

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2007 MTWCC 43

WCC No. 2006-1605

ROBERT HEALY

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Topics

Credibility. Where the claimant and an examining doctor disagreed as to how long a medical appointment lasted, they substantially agreed on what occurred during the appointment. Therefore, the discrepancy in duration does not point to a lack of credibility on the part of either party.

Medical Evidence: Objective Medical Findings. The Court is unpersuaded by an IME doctor's opinion that no objective medical findings support the claimant's complaints of back pain when an MRI revealed a bulging disk at L4-5 and a herniation at L3-4 which were disregarded by the doctor for unknown reasons. While the doctor may have had evidence which warranted a skeptical approach to the claimant's subjective pain complaints, objective findings were present and at least warranted further investigation.

Pain. Where a doctor had previously concluded that a claimant's complaints of pain were subjective and did not correlate with any objective medical findings, the Court is unpersuaded by the doctor's further opinion that this "pain" is related to a previous injury and not the injury which is the subject of the present case.

Injury and Accident: Subsequent Injury. Where Petitioner settled a workers' compensation claim in December 2000 and subsequently returned to manual labor jobs and sought no medical treatment for his back for several years, and where he demonstrated an ability to lift and carry 110 pounds in September 2003 and continued to perform heavy-duty manual labor until an industrial accident in June 2005, the evidence weighs towards Petitioner's claim that he reached MMI from his first industrial injury and that the June 2005 accident caused a permanent aggravation of the preexisting injury.

Physicians: Treating Physicians: Weight of Opinions. One physician opined that Petitioner's back condition was permanently aggravated by his industrial injury on June 9, 2005. A second opined that it was not. This Court has previously found the opinion of a doctor more persuasive because of his "longer and later" treatment of a claimant. *Siegler v. Liberty Ins. Corp.*, 2001 MTWCC 23, ¶ 53. Where the second doctor saw Petitioner for a single appointment in 2005 while the first physician treated Petitioner on multiple and more recent occasions, the first physician's opinion was given greater weight.

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Summary: Petitioner injured his low back in a work-related incident in 2005. He had previously settled a workers' compensation claim for a low-back injury in 1998. While Petitioner complained of severe pain in his low back and leg and an MRI revealed a herniated disk, the PA-C who was treating him and the PA-C's supervising physician concluded that no objective medical findings supported Petitioner's subjective complaints of pain. Petitioner was released to work without restriction, but he did not return to work and sought medical treatment elsewhere, eventually having back surgery performed. The physician from whom Petitioner last sought treatment opined that Petitioner's back condition was permanently aggravated by his 2005 industrial injury. Respondent denies liability for benefits from the date Petitioner was released to work without restriction.

Held: Petitioner has demonstrated by a preponderance of the evidence that his back condition was permanently aggravated as a result of his June 9, 2005, industrial injury. Respondent is therefore liable for payment of workers' compensation benefits.

¶ 1 The trial in this matter was held on April 19, 2007, in Billings, Montana. Petitioner Robert Healy was present and represented by R. Russell Plath. Respondent was represented by Larry W. Jones.

¶ 2 **Exhibits:** Exhibits 1 through 4 were admitted without objection.

¶ 3 **Witnesses and Depositions:** The depositions of Petitioner and Dr. Yves Meyer were submitted to the Court and can be considered part of the record. Petitioner, Jaspur Kolar, and Dr. Scott Ross were sworn and testified at trial.

¶ 4 Issues Presented: The Proposed Pretrial Order¹ states the following contested issue of law:

¶ 4a Whether the insurer is liable for payment of workers' compensation or occupational disease benefits to Petitioner.²

FINDINGS OF FACT

¶ 5 I find the testimony of Petitioner, Dr. Scott Ross, and PA-C Jaspur Kolar to be credible. Although some discrepancies between their recollections of specific events are evident, I believe these discrepancies are negligible and inconsequential. Most notably in this case is the discrepancy between Petitioner's and Dr. Ross' estimates of how long Petitioner's appointment lasted. However, while the parties disagreed as to how long the appointment lasted, they substantially agreed on what occurred during the appointment and I therefore do not believe that the discrepancy points to a lack of credibility on the part of either party.

¶ 6 This case centers on whether Petitioner is entitled to additional benefits stemming from an industrial injury he sustained in the course and scope of his employment on June 9, 2005. Petitioner had a previous work-related injury on May 27, 1998, while working in South Dakota as a laborer.³ In that incident, Petitioner slipped and fell, suffering low-back and right leg pain in the same areas he felt pain after his 2005 injury. However, Petitioner testified that on a scale of 1 to 10, the pain after the 1998 injury never exceeded a 4 or 5, while after the 2005 incident, his pain was around a 9 or 10.⁴ After the first incident, Petitioner was released to return to work without restrictions on August 25, 1998.⁵ He settled the claim on December 26, 2000.⁶ Petitioner testified that although he had been released to return to work without restrictions, he continued to experience pain in his right leg throughout 2000 and he used a TENS unit for his back.⁷

¹ Although the caption is titled "Proposed" Pretrial Order, this document is signed by the parties and the Court and will be referred to as the "Pretrial Order" in all subsequent references.

² Pretrial Order at 2.

³ Ex. 3 at 220.

⁴ Trial Test.

⁵ Ex. 2 at 181.

⁶ Ex. 3 at 4-13.

⁷ Trial Test.

¶ 7 An MRI report from March 1, 2000, indicated that Petitioner had a normal lumbar spine with early changes of disk degeneration at L4-5 without evidence of frank disk herniation.⁸ After 2000, Petitioner did not receive further medical treatment for his back or right leg. Petitioner continued to work as a construction laborer and moved to Havre, Montana. He was incarcerated from June 2002 through September 2003, during which time he received no medical treatment for his back or right leg. While incarcerated, Petitioner performed manual labor. During that time, he did not experience back problems and he was not bothered by the physical demands of his jobs.⁹

¶ 8 Petitioner was released from prison into a prerelease center in Billings. While at the prerelease center, he worked full time as a dishwasher. Petitioner did not have any difficulties with his back at that time. Petitioner then worked for Billings Concrete putting up concrete forms. As part of that job, he frequently lifted more than 50 pounds and his back gave him no problems. Petitioner worked for Billings Concrete for approximately six months before going to work for H.L. Ostermiller Construction.¹⁰

¶ 9 From the time Petitioner was hired at H.L. Ostermiller Construction in April 2004 until the day of his industrial accident, Petitioner did not have any problems with his back and did not seek any medical treatment for his back. From the record before me, it appears Petitioner sought no medical treatment for his back for over five years – from May 12, 2000, until June 9, 2005. Petitioner testified that during that time period, he did not have back problems.¹¹

¶ 10 On June 9, 2005, Petitioner was moving buckets filled with steel dowels from one vehicle to another when he felt something pop in his back. Petitioner estimates the buckets weighed between 70 and 90 pounds each.¹² When Petitioner felt the pop in his back, he experienced pain in his lower back and dropped to his knees. Petitioner's supervisor and a coworker saw him fall and came to his assistance. Petitioner stood up but could not completely straighten his back. He sat in his pick-up truck and rested for 10 to 15 minutes. He then tried to return to work but was unable to do so.¹³

⁸ Ex. 3 at 130.

⁹ Trial Test.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¶ 11 Petitioner's supervisor told him to call the office manager, Claudia Ostermiller (Ostermiller), and inform her about the accident. Ostermiller advised Petitioner to see chiropractor Kevin Dougherty (Dougherty) and Petitioner then drove himself to Dougherty's office.¹⁴

¶ 12 Dougherty noted that when Petitioner arrived, he could not stand upright, and Dougherty was unable to obtain x-rays of Petitioner's back because Petitioner could not stand in a position that would allow them to obtain readable films. Dougherty further noted that Petitioner was in extreme pain, and he concluded that Petitioner might have either a herniated disk or disk degeneration.¹⁵

¶ 13 Dougherty used warm packs and electrical stimulation to relieve Petitioner's muscle spasm, but he did not perform any adjustments. Petitioner testified that Dougherty informed Ostermiller that he was unable to offer Petitioner further treatment, and Ostermiller directed Petitioner to the Occupational Health and Wellness Department at the Billings Clinic. Petitioner then drove to the Billings Clinic.¹⁶

¶ 14 At the Billings Clinic, Petitioner was seen by Jaspur Kolar (Kolar), a physician's assistant in the Occupational Health and Wellness Department. Kolar took a history, noting that in 1998, Petitioner was diagnosed with a possible herniated disk which was ruled out by an MRI.¹⁷ Kolar's examination revealed significant lumbar spasm, extreme tenderness, an antalgic gait, and obvious pain. Kolar also noted decreased strength in both legs which was more prominent on the right side. An x-ray was taken of Petitioner's lumbar spine. Kolar prescribed physical therapy, medication for pain and spasm, and took Petitioner off work. Kolar also requested preauthorization for an MRI and an orthopedic consultation.¹⁸

¶ 15 Petitioner had an MRI performed on June 11, 2005. The exam report notes an extruded disk at L5-S1 "creating mass effect on the ventral thecal sac," a moderate extruded disk at T11-12, a slight eccentricity to the right at L4-5, and a slight eccentricity to the left with a laterally extruded disk at L3-4.¹⁹

¹⁴ Trial Test.

¹⁵ Ex. 2 at 81.

¹⁶ Trial Test.

¹⁷ Ex. 2 at 48.

¹⁸ Ex. 2 at 49.

¹⁹ Ex. 2 at 55.

¶ 16 At a subsequent appointment, Kolar referred Petitioner to Dr. Michael C. Willis, an orthopedist at the Billings Clinic. Petitioner saw Dr. Willis on June 21, 2005.²⁰ Dr. Willis reviewed Petitioner's MRI and concluded that Petitioner had only a "very minimal" disk bulge at L4-5, which Dr. Willis opined was not responsible for Petitioner's symptoms. Dr. Willis concluded that Petitioner had "[l]ow back pain secondary to work injury" and that Petitioner was not a surgical candidate.²¹

¶ 17 Petitioner continued to treat with Kolar. Kolar released Petitioner to return to work with a lifting restriction of 10-15 pounds on June 29, 2005.²² However, Petitioner's employer had no light-duty work available.²³

¶ 18 Petitioner also began physical therapy, which he attended through September 2005. The sessions ended because they did not seem to improve Petitioner's back condition.²⁴ Petitioner subsequently attended physical therapy at the Billings Clinic.²⁵

¶ 19 At the time Petitioner treated with Kolar, he worked exclusively with Dr. Scott K. Ross as his supervising physician. When Kolar joined the Billings Clinic, Dr. Ross instructed him in Waddell's tests, which consist of various diagnostic tests employed to determine if a patient's subjective complaints match objective findings.²⁶ During Kolar's examination of Petitioner on August 31, 2005, Kolar performed two tests he considers to be Waddell's tests – axial loading and trunk rotation – which elicited complaints of low-back pain from Petitioner.²⁷ However, Kolar testified that there is no anatomical reason why either of those tests should have caused Petitioner to experience increased low-back pain.²⁸ Kolar also noted during the same examination that he did not believe Petitioner was

²⁰ Ex. 2 at 51-52.

²¹ Ex. 2 at 52.

²² Ex. 2 at 41.

²³ Ex. 2 at 39.

²⁴ Trial Test.

²⁵ Ex. 2 at 24.

²⁶ Trial Test.

²⁷ Ex. 2 at 30.

²⁸ Trial Test.

giving full effort during strength testing of his lower extremities.²⁹ Kolar testified that he was never able to identify an anatomical cause for Petitioner's complaints of pain.³⁰

¶ 20 At some point, Kolar informed Petitioner that he needed to see Dr. Ross. Petitioner attended an appointment with Dr. Ross on September 27, 2005. Petitioner testified that he spent approximately 10 to 13 minutes with Dr. Ross. Petitioner recalled that Dr. Ross came into the examination room and greeted him; then Dr. Ross sat down and read Petitioner's medical report. Dr. Ross asked Petitioner to stand up straight, bend forward as far as he could, bend backwards, stand on his toes, and twist. Petitioner recalled that additional tests were performed sitting.³¹

¶ 21 Dr. Ross is a physician and chairman of the Occupational Health and Wellness Department at the Billings Clinic. He is board certified in occupational medicine.³² Dr. Ross asserted that Petitioner incorrectly estimated that the appointment took only 10 to 15 minutes because Dr. Ross would not have been able to take a history and perform the tests that quickly. Dr. Ross testified that he spent at least 1 hour and 15 minutes with Petitioner on September 27, 2005.³³ Also, Dr. Ross reviewed Petitioner's medical records from the Billings Clinic, as well as other records regarding Petitioner's previous back injury, prior to the appointment.³⁴ Dr. Ross' report indicates that he spent a total of 2 ½ hours reviewing medical records, counseling Petitioner, and "coordinating care."³⁵

¶ 22 Dr. Ross wrote an extensive Occupational Medicine Report detailing his findings from his review of Petitioner's medical records and physical examination.³⁶ He notes that the consultation was performed at Kolar's request because of Petitioner's persistent subjective complaints of low-back pain.³⁷ In addition to summarizing the treatment and testing Petitioner had undergone to date, Dr. Ross described Petitioner's reported activities, noting:

²⁹ Ex. 2 at 30.

³⁰ Trial Test.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ Ex. 2 at 9.

³⁵ Ex. 2 at 20.

³⁶ Ex. 2 at 9-23.

³⁷ Ex. 2 at 9.

On a typical day, the patient arises at 0600 hours. He does his home-based exercise program and does typical household chores such as laundry, cleaning, and meal preparation. He does yard work and he mows his lawn. He is able to drive; he drove himself to today's appointment. . . . He walks 3-4 days per week, 1-1 [sic] miles per time. Of particular interest, Mr. Kolar observed the patient golfing recently, and reported that the patient was having no difficulty with his golfing activities. I did not question the patient directly in this regard.³⁸

At trial, Dr. Ross explained that he did not question Petitioner about golfing because he forgot.³⁹ When questioned about the golfing at trial, Kolar testified that he witnessed Petitioner on a local golf course carrying a golf club. Kolar and Petitioner greeted each other, and Kolar witnessed Petitioner swinging the club, but not swinging as if to hit a ball. Kolar did not see Petitioner carrying a golf bag or actually playing golf.⁴⁰ While Dr. Ross and Respondent have attempted to characterize Petitioner's "golfing" as possible evidence of malingering, I note that Kolar did not witness whether Petitioner was able to golf with his back condition, and secondly, it appears that Petitioner had been released to light-duty employment at the time Kolar witnessed him on the golf course. Therefore, I place no weight on the alleged "golfing incident" in regards to any impact on Petitioner's credibility.

¶ 23 Dr. Ross further noted in his report that Petitioner was "vague and evasive regarding the history and details of [his] previous work-related injury" and that Petitioner was "extremely vague, evasive, and unhelpful" when questioned about the 1998 injury, subsequent treatment, and return to work.⁴¹ At trial, Dr. Ross testified that he had been unaware of Petitioner's incarceration and that if he had known about it, he would have been more sensitive to Petitioner's reluctance to discuss that time period.

¶ 24 During his examination of Petitioner, Dr. Ross performed the same axial loading and trunk rotation tests as Kolar had and Dr. Ross also got a positive result. Dr. Ross also determined that Petitioner was not giving his full effort on strength tests.⁴² Dr. Ross noted that Petitioner demonstrated an "obvious lack" of effort and break-way weakness during his assessment of Petitioner's quadriceps' strength, and that this was inconsistent with Petitioner's demonstrated ability to perform a deep knee bend or squat.⁴³ Dr. Ross also

³⁸ Ex. 2 at 13.

³⁹ Trial Test.

⁴⁰ *Id.*

⁴¹ Ex. 2 at 14.

⁴² Trial Test.

⁴³ Ex. 2 at 18.

noted no atrophy of Petitioner's lower extremity muscles and he found circulation to the lower extremities to be normal and symmetrical. Dr. Ross also found that Petitioner reported an increase in pain intensity with skin rolling, which Dr. Ross found to be a non-organic finding. Dr. Ross stated, "Throughout today's evaluation, the patient exhibits exaggerated/embellished pain responses, positive Waddell's findings, and examination inconsistencies."⁴⁴

¶ 25 Dr. Ross continued to observe and make note of Petitioner's behavior at the close of the examination because his subjective pain complaints were inconsistent with Dr. Ross' objective medical findings.⁴⁵ Dr. Ross noted that Petitioner was able to stand from a seated position without difficulty, step up onto a footstool, recline easily, and sit up from a supine position without assistance. Dr. Ross also noted that Petitioner put his pants on one leg at a time while standing, and that he could bend forward fully at the waist to pick up his clothing. Dr. Ross observed Petitioner put his shoes on while seated, but without difficulty.⁴⁶ Dr. Ross testified that someone with a significant disk problem would be unable to stand on one leg and bend forward at the waist in the manner that Petitioner did.⁴⁷

¶ 26 At the time he completed his examination, Dr. Ross did not believe Petitioner was a surgical candidate.⁴⁸ In his report, Dr. Ross opined that Petitioner had subjective complaints of low-back pain with no objective correlation on physical examination, with exaggerated/embellished pain responses, positive Waddell's, and examination inconsistencies. Dr. Ross concluded that Petitioner was at MMI from his June 9, 2005, industrial injury, and released him to work with no restrictions and no permanent impairment. Dr. Ross further recommended that if Petitioner continued to report pain without objective findings, and if any invasive procedures were considered, he should first be seen by a neuropsychologist.⁴⁹

¶ 27 Dr. Ross released Petitioner to work without restriction on September 27, 2005, because he found no objective findings to correlate with Petitioner's subjective pain complaints. Dr. Ross admitted that the MRI showed a bulging disk at L4-5 and a herniation at L3-4, but since he determined that Petitioner's subjective complaints of pain upon examination did not correlate with where Dr. Ross would have expected Petitioner to

⁴⁴ Ex. 2 at 19.

⁴⁵ Trial Test.

⁴⁶ Ex. 2 at 19.

⁴⁷ Trial Test.

⁴⁸ *Id.*

⁴⁹ Ex. 2 at 20.

experience pain if those disks were symptomatic, he did not consider those disks to be the cause of Petitioner's symptoms.⁵⁰

¶ 28 Dr. Ross did not consider ordering a diskogram to diagnose Petitioner's condition. He testified that he considers a diskogram to be "useless." Dr. Ross stated that an MRI is a better diagnostic test and that a diskogram has subjective components because it asks patients to describe their pain.⁵¹

¶ 29 On the same day as his appointment with Dr. Ross, a representative for Respondent informed Petitioner that he would no longer receive workers' compensation benefits due to Dr. Ross' report. Petitioner told the representative that he would like to get a second opinion, and the representative told him that he was free to do so, but that Respondent would not pay for it.⁵²

¶ 30 Dr. Ross issued an addendum to his report of September 27, 2005, after reviewing a physical examination which was performed by a PA-C on September 25, 2003. Dr. Ross stated that the history on the examination did not report any prior history of low-back pain, and that according to the examination report, Petitioner stated he had not had previous low-back x-rays or other imaging studies performed. Dr. Ross stated, "Clearly, this represents an untruthful and inaccurate response as the medical records reviewed for today's occupational medicine consultation document several prior imaging studies for [low] back pain complaints." Dr. Ross further noted that the PA-C's report indicated that Petitioner was able to lift and carry 110 pounds without difficulty and that he was also able to lift 129 pounds from the six-inch level.⁵³

¶ 31 I am unpersuaded by Dr. Ross' opinion that no objective medical findings supported Petitioner's complaint. The MRI revealed a bulging disk at L4-5 and a herniation at L3-4 which Dr. Ross disregarded for reasons which are unclear. While Dr. Ross had evidence which warranted a skeptical approach to Petitioner's subjective pain complaints, objective findings were present and at the least warranted further investigation rather than a full release to work and no follow-up care.

¶ 32 Petitioner did not return to work after Dr. Ross' September 27, 2005, release. Petitioner subsequently sought treatment through Indian Health Service and was seen by

⁵⁰ Trial Test.

⁵¹ *Id.*

⁵² *Id.*

⁵³ Ex. 2 at 22.

James N. Kelley, M.D.⁵⁴ On November 9, 2005, Dr. Kelley wrote a letter referring Petitioner to neurosurgeon Dr. Dale Schaefer. In the letter, Dr. Kelley stated that when he saw Petitioner on October 6, 2005, Petitioner had "prominent muscle spasm in the entire thoracolumbar area on the right, weak right Hamstring and weak right toe extensor and a weak root foot eversion." Dr. Kelley opined that although Petitioner wanted to return to work, he was not able to do so at that time.⁵⁵

¶ 33 Petitioner was unable to see Dr. Schaefer, but he eventually treated with Dr. Yves Meyer.⁵⁶ Dr. Meyer is a neurosurgeon practicing in Billings.⁵⁷ He first saw Petitioner on January 19, 2006, on a referral from Dr. Jeffrey S. Johnson.⁵⁸ In his examination notes of January 9, 2006, Dr. Johnson had noted that a neurosurgical consultation seemed appropriate in this case, although he also noted that while Petitioner appeared to have chronic pain and appropriate concerns about medication, the examination was consistent with some malingering.⁵⁹

¶ 34 On January 19, 2006, Dr. Meyer took a history from Petitioner and learned of his industrial accident of June 9, 2005.⁶⁰ Petitioner also informed Dr. Meyer that he had a previous back injury, and that an MRI had been taken following the first injury. Dr. Meyer had a report from the previous MRI which indicated that Petitioner had a herniation at L4-5. From questioning Petitioner, he understood that Petitioner had experienced less pain after the previous incident than after the June 9, 2005, industrial accident.⁶¹ Dr. Meyer also understood that while Petitioner had been able to return to work after the first incident, he was unable to do so after the second.⁶²

¶ 35 On January 19, 2006, Dr. Meyer wrote a letter to Dr. Johnson and reported that after taking a history and conducting a physical examination, he had concluded that Petitioner suffered some S1 radiculopathy in addition to chronic back pain from degenerative disks at L4-5 and L5-S1 with subscapular herniation. Dr. Meyer intended to send Petitioner for

⁵⁴ Trial Test.

⁵⁵ Ex. 2 at 140.

⁵⁶ Trial Test.

⁵⁷ Meyer Dep. 5:23-25.

⁵⁸ Meyer Dep. 7:20-25.

⁵⁹ Ex. 2 at 87.

⁶⁰ Meyer Dep. 8:11-22.

⁶¹ Meyer Dep. 9:1-10.

⁶² Meyer Dep. 9:18-23.

steroid injections, noting that if the injections failed, further testing and possibly surgery could be warranted.⁶³

¶ 36 Petitioner received a steroid injection on March 30, 2006.⁶⁴ Petitioner experienced pain relief for about a week and a half afterwards.⁶⁵ Dr. Meyer subsequently ordered a lumbar myelogram and CT scan, which was performed April 24, 2006. The tests revealed moderate disk protrusions at L3-4, greater on the right, and at L4-5, greater on the left.⁶⁶

¶ 37 During this time period, Petitioner had not returned to work. He had started attending school at the College of Technology at Montana State University-Billings. Petitioner attended full time and planned to get an associate's degree in architectural drafting and designing. Outside of his classes, he was fairly inactive.⁶⁷

¶ 38 After his first examination of Petitioner, Dr. Meyer believed his injury involved the L5-S1 nerve root. However, he later determined that his initial impression was incorrect.⁶⁸ On May 23, 2006, Dr. Meyer saw Petitioner for a follow-up examination and recommended a diskogram.⁶⁹ The diskogram was performed on May 26, 2006, and revealed an "exquisitely concordant pain pattern at L4-L5 and slightly less . . . but definitively concordant [pain pattern] at L5-S1," with less evidence for concordancy at L3-4.⁷⁰ The diskogram showed a very positive response at L4-5 and internal disruption of the disk, with a lesser response at L5-S1.⁷¹ Although at first Dr. Meyer had difficulty matching Petitioner's pain complaints with objective medical findings, after further examination and correlation of a myelogram and CT scan with the results of the diskogram, Dr. Meyer determined that Petitioner's disk

⁶³ Ex. 2 at 90-92.

⁶⁴ Ex. 2 at 95.

⁶⁵ Trial Test.

⁶⁶ Ex. 2 at 108-9.

⁶⁷ Trial Test.

⁶⁸ Meyer Dep. 12:3-5.

⁶⁹ Ex. 2 at 114.

⁷⁰ Ex. 2 at 115-16.

⁷¹ Meyer Dep. 14:7-9.

at L4-5 was causing his pain.⁷² After Dr. Meyer reviewed the results of the diskogram, he recommended that Petitioner consider surgery, contingent on his quitting smoking.⁷³

¶ 39 Petitioner quit smoking and a discectomy at L4-5 was performed on October 11, 2006.⁷⁴ Following the surgery, Petitioner no longer felt pinching and soreness in his left leg, but he continued to have spasms in his right leg. Petitioner testified that since the surgery, his condition has improved, but he still has some stiffness and feelings of pressure in his back. Although Dr. Meyer has not discussed permanent restrictions with Petitioner, Petitioner understands that he will not be able to return to being a laborer.⁷⁵

¶ 40 Petitioner has not sought employment since his back surgery. He intends to return to school to obtain his associate's degree if he can find the funds to do so.⁷⁶

¶ 41 On May 31, 2006, Dr. Ross responded by letter to Respondent's request for him to examine Petitioner's medical records subsequent to September 27, 2005, to determine whether Dr. Ross' opinion of Petitioner's condition had changed. Dr. Ross summarized the newer records and then stated that his opinion had not changed and that Petitioner was still at MMI for his June 9, 2005, industrial injury. Dr. Ross opined that it was more probable than not that Petitioner's back pain related to the 1998 injury and not the June 9, 2005, injury.⁷⁷ I am unpersuaded by Dr. Ross' opinion that Petitioner's back pain relates to his 1998 injury and not his 2005 injury for two reasons. First, at a September 25, 2003, examination, Petitioner demonstrated an ability to lift and carry 110 pounds and lift 129 pounds from pallet level. Second, Dr. Ross' own conclusions have been that Petitioner's pain complaints are subjective and are not correlated by any objective medical findings. Therefore, since Dr. Ross doubts the existence of Petitioner's pain, it seems incongruous to me that this "pain" relates to Petitioner's first injury.

¶ 42 At the time of his deposition, Dr. Meyer had not reviewed Dr. Ross' September 27, 2005, report.⁷⁸ Dr. Meyer testified that he did not know whether he would agree with Dr. Ross' opinion that Petitioner had no permanent limitations or work restrictions as of September 27, 2005, because Dr. Meyer did not see Petitioner until January 19, 2006, and

⁷² Meyer Dep. 22:16 - 23:23.

⁷³ Ex. 2 at 118.

⁷⁴ Ex. 2 at 122-30.

⁷⁵ Trial Test.

⁷⁶ *Id.*

⁷⁷ Ex. 2 at 2-6.

⁷⁸ Meyer Dep. 21:2-8.

his condition could have deteriorated in the interim.⁷⁹ Dr. Meyer stated that when he first saw Petitioner, he was symptomatic and complaining of back and leg pain, and that he was not able to work without restrictions as of that date. Dr. Meyer opined that Petitioner would not have been able to perform a job which entailed heavy lifting.⁸⁰

¶ 43 As of April 2007, Dr. Meyer opined that if Petitioner had not yet reached maximum medical improvement (MMI) post-surgery, he was probably close to it.⁸¹ Dr. Meyer does not perform impairment ratings, and would refer Petitioner out to a specialist to have an impairment rating performed after Petitioner reaches MMI.⁸²

¶ 44 Dr. Meyer opined to a reasonable degree of medical certainty that Petitioner's industrial accident on June 9, 2005, did not cause his disk herniation at L4-5, but that the accident caused the herniation to become symptomatic.⁸³ Dr. Meyer explained,

My review of the medical records on this patient show that he did have a herniation at L4-5 back in 1998. Although, the report of that MRI does not stipulate whether the herniation was on the right or left. It just stated moderate midline posterior herniation at L4-5 without compression of the exiting nerve roots.

So in my mind, it is very likely that the patient has had that herniation for quite some time, perhaps desiccation of the disk and deterioration of the disk internally, and that lifting event specifically tipped him over and triggered the series of the symptoms that he had suffered from ever since. So it's always difficult to give a very precise answer. But in my mind, it is the most likely scenario.⁸⁴

Dr. Meyer agreed that Petitioner had a preexisting condition that was permanently aggravated as a result of the industrial accident on June 9, 2005.⁸⁵

⁷⁹ Meyer Dep. 21:15-25.

⁸⁰ Meyer Dep. 22:1-11.

⁸¹ Meyer Dep. 18:11-25.

⁸² Meyer Dep. 19:1-5.

⁸³ Meyer Dep. 19:19 - 20:5.

⁸⁴ Meyer Dep. 20:6-21.

⁸⁵ Meyer Dep. 20:22 - 21:1.

CONCLUSIONS OF LAW

¶ 45 This case is governed by the 2003 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Petitioner's injury.⁸⁶

¶ 46 Petitioner bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.⁸⁷

¶ 47 This Court has held that 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. However, if the subsequent aggravation is temporary or immaterial, and the disabling condition results from a natural progression set in motion by the first injury, the insurer for the original injury is liable.⁸⁸ In the present case, Petitioner argues that the evidence demonstrates that he reached MMI from his first industrial injury, and that the evidence further demonstrates that his June 9, 2005, industrial accident caused a permanent aggravation of this preexisting injury.

¶ 48 Many of the facts in evidence weigh in Petitioner's favor. The evidence has demonstrated that after Petitioner settled his claim in December 2000, he sought no medical treatment for his back for several years and returned to manual labor jobs. In September 2003, he demonstrated an ability to lift and carry 110 pounds, and to lift 129 pounds from pallet level. He then went on to perform heavy-duty manual labor until his industrial accident on June 9, 2005. Furthermore, his June 11, 2005, MRI revealed a disk herniation which was not present in March 2000.

¶ 49 While Dr. Meyer has opined that Petitioner's back condition was permanently aggravated by his industrial injury on June 9, 2005, Dr. Ross has opined that Petitioner's back condition was not permanently aggravated by this industrial injury. This Court has previously found the opinion of a doctor more persuasive because of his "longer and later treatment" of a claimant.⁸⁹ In the case at hand, Dr. Ross saw Petitioner for a single appointment in 2005 while Dr. Meyer treated him on multiple and more recent occasions. In addition to the other reasons set forth above, I find Dr. Meyer's opinion to have greater

⁸⁶ *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

⁸⁷ *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).

⁸⁸ *Montana Contractor Comp. Fund 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)).

⁸⁹ *Siegler v. Liberty Ins. Corp.*, 2001 MTWCC 23, ¶ 53.

weight than Dr. Ross' opinion based on his more recent and more frequent treatment of Petitioner. I conclude that Petitioner's June 9, 2005, industrial accident permanently aggravated his preexisting injury. Respondent is therefore liable for workers' compensation benefits.

JUDGMENT

¶ 50 Petitioner's back condition was permanently aggravated as a result of his industrial accident of June 9, 2005.

¶ 51 Respondent is liable for payment of workers' compensation benefits to Petitioner.

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

¶ 53 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 23rd day of October, 2007.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: R. Russell Plath
Larry W. Jones
Submitted: April 19, 2007