IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2008 MTWCC 15

WCC No. 2006-1563

MITCHELL IRON

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: While performing his job duties, Petitioner was struck in the head by a metal lid which blew off a pressurized cannister. Respondent accepted liability for Petitioner's facial injuries, but denied liability for an alleged injury to Petitioner's cervical spine. Petitioner sought treatment on his own and eventually had a cervical fusion performed. He now seeks medical and TTD benefits for his cervical condition and surgery, as well as costs, attorney fees, and a penalty.

Held: While Petitioner's underlying cervical condition progressed from the time of his industrial accident in 2004 until his cervical fusion in 2007, Petitioner's lack of credibility, lack of objective medical findings, and his treating physician's inability to attribute the cause of his cervical progression to the industrial accident, lead the Court to conclude that Petitioner has not met his burden of proof. Respondent is therefore not liable.

Topics:

> **Medical Evidence: Non-organic Findings.** Where the Court found Petitioner to lack credibility and where examining doctors found multiple non-organic findings, such as a positive "tuning fork test," nonphysiologic sensory loss, and range of motion which was extremely limited during testing but appeared less limited during observation, the Court determined that Petitioner's subjective complaints of pain likewise had no evidentiary weight.

Credibility. While in other situations the Court would be hesitant to impute stretching the truth on a job application to a claimant's honesty regarding an industrial accident, in the case at hand, the overwhelming evidence demonstrated that Petitioner misrepresented his industrial injury, his work qualifications, and the circumstances surrounding his termination from his time-of-injury job. These facts, along with medical evidence which strongly suggests Petitioner exaggerated or concocted his symptoms, convinced the Court that Petitioner is a wholly incredible witness.

Credibility. Petitioner's "evolving story," as demonstrated by the record in this case, regarding: whether he lost consciousness after his industrial accident; what occurred during and after his IME; and the circumstances surrounding his termination from his time-of-injury employment, lead the Court to find Petitioner without credibility.

Proof: Burden of Proof: Preponderance. While it is possible that Petitioner's industrial accident (being struck in the head by a metal lid) may have caused his cervical condition or made it symptomatic, in light of Petitioner's openly contradictory accounts of pivotal events in his claim, his unreliable testimony, and his examining doctors' pseudo-neurologic findings and lack of objective medical findings, the Court concludes Petitioner has not met his burden of proving that it is *probable* that the accident caused the injury he claims.

Proof: Sufficiency. Where the only evidence that would tend to support Petitioner's claim of a cervical injury is a correlation in chronology and where the doctor upon whose opinion he relies testifies that "it can be either/or" in response to questioning as to whether Petitioner's condition was caused by a trauma or not, Petitioner has not met his burden of proof.

¶ 1 The trial in this matter was held on July 26, 2007, in Billings, Montana. Petitioner Mitchell Iron was present and represented by James G. Edmiston. Respondent was represented by Michael P. Heringer.

¶ 2 Exhibits: Exhibits 1 through 28 were admitted without objection.

¶ 3 Witnesses and Depositions: The depositions of Petitioner, Yves Meyer, M.D., Catherine C. Capps, M.D., Lennard S. Wilson, M.D., Scott Ross, M.D., and Scott Riggins, M.D., were submitted to the Court and can be considered part of the record. Petitioner and Curt Laingen were sworn and testified at trial.

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

¶ 4a Whether Respondent is liable for Petitioner's neck injury, neck fusion surgery of May 2, 2007, and corresponding indemnity benefits;

¶ 4b Whether Petitioner is entitled to temporary total disability benefits retroactive to the date of termination of benefits, and particularly after his neck fusion surgery of May 2, 2007;

¶ 4c Whether Petitioner is entitled to an award of attorney fees and costs pursuant to §§ 39-71-611 and -612, MCA; and

¶ 4d Whether Petitioner is entitled to a 20% penalty pursuant to § 39-71-2907, MCA.[1]

FINDINGS OF FACT

¶ 5 On June 1, 2004, Petitioner suffered an industrial injury in the course and scope of his employment with Dixon Brothers, an employer enrolled under Compensation Plan III of the Montana Workers' Compensation Act and insured by Respondent. Respondent accepted liability for Petitioner's facial injury and has paid certain medical benefits and temporary total disability (TTD) benefits. However, a dispute exists as to whether Respondent is liable for Petitioner's cervical spine condition.[2]

¶ 6 Petitioner obtained a GED and a diesel mechanic certification.[3] He has a diesel technology certificate from Montana State University-Billings.[4] Petitioner worked for Dixon Brothers as a diesel technician.[5] His job duties included repairing trucks and trailers.[6] On June 1, 2004, he reported for work at 9:00 a.m. As he started his shift, he attempted to turn

[1] Pretrial Order at 2.

[2] Statement of Uncontested Facts, Pretrial Order at 1.

[3] Petitioner Dep. 7:12-20.

[4] Petitioner Dep. 7:22 - 8:7.

[5] Petitioner Dep. 8:20 - 9:2.

[6] Petitioner Dep. 12:14-18.

on an air pump, but it malfunctioned. As he was inspecting it, a pressurized lid blew off.[7] The lid hit Petitioner on the left side of the head above his left eye.[8]

¶ 7 Petitioner's first report of injury was prepared by Terminal Manager Bill Watts (Watts) on June 1, 2004. It states that Petitioner's injury was a cut or laceration to his face caused by being struck in the face with a metal canister lid.[9]

¶ 8 Petitioner's account of the industrial accident has varied. At trial, he testified that after the lid hit him, he believes he lost consciousness. Petitioner testified that he may have been unconscious for a couple of hours. He stated that when he became aware of his surroundings, there was a great deal of noise and things were flying through the air. He thought he was yelling for help, but no one heard him. He attempted to escape the shop because he feared it was going to explode, but he was disoriented and had difficulty finding the exit.[10] However, as set forth below, Petitioner's version of events now is not consistent with his contemporaneous descriptions of the industrial accident.

¶ 9 After the accident, Petitioner entered the waiting area and a truck driver gave him a clean rag to hold on his head wound. A secretary transported Petitioner to the hospital.[11] The emergency room report describes Petitioner's accident, his head injury, and blurred vision and further states, "He had no loss of consciousness, no neck pain. . . . He denies other injury."[12] Among other findings, the examination revealed that Petitioner's neck was "supple and nontender."[13] Petitioner received stitches near his eye. Petitioner testified that he does not recall if the emergency room physician asked him about neck pain, and he does not remember telling the doctor that he lost consciousness.[14] Petitioner was discharged the same day.[15]

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[7] Trial Test.

[8] Petitioner Dep. 13:12-23.

[9] Ex. 1 to Petitioner's Dep.

[10] Trial Test.

[11] Trial Test.

[12] Ex. 28K at 1.

[13] *Id.*

[14] Trial Test.

[15] Ex. 28K at 2.

¶ 10 Over the next few days, Petitioner's left eye swelled shut. He went to the Billings Clinic on June 4, 2004, where he was treated by PA-C David Johnson (Johnson). At his deposition, Petitioner testified that Johnson did not ask him if he lost consciousness, and he did not volunteer that information.[16] At trial, Petitioner testified that he may have told Johnson that he lost consciousness after he was hit, but he is not sure. Petitioner does not recall denying that he had neck pain, and he believes Johnson examined his neck.[17]

¶ 11 During his deposition, Petitioner stated that he had neck pain almost immediately following the accident and that he informed his doctors about the neck pain.[18] However, the medical status report signed by Johnson on June 8, 2004, diagnoses Petitioner with a left facial and eye injury and does not mention any neck injury or loss of consciousness.[19] At trial, Petitioner did not characterize his neck pain as immediate, but rather testified that his neck problems developed in the first month following his industrial accident and included shooting pains, bad headaches, and shock-like feelings traveling into his arms and back.[20]

¶ 12 Petitioner returned to see Johnson on June 7, 2004. Johnson reported that Petitioner did not lose consciousness but was "somewhat dazed" after the lid hit him. Johnson further reported, "No problems with neck or back pain . . . ."[21] Johnson referred Petitioner to Dr. Mohammad Karbassi for an ophthalmologic examination and recommended that Petitioner not return to work until further examination.[22]

¶ 13 Dr. Karbassi treated Petitioner on June 7, 2004, on Johnson's referral. Dr. Karbassi noted that Petitioner reported no loss of consciousness after he was hit with the lid.[23]

¶ 14 On June 18, 2004, Petitioner sought a second opinion from Kevin G. McCrea, M.D., because he had ongoing pain which Johnson's treatment had not resolved. Petitioner testified that he did not tell Dr. McCrea that he was having neck problems because he was

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[16] Petitioner Dep. 26:7-15.

[17] Trial Test.

[18] Petitioner Dep. 27:1-6.

[19] Ex. 2 to Petitioner's Dep.

[20] Trial Test.

[21] Ex. 28A at 2.

[22] Ex. 28A at 3.

[23] Ex. 28G at 1.

"confused." He is not sure whether he told Dr. McCrea that he lost consciousness after the industrial accident.[24] Dr. McCrea reported that Petitioner was unsure whether he lost consciousness or not after the industrial accident. Dr. McCrea's findings included dizziness and head pain, and he diagnosed Petitioner with post-concussion syndrome. Dr. McCrea scheduled Petitioner for a CT scan.[25] The CT scan report indicates no acute findings.[26] Dr. McCrea concluded that Petitioner had post-concussion syndrome and sent him for treatment at the Headway Program at Saint Vincent Hospital.[27]

¶ 15 Petitioner sought Respondent's permission to change his treating physician from Johnson to Dr. McCrea, but Respondent denied the request. Petitioner chose to continue treating with Dr. McCrea on his own.[28] Petitioner also continued to treat with Johnson, and on July 2, 2004, Johnson increased Petitioner's restrictions, noting that Petitioner complained of dizziness and light-headedness.[29]

¶ 16 On July 5, 2004, Johnson noted Petitioner's visit to Dr. McCrea and the CT scan's negative results.[30] Johnson further reported that Petitioner complained of headaches and dizziness that were too severe to permit him to drive safely. Johnson requested authorization from Respondent for Petitioner to be seen by a neurologist and by Dr. Scott Ross for further evaluation.[31]

¶ 17 On July 7, 2004, Petitioner again treated with Dr. McCrea. Dr. McCrea noted, "He has a new complaint of persistent neck pain."[32] After an examination, Dr. McCrea determined that Petitioner had cervical spine neck pain due to arthritis and musculoskeletal pain and placed Petitioner in a cervical collar. Dr. McCrea further requested a cervical MRI.[33] Cervical spine films were taken at Saint Vincent Healthcare on July 7, 2004. The

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[24] Trial Test.

[25] Ex. 28B at 4.

[26] Ex. 28I at 1.

[27] Trial Test.

[28] Trial Test.

[29] Ex. 7 to Petitioner's Dep.

[30] Ex. 28A at 5.

[31] Ex. 28A at 6.

[32] Ex. 28B at 7.

[33] *Id.*

radiology report notes small anterior inferior osteophytes at C5-6.[34] On July 30, 2004, Dr. McCrea noted that Petitioner's MRI had not been approved by his workers' compensation insurer and that Petitioner had not obtained an MRI.[35]

¶ 18 Scott Riggins, M.D., is board-certified in psychiatry and neurology.[36] He practices at the Billings Clinic as a neurologist.[37] He examined Petitioner on August 20, 2004, after a referral by Johnson because Petitioner complained of neck pain, headaches, and numbness.[38] Petitioner reported to Dr. Riggins that he had lost consciousness after being struck in the head with a pneumatic plate on June 1, 2004, and that he developed neck pain and a headache, with some numbness on his right side.[39] Petitioner also reported that, although he did not have head and neck pain prior to the accident, he subsequently developed a constant headache and neck pain with rotation of his head. Petitioner also reported some numbness and tingling in his right arm and leg.[40]

¶ 19 Dr. Riggins noted that Petitioner's mental status seemed good, and his cranial nerves appeared normal, although he did exhibit some slowing of his movements on the right.[41] Dr. Riggins' testing further found a decreased pinprick sensation in Petitioner's right leg, but his vibration and proprioception were intact and his coordination, gait, and reflexes did not show any abnormalities.[42] Dr. Riggins found paraspinal muscle spasm in Petitioner's neck and tenderness over the occipital nerves.[43]

¶ 20 However, Dr. Riggins also conducted a "tuning-fork test" and got a positive result.[44] Dr. Riggins explained:

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[34] Ex. 28H.

[35] Ex. 28B at 8.

[36] Riggins Dep. 5:20-22.

[37] Riggins Dep. 6:6-8.

[38] Riggins Dep. 6:15 - 7:4.

[39] Riggins Dep. 7:9-24.

[40] Ex. 28D at 1.

[41] Riggins Dep. 9:16 - 10:23.

[42] Riggins Dep. 12:1-16.

[43] Riggins Dep. 12:22-24.

[44] Riggins Dep. 11:3-5.

> [T]his is all one bone across the forehead . . . and so even if you lose sensation to [one] side of the forehead . . . when I stick a tuning fork on the forehead, it should feel the same on both sides, because it's all one bone.
>
> And so when I stuck the tuning fork on his . . . left forehead, he said it was . . . markedly decreased compared to the right.
>
> So this is one of our what we call pseudo neurologic findings that we do to see if patients are telling us - - you know, being honest with us.[45]

¶ 21 Dr. Riggins also conducted a test for decreased fingertip sensation which involved Petitioner crossing his hands over each other and then reporting whether he felt sensations and in what hand. Dr. Riggins explained that the test is intentionally confusing in order to determine if a patient can correctly report on which side they claim to have decreased sensation.[46] Dr. Riggins found Petitioner to sometimes answer correctly and sometimes answer incorrectly, and further found Petitioner was taking a long time to answer.[47] Dr. Riggins explained that the pseudo neurological results he obtained during his examination of Petitioner made Petitioner's sensory examination less reliable, and he ultimately did not find any objective neurologic findings although Petitioner had muscle spasm and tenderness over the occipital nerves.[48] Dr. Riggins concluded that referral to a neurosurgeon was not warranted because he found no specific neurological disease that warranted intervention.[49]

¶ 22 Dr. Riggins found no objective medical evidence to support a finding that Petitioner's cervical condition was symptomatic at that time. All of Dr. Riggins' objective medical findings were related to Petitioner's facial injury, for which Respondent had accepted liability. Dr. Riggins concluded that Petitioner experienced daily tension-type headaches based both upon the history Petitioner related to him and Dr. Riggins' examination.[50] Dr. Riggins opined that on a more-probable-than-not basis, these headaches could be related to Petitioner's industrial accident.[51] Dr. Riggins recommended muscle relaxers, a trial of

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[45] Riggins Dep. 11:6-16.

[46] Riggins Dep. 14:2-13.

[47] Riggins Dep. 14:21-25.

[48] Riggins Dep. 15:1-15.

[49] Riggins Dep. 30:17 - 31:3.

[50] Riggins Dep. 16:1-12.

[51] Riggins Dep. 18:22 - 19:8.

physical therapy, chronic pain medication, possibly occipital blocks, and ceasing the use of analgesic medications as treatments to alleviate Petitioner's headaches.[52]

¶ 23 Dr. Scott K. Ross is board-certified in occupational medicine, and is also certified as a medical review officer and an independent medical examiner.[53] Dr. Ross examined Petitioner at Johnson's request.[54] Johnson was under Dr. Ross's supervision in the occupational health department of the Billings Clinic at that time, and requested the consultation because of Petitioner's ongoing complaints of headache, neck, and upper back pain.[55] Dr. Ross diagnosed Petitioner with a contusion of his left orbit with laceration and found Petitioner to be at maximum medical improvement (MMI). Dr. Ross also indicated that Petitioner had no permanent impairment and released him to return to work without restrictions. Dr. Ross signed the release and in the space for the employee's signature noted, "patient refuses to sign."[56]

¶ 24 Petitioner testified that when he arrived at the appointment, Dr. Ross asked him about his complaints and examined him. Dr. Ross then handed him a release form and while Petitioner was reading it, Dr. Ross informed him that there was nothing wrong with him and that he intended to inform Respondent and Petitioner's supervisor of that. Dr. Ross asked Petitioner to sign the form; Petitioner refused. Dr. Ross then took the form from Petitioner. Petitioner asked for a copy and Dr. Ross provided him one.[57] Although at trial Petitioner admitted he refused to sign the form, at his deposition he testified that he did not recall whether Dr. Ross asked him to sign the form and he denied refusing to sign it.[58]

¶ 25 Dr. Ross testified that he found no objective findings during the examination.[59] Dr. Ross opined that Petitioner's degenerative disk disease, which was documented on x-rays taken July 7, 2004, was not related to his industrial accident because it would not have

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[52] Riggins Dep. 30:8-16.

[53] Ross Dep. 6:13-18.

[54] Ross Dep. 7:6-9 and 10:1-3.

[55] Ross Dep. 11:2-15.

[56] Ex. 9 to Petitioner's Dep.

[57] Trial Test.

[58] Petitioner Dep. 50:12-15.

[59] Ross Dep. 19:24-25.

appeared on an x-ray taken so soon after the accident.[60] Dr. Ross further opined that Petitioner's industrial accident did not permanently aggravate his underlying degenerative disk disease. In that regard, Dr. Ross testified as follows:

> There were actually just a variety of inconsistencies during this gentleman's physical exams reported not only by myself, but other providers. There were just no findings consistent with an aggravation of a cervical condition. In fact, there were no findings consistent with a serious cervical condition.[61]

¶ 26 After the appointment with Dr. Ross, Petitioner proceeded to Dixon Brothers, where he met with Watts. Petitioner had not worked since his accident because Dixon Brothers did not have a position available for him until he was fully released to return to work. Watts informed Petitioner that he might be laid off. Watts asked Petitioner why he did not sign the release form at Dr. Ross's office and indicated that Petitioner could lose his job for refusing to sign the form. Petitioner testified that he told Watts that he would not sign the release form because he was still in pain. Petitioner told Watts that he did not think he was capable of returning to his time-of-injury position because he had ongoing neck problems and headaches and had difficulty lifting things.[62]

¶ 27 Watts scheduled a meeting with Petitioner for September 2, 2004, to further discuss Petitioner's return to work. Petitioner did not appear for the meeting. At his deposition, Petitioner testified that Watts did not tell him to come back on September 2 for a meeting.[63] He further testified that he could not recall Watts telling him on August 31 that he was being laid off due to lack of work, that he could not recall telling Watts he thought being laid off was unfair, and that he could not recall telling Watts that he was unavailable to meet with him the next day.[64] At trial, Petitioner testified that he knew about the meeting but decided not to attend because he did not want to beg for his job and he was still in pain from the accident.[65]

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[60] Ross Dep. 34:13-23.

[61] Ross Dep. 35:7-12.

[62] Trial Test.

[63] Petitioner Dep. 53:13-14.

[64] Petitioner Dep. 59:3-19.

[65] Trial Test.

¶ 28 On September 3, 2004, Watts wrote a letter to Petitioner informing him that since he did not attend the meeting and did not contact Watts regarding his failure to appear, his employment with Dixon Brothers was terminated. In the letter, Watts detailed some of the items which he alleged to have discussed with Petitioner on August 31, 2004, stating that Petitioner had informed him that he believed it was unfair to lay him off for lack of work, and that Petitioner could not return for a follow-up discussion on September 1 because of another commitment.[66]

¶ 29 On September 1, 2004, Respondent informed Petitioner via letter that based on Dr. Ross's release to return to work at full duty on August 31, 2004, Petitioner's wage loss compensation benefits would be terminated in 14 days although medical benefits for his facial injury would remain open.[67]

¶ 30 Dr. Ross's Occupational Medicine Report from Petitioner's August 31, 2004, appointment was completed on September 3, 2004.[68] Dr. Ross summarized Petitioner's medical records from June 1, 2004, forward, noting that Petitioner changed his story regarding whether he lost consciousness and for how long. Dr. Ross noted that when Petitioner presented to the emergency room on June 1, 2004, and in his follow-up treatments with PA-C Johnson and ophthalmologist Mohammad Karbassi, M.D., on June 4, 2004, Petitioner reported that he did not lose consciousness after the lid hit him in the head.[69] When Petitioner was evaluated by Dr. McCrea on June 18, 2004, he reported that Petitioner was not sure if he lost consciousness.[70] Dr. Riggins' note from Petitioner's August 20, 2004, appointment states that Petitioner informed him that he believed he lost consciousness and drifted in and out of consciousness after the lid hit him.[71]

¶ 31 Petitioner again treated with Dr. McCrea on September 2, 2004, after Dr. Ross had released him to return to work. Dr. McCrea noted the work-release and that Petitioner had been "let go" from Dixon Brothers, and further noted that Petitioner continued to complain of lower neck pain. Dr. McCrea's examination on that date revealed suppleness in Petitioner's neck and no loss of motor function in his arms. However, Dr. McCrea noted

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[66] Ex. 11 to Petitioner's Dep.

[67] Ex. 10 to Petitioner's Dep.

[68] Ex. 25 to Ross Dep.

[69] Ex. 25 to Ross Dep. at 2.

[70] Ex. 25 to Ross Dep. at 3.

[71] Ex. 25 to Ross Dep. at 6.

some tenderness "with the last 15 degrees of lateral neck side to side bending and with forward bending."[72]

¶ 32 Dr. McCrea further stated:

> The patient has an expectation of getting an MRI for symptoms, yet his symptoms have continued to improve. I have explained to him how the Work Comp program works and that he is to follow up with the specified providers and was supposed to do so in the past. . . . I explained to the patient that there are certain criteria that must be met before the MRI is ordered and essentially [he] neurologically is intact at this point. . . . I do not object to the fact that the patient has been cleared for work.[73]

¶ 33 Curt Laingen (Laingen) was the Company Operations Manager for Dixon Brothers at the time of Petitioner's accident. Laingen, who no longer works for Dixon Brothers, testified at trial. I find Laingen to be a credible witness. Laingen testified that although Petitioner had been released to light duty, Dixon Brothers had no light-duty employment available. On August 31, 2004, Dr. Ross released Petitioner to return to work without restrictions and Petitioner reported to Watts's office at Dixon Brothers. However, Petitioner did not return to work and was terminated.[74]

¶ 34 After Petitioner received a letter from Watts terminating his employment and a letter from Respondent terminating his benefits, Petitioner filed for unemployment.[75] On his unemployment application, Petitioner indicated that his doctor had released him to return to work without restrictions. Petitioner further indicated that he was capable of doing his time-of-injury job.[76] This contradicts Petitioner's assertion that he was unable to do his job and that he refused to sign Dr. Ross's release on that account. However at trial, Petitioner testified that his responses on his unemployment application were truthful because he was willing to try to do any normal job.[77]

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[72] Ex. 28B at 10.

[73] *Id*.

[74] Trial Test.

[75] Trial Test.

[76] Ex. 12 to Petitioner's Dep.

[77] Trial Test.

¶ 35 Petitioner also filed complaints against Dixon Brothers with the Montana Human Rights Bureau and the Equal Employment Opportunity Commission, alleging that Dixon Brothers had discriminated against him because of race and disability. In correspondence with the Montana Human Rights Bureau, Petitioner represented that he had contacted Dixon Brothers after he had been released to return to work and that he informed Dixon Brothers that he was available to work.[78] Again, this contradicts Petitioner's testimony in this Court.

¶ 36 Petitioner has not worked since June 1, 2004.[79] At his deposition, Petitioner asserted that he had not applied for any jobs since he left Dixon Brothers.[80] At trial, he testified that in October 2004, he sought employment as a truck driver with American Driver. The job required a commercial driver's license (CDL) with a long vehicle combination permit. Petitioner did not have a CDL, but he had an expired learner's permit. As part of his job duties for Dixon Brothers, he test drove semi-trucks after he performed work on them. He never did over-the-road hauling, but on occasion he drove tractors to broken down trucks in order to switch out tractors.[81] To obtain a CDL with a long vehicle combination permit, a driver would need verification from his employer that he had the requisite experience to be grandfathered in. Petitioner wrote to Watts and asked him to fill out a form that would allow him to receive this permit. Watts refused because Petitioner had not done over-the-road hauling for Dixon Brothers.[82] Laingen also testified that he refused to sign the form since Petitioner had not driven long-combination vehicles for Dixon Brothers.[83]

¶ 37 Petitioner's medical treatment continued after his termination from his employment. On December 29, 2004, an MRI of Petitioner's cervical spine was performed. The reported findings included mild, diffuse disk bulges at C5-6 and C6-7, with mild narrowing of the central spinal canal and of the right neural foramen at C5-6.[84] A second opinion of this MRI reported similar findings to the first, including mild bulging at the same two disks without

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[78] Trial Test.

[79] Trial Test.

[80] Petitioner Dep. 10:23-25.

[81] Trial Test.

[82] Trial Test.

[83] Trial Test.

[84] Ex. 21 to Riggins Dep.

significant spinal stenosis or foraminal encroachment. Slight flattening of the ventral aspect of the thecal sac at C5-6 was noted.[85]

¶ 38 Fred G. McMurry, M.D., examined Petitioner on May 6, 2005, after a referral from Grey Gardner, D.C. Dr. McMurry wrote to Dr. Gardner that he found evidence of a two-level cervical disk abnormality in Petitioner's neck, but he was unsure if these disks were the source of Petitioner's symptoms.[86] Dr. McMurry noted that Petitioner reported tightness in his neck and upper extremity symptoms from the time of his industrial accident forward, and further noted that Petitioner was knocked unconscious during the accident.[87] Dr. McMurry observed:

> An MRI scan was performed on 12/28/04 and this, I think, is an abnormal study. He has a large spinal canal at C5-6 and C6-7 he has evidence of disk bulging deformity, particularly at C5-6 where the protrusion extends into the canal near the anterior cord and the foraminal areas are clearly not normal, particularly on the right at C5-6, but also essentially bilaterally at C6-7.[88]

¶ 39 Dr. McMurry's impression was of an unresolved cervical pain disorder, mechanically aggravated with abnormalities at C5-6 and C6-7. However, Dr. McMurry noted, "[Whether] we can correlate these findings with his symptoms needs to be challenged," and he planned to request an EMG study.[89]

¶ 40 An EMG and nerve conduction study were performed on June 24, 2005. The findings included normal bilateral upper extremities and no neurophysiological evidence of a proximal or distal entrapment neuropathy.[90] Dr. McMurry's follow-up note of August 15, 2005, indicated that the EMG studies were normal. However, he observed:

> He has two bad disks, terrible cervical pain and headache. I think that it would be reasonable to offer intradiscal local at both levels and see what kind of relief could be afforded. If pain is reasonably relieved from his active

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[85] Ex. 22 to Riggins Dep.

[86] Ex. 28F at 1.

[87] Ex. 28F at 2.

[88] Ex. 28F at 3.

[89] *Id.*

[90] Ex. 23 to Riggins Dep.

> mechanically aggravated symptoms, then consideration of anterior cervical diskectomy and fusion at C5-6 and C6-7 may be appropriate.[91]

¶ 41 Petitioner had a neurosurgical evaluation with John I. Moseley, M.D., on June 6, 2006, after Dr. McMurry retired. Dr. Moseley's history reported that Petitioner was "unconscious for an undetermined period of time" after he was struck in the head on June 1, 2004. The history further stated that Petitioner "had immediate neck pain going down his left arm to the 4th and 5th fingers" and similar pain in his right arm.[92] Dr. Moseley also reviewed the films and report from Petitioner's 2004 MRI and concluded that he had a significant abnormality with central canal compression and disk disease at C5-6 and C6-7. Dr. Moseley recommended a new MRI and suggested that Petitioner might require decompression surgery. Dr. Moseley further opined that Petitioner's cervical condition was the result of his industrial accident.[93]

¶ 42 Lennard S. Wilson, M.D., is a neurologist who participated in a panel examination of Petitioner on December 7, 2006.[94] Dr. Wilson reviewed various medical records of Petitioner, including radiographic studies.[95] Dr. Wilson also performed a neurological examination.[96] Dr. Wilson highlighted portions of his examination report which he found noteworthy:

> No. 1, the patient's mental status was extremely poor. He could give very little information, appeared depressed when we talked to him, could speak normally, was oriented, but showed extremely bad memory. At times he showed better memory.
>
> As far as his cranial nerves, there was nonphysiologic sensory loss involving his hemicranium. . . . [H]e claimed that he could not feel certain things on one side, which is physiologically impossible. . . . Lateral neck, also unusual, and . . . he could walk reasonably well. . . . [S]ignificant orthopedic parts of the exam with regard to movement of his neck . . . showed limitation of motion.

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[91] Ex. 28F at 4.

[92] Ex. 28E at 1.

[93] Ex. 28E at 3.

[94] Wilson Dep. 5:9 - 9:22.

[95] Wilson Dep. 6:21 - 7:6.

[96] Wilson Dep. 7:7-9.

> There was some tenderness diffusely in the shoulder girdle area which seemed to be somewhat variable, as was the movement. For instance, if we pushed down very lightly with two fingers, you know, he would complain about discomfort.[97]

¶ 43 Dr. Wilson further found no obvious atrophy of the arms, carpal tunnel problems, or obvious shoulder problems, and he had no findings of a specifically pinched nerve in the neck or spinal cord compression.[98] Dr. Wilson believes Petitioner has mild degenerative disease of the cervical spine, but believes his sensory loss is nonphysiologic and further did not find signs of a traumatic brain injury.[99] Dr. Wilson opined that Petitioner's symptoms "strongly suggest symptom magnification and nonphysiologic abnormalities."[100]

¶ 44 Along with Dr. Wilson, Catherine C. Capps, M.D., a board-certified orthopedic surgeon, completed a panel examination of Petitioner on December 7, 2006.[101] Dr. Capps explained that in a typical panel examination and in the present case, she and Dr. Wilson reviewed Petitioner's records ahead of time and then went over Petitioner's history and asked him questions at the same time.[102] They also completed a physical examination of Petitioner.[103] After the examination, Drs. Capps and Wilson discussed the case with each other, and one of them – in this case Dr. Wilson – dictates the report.[104] Dr. Capps explained:

> His neck range of motion was extremely limited while we were measuring it . . . but when you weren't measuring it, his neck range of motion was substantially better. . . . [W]hen we were measuring it, he – he would kind of jerk his head up and down, which . . . it's not a natural phenomena. We usually see it when people are limiting their range of motion and, you know, trying to act like they have a lot of spasm.

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[97] Wilson Dep. 7:12 - 8:8.

[98] Wilson Dep. 8:10-14.

[99] Wilson Dep. 8:23 - 9:4.

[100] Wilson Dep. 12:8-9.

[101] Capps Dep. 5:22-25 and 6:10-24.

[102] Capps Dep. 8:6 - 9:25.

[103] Capps Dep. 17:5-7.

[104] Capps Dep. 8:6 - 9:25.

> Anyway, similarly on shoulder examination, he really self-limited his shoulder range of motion, but when we did finger/nose testing . . . where he couldn't lift it above a certain amount before he was lifting it substantially higher, so there was some question of giving full effort or, you know, trying to mislead people or whatever reason, he had a marked difference between spontaneous movements and movements when getting measured. . . .
>
> He had abnormal, meaning nonphysiologic loss of sensation that can't be explained by normal anatomy. You know, he – basically the whole left side of his head, it's not in distribution of certain nerves or anything . . . .[105]

¶ 45 Dr. Capps opined that Petitioner was at MMI at the time of his panel examination.[106] She did not place any work restrictions on him.[107] She did not find Petitioner to be a surgical candidate.[108] In the post-examination report prepared by Drs. Capps and Wilson, they opined that Petitioner's industrial injury did not aggravate any preexisting medical conditions as there was no history of symptomatic intracranial or cervical problems prior to the accident. However, they further noted that he had underlying degenerative disk disease of his cervical spine.[109]

¶ 46 In their report, Drs. Capps and Wilson summarized Petitioner's medical history and reported their own findings from their physical examination of him. They further answered specific questions which Respondent had posed regarding Petitioner's condition and prognosis.[110] Among other findings, they diagnosed Petitioner with mild degenerative disease of the cervical spine with variable cervical movement, reduced movement of the shoulders, and suspected chronic pain syndrome. They explained that while their examination did not reveal any findings to indicate traumatic brain injury, cervical myelopathy or radiculopathy, Petitioner exhibited nonphysiologic sensory findings, unusually poor memory, and variable performance on range of motion tests.[111] They

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[105] Capps Dep. 17:12 - 19:12.

[106] Capps Dep. 26:18-23.

[107] Capps Dep. 27:19-21.

[108] Capps Dep. 28:11-12.

[109] Ex. B to Capps Dep. at 9.

[110] Ex. 26.

[111] Ex. 26 at 8.

opined, “There appears to be a chronic pain syndrome and secondary gain cannot be excluded, given the findings.”[112]

¶ 47 Drs. Capps and Wilson further opined that Petitioner had “minimal degenerative changes” of his cervical spine “which certainly would not mandate fusion under any conceivable circumstances.” They opined that his June 1, 2004, industrial accident did not cause an aggravation of a preexisting medical condition, and agreed with Dr. Ross’s assessment that Petitioner was at MMI with no permanent impairment.[113]

¶ 48 In January 2007, Petitioner began to treat with Dr. Yves Meyer,[114] a board-certified neurosurgeon.[115] Dr. Meyer treated Petitioner after Petitioner had treated with Drs. McMurry and Moseley, who were both unable to treat Petitioner further. Dr. Meyer received Petitioner’s medical records from both of these practitioners.[116]

¶ 49 Dr. Meyer’s consultation report of January 15, 2007, notes that he reviewed the 2004 MRI and noted disk protrusion at C5-6 and C6-7, but no evidence of focal impingement. However, Dr. Meyer recommended a repeat MRI to determine if the condition had progressed in the interim.[117]

¶ 50 An MRI of Petitioner’s cervical spine was performed on January 29, 2007. The report notes that at C5-6, a small broad-based disk herniation which indented the ventral thecal sac and was associated with a dorsal annular tear, was visible. Minimal cord deformation on the right and mild right-sided foraminal narrowing through the left-sided neural foramen was noted, with potential for right-sided C6 root impingement. At C6-7, the radiologist noted a broad-based disk herniation associated with an annular tear and mild disk space narrowing.[118] Dr. Meyer testified that although Petitioner’s 2004 MRI did not show significant degenerative changes, a 2007 MRI contained more pronounced findings, and a CT myelogram revealed some cord impingement at C5-6 with spondylitic changes

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[112] *Id*.

[113] *Id*.

[114] Trial Test.

[115] Meyer Dep. 6:7-10.

[116] Meyer Dep. 7:7-14.

[117] Ex. 28M at 7.

[118] Ex. 28M at 23.

and some spondylitic changes and spurring at C6-7.[119] Dr. Meyer opined that the conditions seen on the 2007 films were a progression of the same conditions evident on the 2004 films.[120]

¶ 51 On Dr. Meyer's recommendation, Petitioner received a cervical epidural steroid injection at C5-6 on February 21, 2007.[121] Films taken of Petitioner's cervical spine on March 30, 2007, revealed generalized osteopenia with mild narrowing at the C5-6 interspace, and mild uncovertebral hypertrophy at that level. A small anterior osteophyte was visible at C6-7. The radiologist's impression was of anterior spondylosis at C5-6 and C6-7, with the cervicocovertebral bodies appearing osteopenic for Petitioner's age.[122] A CT scan on that date showed minimal anterior spondylosis without significant canal or foraminal stenosis at C4-5, and disk space narrowing with anterior spondylosis and small broad-based disk herniation minimally indenting the thecal sac and slightly flattening the ventral cord at C5-6. The radiologist further noted no significant foraminal compromise.[123]

¶ 52 At a follow-up examination on April 2, 2007, Dr. Meyer noted that the epidural steroid had failed to provide any relief. Dr. Meyer further noted that a recent myleogram had revealed spondylosis at C5-6 with some cord deformity, and significant degenerative disk disease at C6-7. Dr. Meyer therefore intended to proceed with an anterior cervical diskectomy at C5-6 and C6-7.[124] On April 26, 2007, Dr. Meyer noted that the recent MRI and myelogram had revealed some spondylosis and stenosis at C5-6 and C6-7, with a spinal cord deformity at C5-6. Dr. Meyer planned to proceed with a two-level diskectomy and fusion of C5-6 and C6-7.[125] Petitioner's surgery occurred about a week later.[126]

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[119] Meyer Dep. 8:24 - 9:9.

[120] Meyers Dep. 15:22 - 16:10.

[121] Ex. 28M at 2.

[122] Ex. 28M at 20.

[123] Ex. 28M at 21-22.

[124] Ex. 28M at 4.

[125] Ex. 28M at 8.

[126] Ex. 28M at 12.

¶ 53 Dr. Meyer performed an anterior cervical diskectomy and fusion at C5-6 and C6-7 of Petitioner's spine on May 2, 2007.[127] At the time of Dr. Meyer's deposition, Petitioner was not ready to be evaluated for MMI.[128]

¶ 54 Dr. Meyer has no opinion regarding the cause of Petitioner's cervical condition. Although Dr. Meyer was aware of Petitioner's industrial accident, he did not attempt to correlate the accident to the cervical condition.[129] Dr. Meyer stated that the findings on the 2004 MRI did not necessarily point to a traumatic injury.[130] Dr. Meyer further explained:

> According to the patient, the patient was injured and developed neck pain after that injury. Therefore, one can assume that the injury has something to do with the symptoms. Yet, the MR finding could be seen on a person who has never had an injury to his neck or a head injury.[131]

Dr. Meyer stated that it is possible that Petitioner's industrial accident caused his cervical condition, and assuming Petitioner had no other injuries or reasons for further aggravation of his disk protrusion, he thinks it is likely, but not certain, that the industrial accident triggered the progression of Petitioner's cervical condition.[132] However, he further stated that he has no opinion as to whether Petitioner's injury provoked a progression of his underlying degenerative disk disease or whether this was simply a natural progression of it. He stated, "it can be either/or."[133]

¶ 55 On June 26, 2007, Drs. Capps and Wilson wrote to Respondent's counsel after they had reviewed Dr. Meyer's deposition and additional radiographic studies of Petitioner. After summarizing portions of Dr. Meyer's testimony which they found significant, they stated:

> The cervical MRI scan report of 2007 indicates there was a mild disk protrusion. When we viewed the scan you have sent, it is noted there is minimal disk bulging at C5-6 and C6-7, with minimal disk height loss. There is no cord compression at any level. There is fluid around every level of the

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[127] Meyer Dep. 10:5-11.

[128] Meyer Dep. 11:17-22.

[129] Meyer Dep. 11:23 - 12:10.

[130] Meyer Dep. 13:21 - 14:3.

[131] Meyer Dep. 14:10-15.

[132] Meyer Dep. 14:16 - 15:4.

[133] Meyer Dep. 23:12-17.

cord and every nerve root. There is no level of compression, and we do not see any specific annular tears. The 1/29/07 cervical MRI scan at Big Sky does show minimal change with only minimal increased narrowing of the disk height at C5-6 and C6-7. He again is found to have significant fluid around all levels of the cord, without focal cord compression or nerve root compression. Small annular tears are seen at C5-6 and C6-7 posteriorly.

The CT myelogram from St. Vincent's Hospital shows interval degenerative disk disease, C5-6 and C6-7, with large anterior spur formation. There is again a lot of fluid around all levels on the axial views, without specific compression.

Based on the above, we would have to state that the patient did not have clear spinal cord compression or definitive nerve root compression seen on the films we were sent. Apparently, based on the deposition, the surgery was performed primarily because the patient did not get better after three years of conservative management. The doctor also noted progression of the changes from the 2004 through 2007 MRI scan. The patient does have progression of his mild degenerative disk disease and disk bulges, but this would be expected independent of any type of trauma. We find it interesting that the original MRI scan done post injury did not show the annular tears compared to the scan in 2007. Thus, the tears in 2007 were not from the 2004 date of injury.

Based on the above, [we] have no change in our opinion expressed in our original report of 12/7/06 or our deposition testimony except to say that Dr. Meyer appeared to operate on the patient primarily because of subjective symptomatology combined with degenerative changes, rather than myelopathy or radiculopathy, which are the classical indications. Operating for subjective symptoms in the face of minor degenerative changes is controversial because many of those patients do not improve when the pain generator is not certain.[134]

¶ 56 Petitioner testified that prior to surgery, he had headaches, neck pains, electrical sensations traveling from his neck into his arms, and difficulty sleeping. These symptoms subsided after surgery and his neck feels more stable. However, since surgery he has

[134] Ex. 27.

difficulty with lifting and cannot do too many activities in a day, and he still has trouble sleeping. He has also experienced some pain in the incision area.[135]

¶ 57 I find Petitioner to be a wholly incredible witness. While in other situations I would be hesitant to impute a claimant's stretching the truth on a job application to the claimant's honesty regarding his industrial accident, in the case at hand, the evidence is overwhelming that Petitioner has misrepresented his industrial injury on multiple occasions, and his misrepresentation of his work qualifications and the circumstances surrounding his termination from Dixon Brothers further goes to Petitioner's lack of credibility. The medical evidence in this case strongly suggests that Petitioner exaggerated or concocted his symptoms regarding his neck injury.

¶ 58 Most persuasive for my credibility finding, however, were two elements of Petitioner's testimony: whether he lost consciousness, and what occurred during and after his appointment with Dr. Ross. The medical record, as set forth in these findings, clearly demonstrates an "evolving story" regarding whether Petitioner lost consciousness after he was hit with the lid. Petitioner initially told his medical providers that he did not lose consciousness or that he might have briefly lost consciousness, but by the time of trial, Petitioner asserted that he was unconscious *for hours*. Petitioner's contention that he regained consciousness *hours after the accident* to find things flying through the air, causing him to believe that the shop might explode, is completely incredible. Likewise, Petitioner openly contradicted his account of what occurred with Dr. Ross and the release form. At first, Petitioner insisted that Dr. Ross pulled the form away from him before he finished reading it, and that Dr. Ross never asked him to sign it. Later, Petitioner admitted that he refused to sign the form because he did not agree with Dr. Ross's conclusions. Petitioner then went to Dixon Brothers to meet with Watts. At first, Petitioner asserted that he did not attend the follow-up meeting because Watts did not tell him about it. At trial, Petitioner testified that he knew about the meeting but chose not to attend because he did not want to beg for his job. After Petitioner's termination from Dixon Brothers, he reported to both unemployment and in a human rights complaint that he was willing and able to return to his time-of-injury position, even though he had informed his medical providers and his employer that he was not. Petitioner's contradictory testimony, combined with other evidence in the record of Petitioner's inaccurate account of events, cause me to find him without credibility in this matter.

[135] Trial Test.

CONCLUSIONS OF LAW

¶ 59 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.[136]

¶ 60 Petitioner bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.[137] Petitioner's openly contradictory accounts of pivotal events in his claim, combined with the pseudo neurologic findings and lack of objective medical findings by his examining doctors, make it impossible for me to give any credibility to his subjective complaints of pain and his assertions that the industrial accident either caused his cervical condition or otherwise made it symptomatic. While it is possible that it may have done so, in light of Petitioner's unreliable testimony, I cannot conclude that it is ***probable*** that it did. Therefore, Petitioner has not met his burden of proof.

¶ 61 At issue is whether Respondent is liable for Petitioner's neck injury, neck fusion surgery on May 2, 2007, and corresponding indemnity benefits. From the medical records, it appears that Petitioner had some degenerative cervical changes which predated his industrial injury. As Dr. Capps testified in her deposition, the degenerative changes visible on the 2004 films were changes which must have predated the industrial accident because these changes would not have been visible on films taken so soon after the accident if they were caused by the accident. It also appears from the medical records, and particularly the radiographic studies, that Petitioner had a progression of this cervical condition from 2004 until 2007.

¶ 62 However, for Petitioner to prevail in his claim, he must prove that it is more probable than not that the progression in his cervical condition was caused by his industrial injury. In light of Petitioner's lack of credibility and the non-physiologic findings of the doctors who examined him, I cannot give Petitioner's subjective complaints of pain any weight in determining whether his industrial accident caused the cervical condition to progress. Moreover, there are no objective medical findings sufficient to corroborate Petitioner's claim and overcome the contrary evidence and his lack of credibility.

¶ 63 The only evidence that would tend to support Petitioner's claim is the correlation in chronology. Dr. Meyer testified to that effect but refused to provide an opinion as to whether Petitioner's industrial accident caused the progression of his cervical condition. Dr. Meyer explained that the condition of Petitioner's neck may or may not have been caused by a trauma of any sort and, although he stated at one point that in light of the chronology, it was "likely" that the industrial accident contributed to the degeneration, he ultimately opined, "it can be either/or." Moreover, to the extent that Dr. Meyer's opinion

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

[137] *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).

relies upon the chronology of events, this necessarily implicates Petitioner's credibility which I have found to be lacking.

¶ 64 I also note that the medical records of Drs. Moseley and McMurry indicate that they related Petitioner's cervical condition to his industrial accident. Unfortunately, neither Dr. Moseley nor Dr. McMurry were available to testify in this case, and I cannot tell from their records whether their opinions were based on objective medical evidence or on Petitioner's subjective complaints, which other medical providers and this Court have found to be suspect.

¶ 65 Since Petitioner has not prevailed in his claim, he is not entitled to his costs, attorney fees, or a penalty, pursuant to §§ 39-71-611, -612, -2907, MCA.

JUDGMENT

¶ 66 Respondent is not liable for Petitioner's neck injury, neck fusion surgery on May 2, 2007, and corresponding indemnity benefits.

¶ 67 Petitioner is not entitled to temporary total disability benefits retroactive to the date of termination of benefits, and particularly after his neck fusion surgery on May 2, 2007.

¶ 68 Petitioner is not entitled to his costs.

¶ 69 Petitioner is not entitled to attorney fees.

¶ 70 Petitioner is not entitled to a penalty pursuant to § 39-71-2907, MCA.

¶ 71 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 10th day of April, 2008.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: James G. Edmiston
Michael P. Heringer
Submitted: July 26, 2007