial as follows:[2]

> ¶ 4a Whether Petitioner is presently entitled to continuing biweekly temporary total disability (TTD) benefits by reason of a compensable occupational disease or industrial injury.
>
> ¶ 4b If Petitioner is presently entitled to continuing biweekly TTD benefits by reason of an occupational disease or industrial injury, which insurer is responsible for payment.
>
> ¶ 4c If Petitioner's present condition is due to the occupational disease he sustained while employed at Stillwater, whether the settlement of Petitioner's claim with Stillwater should be set aside for mutual mistake of fact or some other reason.
>
> ¶ 4d Whether Petitioner is entitled to medical benefits by reason of his occupational disease or industrial injury.
>
> ¶ 4e If Petitioner is entitled to medical benefits by reason of his occupational disease or industrial injury, which insurer is responsible for payment.
>
> ¶ 4f Whether Petitioner is entitled to an award of reasonable costs incurred in connection with this matter.
>
> ¶ 4g Whether Stillwater is liable to indemnify Liberty for the wage loss and medical benefits Liberty has paid under a reservation of rights.

¶ 4h Whether Petitioner is liable to indemnify Liberty for the payment of forty-nine days of benefits if neither Stillwater nor Liberty is found liable for the payment of TTD benefits.[3]

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[2] The Petitioner withdrew the claims for a penalty and attorney fees at trial.

[3] Pretrial Order at 2-3.

FINDINGS OF FACT

¶ 5 Petitioner was sworn and testified at trial. The Court finds his testimony at trial credible.

¶ 6 The depositions of Petitioner, Dr. Gus Varnavas, and Dr. Lowell R. Quenemoen were taken and submitted to the Court. The parties agreed all depositions would be part of the record.

¶ 7 Petitioner is 32 years old and resides in Helena, Montana.[4]

¶ 8 Petitioner was hired by Stillwater on or about March 5, 2000.[5]

¶ 9 On November 13, 2002, Petitioner suffered an occupational disease in the course and scope of his employment with Stillwater. Petitioner reported a claim for low-back and neck pain resulting from his employment as an underground equipment operator at Stillwater and Stillwater accepted the claim under the Occupational Disease Act.[6]

¶ 10 Petitioner has worked as an underground equipment operator, carpenter, roofer, equipment maintenance mechanic, and concrete construction crew laborer during the times relevant to the claims with Stillwater and Liberty.[7]

¶ 11 On November 21, 2002, Petitioner was treated by Dr. Gregory S. McDowell. Petitioner complained of low-back pain with radicular leg pain. He also complained of some neck discomfort with some tingling and numbness in his arms. Petitioner told Dr. McDowell that his pain began approximately six months earlier and attributed the pain to his work at Stillwater.[8]

¶ 12 Petitioner was diagnosed with early degenerative changes in his lower lumbar spine at L4-5 and L5-S1 by Dr. McDowell and Physician Assistant Mark Sullivan.[9]

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[4] Ex. 1.; Trial Test.

[5] *Id.*

[6] Pretrial Order at 2, Uncontested Facts; Exs. 1 & 11.

[7] Trial Test.; Harrison Dep. at 11-13, 34-69.

[8] Ex. 9 at 3.

[9] Ex. 9 at 3-4.

¶ 13 Dr. McDowell, an orthopedic surgeon, opined: "It sounds like he has an occupational disease, in part disease state and part caused by his work." Dr. McDowell suggested "downgrading the stresses in his work place . . . [and] made some simple conservative recommendations," and stated "[s]urgery at this time is not indicated . . . ."[10]

¶ 14 On November 21, 2002, Dr. McDowell wrote Lori Stewart, Stillwater's Safety Administrator. In his letter, Dr. McDowell stated that he did not think Petitioner's condition would "require a lot of intervention." Dr. McDowell went on to suggest, however, that an alternative position should be found for Petitioner.[11]

¶ 15 On December 5, 2002, Petitioner received an epidural steroid injection at the L4-5 interspace performed by Dr. Douglas H. Cornelius.[12]

¶ 16 On December 19, 2002, Dr. McDowell noted "[t]he back and leg situation is something that he [Petitioner] really wants to look into . . . ." Dr. McDowell further noted that Petitioner inquired as to "whether he needed to [see] a neurologist."[13]

¶ 17 On January 17, 2003, Petitioner was examined by Dr. Lowell R. Quenemoen. Dr. Quenemoen is a board certified neurologist/psychiatrist. He is a member of the American Academy of Neurology, American Society for Study of Headache, and the International Headache Society. After examining Petitioner, Dr. Quenemoen recommended a Medrol Dosepak, electrodiagnostic studies, and lumbar MRI.[14]

¶ 18 The MRI of January 24, 2003, revealed a minimal annular disk bulge at L4-5 without mass effect upon either the L5 nerve root or significant central canal narrowing.[15]

¶ 19 On January 29, 2003, lower extremity nerve conduction studies of the right and left peroneal nerves were normal. Electromyographic studies revealed mild irritability in the left S1 distribution. The findings were "mild," and Dr. Quenemoen stated, "[a]t this point, there is nothing to suggest a surgical lesion."[16]

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[10] *Id.* at 2.

[11] *Id.* at 1.

[12] Ex. 12.

[13] Ex. 9 at 8.

[14] Quenemoen Dep. 5:5-7; Ex. 13 at 1-2.

[15] Ex. 14.

[16] Ex. 13 at 3-7.

¶ 20 During the course of his treatment of Petitioner, Dr. Quenemoen prescribed Neurontin, steroids, exercise, and physical therapy.[17]

¶ 21 On May 20, 2003, Dr. Quenemoen assigned work restrictions which limited Petitioner to lifting less than 50 pounds and ruled out a return to work as an underground equipment operator.[18]

¶ 22 On July 22, 2003, Dr. Quenemoen wrote Stillwater's claims adjuster, Cathy Andersen, noting Petitioner's continued improvement in physical therapy. Dr. Quenemoen placed Petitioner at maximum medical improvement (MMI) and assigned a 3% whole person impairment in regard to the lumbar condition, and 5% whole person impairment rating based on combined lumbar and cervical conditions.[19]

¶ 23 Petitioner settled his claim with Stillwater for $20,339, with medical benefits reserved. The settlement was approved by the Department of Labor and Industry on September 16, 2003.[20]

¶ 24 After leaving Stillwater, Petitioner began a rehabilitation plan which included retraining at the Helena College of Technology. He withdrew from school in October 2003, and later worked in a number of jobs in the construction and mining industries. During this period, Petitioner did not seek treatment for his low-back condition.[21]

¶25 Petitioner did not have any significant problems with his back while working construction during the period after his withdrawal from the Helena College of Technology, although he occasionally took medications prescribed by Dr. Quenemoen.[22]
¶ 26 Petitioner went to work for Derek Brown Construction Company (Derek Brown) on or about April 12, 2004.[23]

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[17] *See* Ex. 13, generally.

[18] Ex. 13 at 19-22.

[19] *Id.* at 23-24.

[20] Ex. 16.

[21] Trial Test.; Harrison Dep. at 32-47.

[22] Trial Test.; Harrison Dep. at 37-38, 47.

[23] Harrison Dep. at 48.

¶ 27 Petitioner filed a claim for compensation due to an industrial injury on April 23, 2004. In the claim Petitioner wrote, "I believe that I aggravated my low back condition that day (4/23/04) doing the heavy concrete work for Derek Brown Construction."[24]

¶ 28 At the time of the April 23, 2004, injury Derek Brown was insured by Liberty under Plan 2 of the Workers' Compensation Act.[25]

¶ 29 On May 7, 2004, Petitioner sought treatment for his injury with Dr. Gus Varnavas. Dr. Varnavas is a board eligible neurosurgeon.[26]

¶ 30 After discussing Petitioner's symptoms with him, reviewing his studies and examining him, Dr. Varnavas believed Petitioner would need a fusion at the L4-5 level of his lumbar spine. Dr. Varnavas ordered a CT scan of the lumbar spine to gather additional technical information.[27]

¶ 31 After further studies, Dr. Varnavas believed Petitioner was a candidate for an arthroplasty or a fusion.[28]

¶ 32 Dr. Varnavas discussed with Petitioner the option of arthroplasty or a fusion and the Petitioner chose the arthroplasty.[29]

¶ 33 On July 7, 2005, Dr. Varnavas performed an arthroplasty on Petitioner and put an artificial disk at the L4-5 interspace.[30]

¶ 34 Liberty paid Petitioner's TTD and medical benefits, including paying for the surgery recommended by Dr. Varnavas, under a reservation of rights.[31]

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[24] Ex. 17.

[25] Pretrial Order at 2.

[26] Varnavas Dep. at 6; *See* Ex. 20, generally.

[27] Ex. 20 at 6.

[28] *Id.* at 16.

[29] *Id.* at 18.

[30] Varnavas Dep. at 10.

[31] Pretrial Order at 2.

¶ 35 In response to an inquiry by Rebecca Dahl, Claims Adjuster for Industrial Injury Claims,[32] on May 26, 2005, Dr. Quenemoen opined:

> In regard to the diagnosis of segmental instability and was that condition present during the treatment of Mr. Harrison, I cannot really comment on this. I did not appreciate segmental instability; but, indeed, he did have significant restriction of motion and did have degenerative changes in the lumbar region at the time he was evaluated.[33]

¶ 36 In a letter dated September 15, 2004, Dr. Varnavas opined on a more-probable-than-not basis as follows:

> [Mr. Harrison] had a significant injury while working for the mining company and even by his own admission to me tried to go back to work with the only job that he knew how to do, which was construction wherein he reinjured himself at the construction company.
>
> I believe that Mr. Harrison's condition is a direct connection to the prior injury that he suffered at the Stillwater Mine. The records reflect, his admissions state, and his history supports that he has never been right since the original injury.
>
> He is not at his pre-injury baseline – in fact, he will require a surgical procedure to correct his problem.
>
> I think that this gentleman was clearly in evolution as far as going on to have a structural failure. He has a segmental instability that is very straightforward. His problem was not readily identifiable until he got to the point where he failed completely, which is where he is at the present time.[34]

¶ 37 In a letter dated October 28, 2004, Dr. Varnavas opined on a more-probable-than-not basis as follows:

> Jason has a segmental structural instability involving the L5-S1 joint. In reviewing his history and his symptoms, I believe that this is not the result of his employment with the Derek Brown Construction Company. I believe that

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[32] Industrial Injury Claims is the adjusting office for the workers' compensation claims of Stillwater.

[33] Ex. 13 at 41-42.

[34] Ex. 20 at 7; Varnavas Dep. at 8.

> this is a manifestation of an injury that he suffered while still working at the mine – it was a process in evolution that took some time to become readily apparent.[35]

¶ 38 In a letter dated November 14, 2004, Dr. Varnavas opined on a more-probable-than-not basis as follows:

> I think that when Mr. Harrison was working for the Derek Brown Construction Company that this is clearly to my mind and to his a temporary aggravation. He did not have any new problems. He is a young man with a young family and he is trying to provide for them, however, he could not perform the job.
>
> I do not think that his underlying condition is related to the Derek Brown Construction Company.
>
> Mr. Harrison has been suffering from his back pain for quite some time. I believe that he is back to the point of where he was at when he tried to perform the job at the Derek Brown Company. I believe that the confusion has come in due to a lack of clarity regarding his overall situation. It is unfortunate that things have happened in this manner. He has clearly been a person who was probably evaluated by a number of physicians in such a way that his condition was not readily identifiable at that early point of evaluation. He has been through numerous tests and evaluations, and I think that he is completely consistent in his symptoms. He had an injury that he suffered at the mine, which has slowly progressed and has gotten worse over time. It would be nice to get him back to a functional state.[36]

CONCLUSIONS OF LAW

¶ 39 Petitioner bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.[37]

¶ 40 The case law is well-established regarding a temporary aggravation of a preexisting occupationally-caused condition after MMI.

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[35] Ex. 20 at 9; Dr. Varnavas Dep. at 9.

[36] Ex. 20 at 10; Dr. Varnavas Dep. at p. 9.

[37] *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).

> Liability, as between insurers, has been the [gist] of a number of decisions over the past few years. The rules are straightforward. If a claimant has reached MMI with respect to a first industrial injury and he thereafter suffers a work-related, permanent, and material aggravation of his medical condition, then the insurer at risk at the time of the aggravation is liable for compensation and medical benefits attributable to the condition. If, on the other hand, the subsequent aggravation is temporary or immaterial, and the disabling condition results from a natural progression set in motion by the first injury, then the insurer for the original injury is liable for compensation and medical benefits for the condition.[38]

¶ 41 In a case where two insurers dispute which insurer is responsible for compensating a claimant, the insurer which is on risk at the time of the accident in which a compensable injury is claimed has the burden of proof.[39] Liberty is on risk at the time the compensable injury is claimed. Liberty has the burden of proving, by a more-probable-than-not standard, that Stillwater is the responsible insurer.

¶ 42 Under Montana law, a treating physician's opinions are entitled to greater weight than a non-treating physician.[40]

¶ 43 The Court finds that Petitioner had two treating physicians from two different claims. Both Dr. Varnavas and Dr. Quenemoen are considered treating physicians for purposes of this decision.

¶ 44 Dr. Varnavas is the only treating physician to offer an opinion as to whether Petitioner's injury while working at Derek Brown arose from Petitioner's earlier injury at Stillwater. Dr. Varnavas opined that it did. When Dr. Quenemoen was asked whether or not the Derek Brown injury was attributable to the earlier Stillwater injury, Dr. Quenemoen responded that he did not know. Therefore, the Court is left with the uncontroverted testimony of Dr. Varnavas.

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[38] *MCCF v. Liberty Northwest Ins. Corp.*, 2003 MTWCC 10, ¶35 (*citing Burglund v. Liberty Mutual Fire Ins. Co.,* 286 Mont. 134, 950 P.2d 1371 (1997)).

[39] *Belton v. Carlson Transp.,* 202 Mont. 384, 392, 658 P.2d 405, 409-410 (1983).

[40] *Wall v. Nat'l Union Fire Ins. Co.,* 1998 MTWCC 11; *Waite v. State Compensation Ins. Fund,* 1998 MTWCC 47.

¶ 45 A settlement agreement may be reopened or set aside where both parties were operating under a mistake of material fact at the time the settlement was consummated.[41] However, "the parties [must] share a common misconception about a vital fact upon which they based their bargain."[42]

¶ 46 In the present case, Petitioner and Stillwater were both operating under the mistake that Petitioner's injury would not require surgical intervention when they entered into their settlement. This must be considered a material mistake of fact because, as it turned out, Petitioner ***was*** required to have surgery to address his Stillwater injury.

¶ 47 The Court concludes Petitioner is entitled to reopen his Stillwater settlement.

¶ 48 Liberty seeks indemnification from Stillwater for wage loss and medical benefits it paid to Petitioner under a reservation of rights. Liberty is only entitled to indemnification if the payments it made were properly the responsibility of Stillwater.[43]

¶ 49 To sustain its claim for indemnification, Liberty must initially show that Petitioner' condition was caused by his employment at Stillwater. In light of the uncontroverted testimony of Dr. Varnavas, Liberty has established to the satisfaction of the Court that Petitioner's current condition was caused by the occupational disease he sustained during his employment at Stillwater. The payments Liberty made to Petitioner were the responsibility of Stillwater.

¶ 50 The statute applicable to whether Petitioner is entitled to costs is § 39-71-612(1), MCA, which reads:

> If an insurer pays or submits a written offer of payment of compensation under chapter 71 or 72 of this title but controversy relates to the amount of compensation due, the case is brought before the workers' compensation judge for adjudication of the controversy, and the award granted by the judge is greater than the amount paid or offered by the insurer, a reasonable attorney's fee and costs as established by the workers' compensation judge if the case has gone to a hearing may be awarded by the judge in addition to the amount of compensation.

¶ 51 The Court finds that under § 39-71-612(1), MCA, Petitioner is entitled to his reasonable costs. Stillwater disputed the amount of compensation it owed Petitioner; the

[41] *South v. Transportation Ins. Co.,* 275 Mont. 397, 401, 913 P.2d 233, 235 (1996).

[42] *Mitchell v. Boyer,* 237 Mont. 434, 437, 774 P.2d 384, 386 (1989) (citations omitted).

[43] *See EBI/Orion Group v. State Compensation Ins. Fund,* 240 Mont. 99, 782 P.2d 1276 (1989).

case was brought before the Workers' Compensation Court; and the Court awarded an amount greater than that offered by Stillwater.

JUDGMENT

¶ 52 Petitioner is entitled to continuing biweekly temporary total disability benefits.

¶ 53 Stillwater is responsible for payment of Petitioner's biweekly temporary total disability benefits.

¶ 54 Petitioner's settlement with Stillwater shall be set aside for mutual mistake of fact.

¶ 55 Petitioner is entitled to medical benefits and Stillwater is responsible for payment of such medical benefits.

¶ 56 Stillwater is liable to Liberty for indemnification of disability loss and medical benefits Liberty paid to Petitioner under a reservation of rights.

¶ 57 Petitioner is entitled to receive his costs from Stillwater.

¶ 58 This JUDGMENT is certified as final for purposes of appeal.

¶ 59 Any party to this dispute may have twenty days in which to request reconsideration from these FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT.

DATED in Helena, Montana, this 12th day of May, 2006.

(SEAL)

/s/ James Jeremiah Shea
JUDGE

c: Andrew J. Utick
James R. Hintz
Larry W. Jones
Submitted: December 19, 2005.