IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2016 MTWCC 9

WCC No. 2015-3689

CHANCE KIRK

Petitioner

vs.

MONTANA CONTRACTORS COMPENSATION FUND

Respondent/Insurer.

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

Summary: Respondent moves for summary judgment, arguing that Petitioner does not have sufficient evidence to prove he suffered an industrial injury on May 15, 2015. Petitioner opposes the motion on the grounds that there are material issues of fact.

Held: Respondent's motion for summary judgment is denied because Petitioner presents a genuine issue of material fact as to whether he incurred a work-related lumbar sprain/strain on May 15, 2015.

¶ 1 Respondent Montana Contractors Compensation Fund (MCCF) moves for summary judgment on the grounds that Petitioner Chance Kirk does not have sufficient evidence to prove he suffered an industrial injury. Kirk opposes the motion on the grounds that there are issues of material fact, and that MCCF is not applying the correct legal standard for proving causation.

¶ 2 This Court held a hearing on June 15, 2016. Oliver H. Goe represented Respondent MCCF. Norman L. Newhall represented Petitioner Chance Kirk.

FACTS

¶ 3 Kirk worked as a concrete finisher for Knife River Concrete in the spring of 2015.

¶ 4 Except for "normal stiffness following a long day of hard work," Kirk had not experienced low back pain before Friday, May 15, 2015. On that day, Kirk experienced

a stiff back when driving his truck home after work and sharp lower-back pain when he got out of his truck. He did not go to a doctor that weekend, as he thought he would get better.

¶ 5 On May 18, 2015, Kirk's back began to hurt while raking concrete. He worked until he could not tolerate the pain, and reported the injury to a co-worker and foreman.

¶ 6 Kirk did not return to work after May 18, 2015.

¶ 7 A supervisor took Kirk to see Michael Layman, MD, at Belgrade Urgent Care on May 19, 2015. Dr. Layman set forth the history as follows:

> The patient presents with a chief complaint of constant ds /hurt back since Fri[day], May 15, 2015. Context: The patient reports it was the result of an injury. At the end of the work day on Friday his back stiffened up on the ride home and he had right sided lower back pain. No pain during the course of the work day. Symptoms persisted through the weekend[.][1]

Dr. Layman noted that Kirk was "walking slowly" and had an "altered gait and posture." In the physical examination portion of his record, Dr. Layman noted "spasm/tenderness" of paraspinal muscles and tenderness of the lumbar spine and muscles. Dr. Layman diagnosed Kirk with a "[s]prain/[s]train [of the] [l]umbar [r]egion." Dr. Layman referred Kirk to physical therapy and imposed work restrictions including no lifting over 20 pounds; no bending, kneeling, or squatting; and no standing or walking a greater duration than four hours per day. Dr. Layman recommended Kirk take ibuprofen for pain and inflammation.

¶ 8 Kirk began a course of physical therapy on May 20, 2015. Kirk reported that he had pain radiating down his right leg and into his right foot. Megan E. Hoover, DPT, noted "significant inflammation through back musculature, nervous system and spine."

¶ 9 Kirk returned for his second physical therapy appointment on May 22, 2015. Following the therapy, Hoover wrote a letter to Dr. Layman stating that Kirk's symptoms were worse. She suggested to discontinue physical therapy "until pain controlled [and patient is] willing to participate."

¶ 10 Kirk returned to Dr. Layman for a follow-up on May 24, 2015. Dr. Layman set forth the history that Kirk injured himself while "raking mud." Kirk reported that his pain was worse, and that he had pain radiating into his left leg. Dr. Layman again noted "spasm/tenderness" in Kirk's paraspinal muscles, and tenderness in Kirk's lumbar spine. Dr. Layman again diagnosed a lumbar sprain/strain. Due to the worsening condition, and per Kirk's request, Dr. Layman prescribed oxycodone and Flexeril. Dr. Layman ordered an MRI "to determine if there is an underlying disc problem."

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[1] Emphasis omitted.

¶ 11 On May 28, 2015, Kirk returned to physical therapy. However, due to "[p]oor tolerance for any treatment intervention, position or exercise," Hoover put a hold on therapy until Kirk could "manage pain" and would be willing to participate.

¶ 12 MCCF authorized the MRI under a reservation of rights on June 2, 2015.

¶ 13 On June 2, 2015, Kirk returned to Dr. Layman, who maintained his original diagnosis and released Kirk from work until a scheduled re-evaluation on June 8, 2015.

¶ 14 Kirk underwent an MRI on June 3, 2015. The MRI revealed a L4-L5 shallow annular disc bulge and small annular tear, and a L5-S1 shallow annular disc bulge and bilateral foraminal narrowing with encroachment on both exiting nerve roots.

¶ 15 MCCF began paying Kirk benefits on June 12, 2015, under § 39-71-608, MCA.

¶ 16 On August 10, 2015, MCCF sent Kirk to an IME with Scott K. Ross, MD. Dr. Ross was unable to complete his physical examination, as Dr. Ross and Kirk had a disagreement about the examination. However, Dr. Ross opined that Kirk's work on May 15, 2015, did not cause the changes seen on the MRI:

> Of note, the June 3, 2015 lumbar spine MRI report documents degenerative disc disease/spondylosis of the lumbar spine (i.e. facet hypertrophy, ligamentum flavum hypertrophy, synovial cysts related to facet degeneration, disc desiccation, annular disc bulges/annular tear). These degenerative, spondylotic changes are pre-existing and not, on a more probable than not basis, attributable to the May 15, 2015 work incident.

¶ 17 Following the MRI and incomplete IME with Dr. Ross, MCCF deemed Kirk's claim to be "fully denied," and terminated all benefits.

¶ 18 On referral from his attorneys, Kirk saw Greg Vanichkachorn, MD, for an IME on February 29, 2016. Dr. Vanichkachorn physically examined Kirk and reviewed his medical records. Dr. Vanichkachorn diagnosed, "Nonspecific low back pain – ongoing, not work injury related." In response to a question as to what objective findings support his diagnosis, Dr. Vanichkachorn stated:

> There are no objective findings appreciated on examination that shed insight into the examinee's diagnosis. Objective findings from imaging include multilevel degenerative changes resulting in some foraminal stenosis. However, these changes can be age-related. Moreover, I would not expect such changes to develop following an acute injury. Overall, the relationship of these MRI findings to the examinee's pain is nebulous at best.

Dr. Vanichkachorn also stated, "I am unfortunately unable to relate Mr. Kirk's current symptoms to any work injury occurring on or near May 15, 2015." Dr. Vanichkachorn stated, "At this time, I have no objective indications to state that the examinee would not be able to work full duty."

¶ 19 Kirk continues to suffer "significant low back pain," which radiates into his legs. He avers that the "pain can be so great that [he is] unable to perform even regular daily activities."

LAW AND ANALYSIS

¶ 20 This case is governed by the 2013 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Kirk's alleged industrial accident.[2]

¶ 21 The Montana Supreme Court has explained:

> [A]t the summary judgment stage, the court does not make findings of fact, weigh the evidence, choose one disputed fact over another, or assess the credibility of witnesses. Rather, the court examines the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits to determine whether there is a genuine issue as to any material fact relating to the legal issues raised and, if there is not, whether the moving party is entitled to judgment as a matter of law on the undisputed facts.[3]

When examining the evidence, the court is to draw all reasonable inferences in favor of the party opposing summary judgment.[4]

¶ 22 The dispute in this case is whether Kirk suffered an industrial injury on May 15, 2015. Relying on Dr. Layman's records and his MRI, Kirk contends that he suffered a lumbar strain/strain and a disc bulge and annular tear at L4-L5, and a disc bulge at L5-S1. MCCF argues that there is insufficient evidence for this Court to find that Kirk suffered any injury on May 15, 2015.

¶ 23 Section 39-71-119(1)(a), MCA, defines "injury" and "injured," in relevant part, as: "internal or external physical harm to the body that is established by objective medical findings . . . ." Subsection (2) of this statute states:

> (2) An injury is caused by an accident. An accident is:
> (a) an unexpected traumatic incident or unusual strain;

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[2] *Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶ 32, 365 Mont. 405, 282 P.3d 687 (citation omitted); § 1-2-201, MCA.

[3] *Andersen v. Schenk,* 2009 MT 399, ¶ 2, 353 Mont. 424, 220 P.3d 675 (citing Rule 56(c), M.R.Civ.P and *Corporate Air v. Edwards Jet Ctr.,* 2008 MT 283, ¶ 28, 345 Mont. 336, 190 P.3d 1111).

[4] *Morrow v. Bank of America, N.A.,* 2014 MT 117, ¶ 24, 375 Mont. 38, 324 P.3d 1167 (citation omitted).

(b) identifiable by time and place of occurrence;
(c) identifiable by member or part of the body affected; and
(d) caused by a specific event on a single day or during a single work shift.

¶ 24 Section 39-71-407(3), MCA, provides:

> (3) (a) An insurer is liable for an injury, as defined in 39-71-119, only if the injury is established by objective medical findings and if the claimant establishes that it is more probable than not that:
> (i) a claimed injury has occurred; or
> (ii) a claimed injury has occurred and aggravated a preexisting condition.
> (b) Proof that it was medically possible that a claimed injury occurred or that the claimed injury aggravated a preexisting condition is not sufficient to establish liability.

¶ 25 Objective medical findings must be established for an employee to receive benefits. Section 39-71-407(10), MCA, states:

> An employee is not eligible for benefits payable under this chapter unless the entitlement to benefits is established by objective medical findings that contain sufficient factual and historical information concerning the relationship of the worker's condition to the original injury.

Further, § 39-71-116(22), MCA, defines "objective medical findings" as "medical evidence, including range of motion, atrophy, muscle strength, muscle spasm, or other diagnostic evidence, substantiated by clinical findings."

¶ 26 The Montana Supreme Court's decision in *Ford v. Sentry Casualty Co.*[5] is the seminal case interpreting these statutes. Similar to the case at bar, Ford was asymptomatic before he suffered a cervical injury at work.[6] Thereafter, he suffered from headaches, numbness and tingling in his fingers, and neck pain.[7] An MRI revealed degenerative changes in his cervical spine, including disc desiccation, disc space narrowing, posterior bony ridging and disc bulge, and a disc herniation.[8] Ford argued that the insurer was liable for the surgery his treating physician had recommended.[9] The court stated: "What is in dispute is the particular harm Ford suffered—a cervical strain, or damage to his cervical discs for which surgery is required. In other words, is it more

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[5] 2012 MT 156, 365 Mont. 405, 282 P.3d 687.

[6] *Ford*, ¶ 5.

[7] *Ford*, ¶ 6.

[8] *Ford*, ¶ 8.

[9] *Ford*, ¶ 1.

probable than not that Ford's spinal condition for which he seeks surgery was caused by the accident?"[10]

¶ 27 Ford argued that this Court had erred in relying solely on medical opinions to conclude that he did not prove that his accident caused his cervical disc condition and need for surgery.[11] Relying upon *Boyd v. Zurich Am. Ins. Co*.,[12] Ford argued that "claimants are not required to prove causation through medical expertise or opinion."[13] The Supreme Court, however, overruled *Boyd.*[14] The court explained that the Legislature abrogated the cases on which *Boyd* relied — *Plainbull v. Transamerica Ins. Co*.[15] and *Prillaman v. Community Medical Center*[16] — when it amended § 39-71-407, MCA, and added new provisions to the Workers' Compensation Act in 1995.[17] The court explained that under the current law, a claimant is required to prove causation with medical expertise or opinion:

> ¶ 48 As discussed, we interpret §§ 39-71-407(2) and -119, MCA, together. *See* ¶ 38, *supra; Prillaman,* 264 Mont. at 137, 870 P.2d at 84. Again, to constitute an "injury," the internal or external physical harm to the claimant's body must have been "caused by" a work-related accident. Section 39-71-119(1)(a), (2), MCA. In other words, a causal connection between the claimant's physical condition and a work-related accident is an integral part of establishing a compensable "injury" under § 39-71-407(2)(a), MCA. That "injury," and "the entitlement to benefits" generally, must be established by objective medical findings. Section 39-71-407(2)(a), (7), MCA. It follows, then, that not only the physical harm but also the causal connection must be established by objective medical findings. Indeed, that was the plain intent of the Legislature's 1995 amendments to these statutes subsequent to our decisions in *Plainbull* and *Prillaman.*
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> ¶ 49 For these reasons, we overrule the statement in *Boyd,* ¶ 22, that "claimants are not required to prove causation through medical expertise or opinion." Claimants are required to establish injury and causation by objective medical findings. Accordingly, contrary to Ford's argument, the

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[10] *Ford*, ¶ 51.

[11] *Ford*, ¶ 44.

[12] 2010 MT 52, ¶ 22, 355 Mont. 336, 227 P.3d 1026.

[13] *Ford*, ¶ 44 (internal quotation marks omitted).

[14] *Ford*, ¶ 49.

[15] 264 Mont. 120, 870 P.2d 76 (1994).

[16] 264 Mont. 134, 870 P.2d 82 (1994).

[17] *Ford*, ¶ 47.

> WCC did not err by relying solely on medical opinions to determine causation or aggravation in this case.[18]

Based upon the medical opinions, the Supreme Court concluded it was "more probable than not that Ford suffered a cervical strain injury . . . and that the recommended surgery is necessary to address his preexisting degenerative spine condition rather than an injury or condition resulting from the accident."[19]

¶ 28 The dispute in the case at bar is similar to that in *Ford*: it is whether Kirk suffered no injury on May 15, 2015, or whether he suffered a lumbar sprain/strain and/or an injury to his lumbar discs. Under *Ford*, MCCF is correct that Kirk has not presented sufficient evidence to prove that the disc problems at L4-L5 and L5-S1 were caused by his work on May 15, 2015, because there is no medical expertise or opinion that Kirk's work caused these problems. Dr. Layman did not provide a medical opinion regarding the cause of Kirk's bulging discs or annular tear. Dr. Vanichkachorn determined the objective findings from the MRI are "nebulous at best," as the bulges and tears can be age-related and probably not caused by "an acute injury." Similarly, Dr. Ross opined that the MRI showed degenerative changes that "are pre-existing and not, on a medically more probable than not basis, attributable to the May 15, 2015 work incident." Kirk points to Dr. Ross's testimony, where he agreed that an annular disc bulge and an annular tear "can" or "could" be caused by an injury and that an injury "can" cause pre-existing degenerative spondylotic changes to become symptomatic, and argues that this testimony creates a material issue of fact as to whether his disc problems were caused by an industrial accident. However, Dr. Ross' testimony does not create a material issue of fact because Kirk must prove more than a possibility; he must prove it is more probable than not.[20]

¶ 29 At the hearing, Kirk urged this Court to rely upon *Johnson v. MHA Workers' Comp. Trust,*[21] a case in which none of the physicians opined that the claimant's injury to a nerve in her right upper extremity was caused by her work.[22] Nevertheless, this Court took the "evidence as a whole" and found that the claimant suffered an injury based upon "the objective findings that an injury occurred, the fact that this type of injury can be caused by lifting, the absence of any symptoms before the event of October 4, 2005, and the immediate onset of symptoms at the time of the incident."[23] Kirk argues that although none of the physicians in this case have opined that his lumbar disc problems are causally

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[18] *Ford*, ¶¶ 48-49.

[19] *Ford*, ¶ 59.

[20] § 39-71-407(3)(b), MCA. *See also Ford*, ¶¶ 41-42; *McClue v. Safeco Ins. Co. of Illinois*, 2015 MT 222, ¶ 29, 380 Mont. 204, 354 P.3d 604 (explaining that when expert medical testimony is required to establish the necessary element of a claim, the expert must testify to a reasonable degree of medical certainty, i.e.,"more likely than not" and that a mere possibility is insufficient.)

[21] 2007 MTWCC 17.

[22] *Johnson*, ¶¶ 37-39, 42, 45, 65, 68-69.

[23] *Johnson*, ¶ 88.

related to his work, this Court should look at the evidence as a whole — including the fact he was asymptomatic before May 15, 2015 — and find that his work on May 15, 2015, either caused his lumbar disc problems or aggravated his pre-existing condition. However, this Court decided *Johnson* five years before the Supreme Court decided *Ford*, and *Johnson* is therefore no longer good law, insofar as it holds that causation need not be proven with medical expertise or opinion.

¶ 30 "Summary judgment is proper when a non-moving party fails to make a showing sufficient to establish the existence of an essential element of its case on which it bears the burden of proof at trial."[24] Therefore, if the issue in this case was limited to whether Kirk suffered disc bulges or an annular tear in his lumbar spine as a result of an accident on May 15, 2015, then MCCF would be entitled to summary judgment because Kirk has not presented sufficient evidence that the lumbar spine problems shown on his MRI were caused by his work on May 15, 2015. However, the issue in this case is broader; it is whether Kirk suffered an "injury" in the course of his employment on May 15, 2015.[25] As in *Ford*, Kirk claims that he also suffered a lumbar sprain/strain.

¶ 31 As to this claim, MCCF contends that Kirk has failed to present sufficient evidence to prove that he suffered a sprain/strain. It argues: "While Dr. Layman diagnosed a lumbar strain, he never opines in any of his records that based on the mechanism of injury and objective medical findings that the cause of the condition treated arose from a work-related accident occurring on May 15, 2015." MCCF also argues that a medical opinion cannot be inferred.

¶ 32 However, when ruling on a summary judgment motion, this Court makes all reasonable inferences in Kirk's favor.[26] Moreover, in *Ford*, the Supreme Court explained that a doctor does not need to use the specific legal terminology for this Court to find that the doctor opined on a more-probable-than-not standard that the work-related accident caused an injury. The court explained:

> ¶ 42 . . . the Legislature incorporated a "more probable than not" standard into § 39-71-407, MCA, as the burden which a claimant must satisfy in demonstrating accident, injury, and causation. Laws of Montana, 1987, ch. 464, § 11. Of course, notwithstanding the particular language used in the statute, we cannot control how doctors phrase their opinions and testimony on these issues, and we do not purport to do so here. As a result, there may be cases in which a doctor states his or her opinion in terms of "a reasonable degree of medical certainty" or fails to state that his or her

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[24] *Blacktail Mountain Ranch, Co. v. State, Dep't of Natural Res. & Conservation*, 2009 MT 345, ¶ 7, 353 Mont. 149, 220 P.3d 388 (citation omitted).

[25] *Compare* Petition for Trial, ¶ 1, Docket Item No. 1, *with* Response to Petition, ¶ IA, Docket Item No. 5.

[26] *Shattuck v. Kalispell Reg'l Med. Ctr., Inc.*, 2011 MT 229, ¶ 8, 362 Mont. 100, 261 P.3d 1021 (citation omitted) ("The evidence must be analyzed in the most favorable light to the non-moving party, and all reasonable inferences are to be drawn in favor of the non-moving party.")

> opinion is on a "more probable than not" basis. Nevertheless, the probative force of the opinion "is not to be defeated by semantics if it is reasonably apparent that the doctor intends to signify a probability supported by some rational basis." *Miller v. Natl. Cabinet Co.,* 168 N.E.2d 811, 813 (N.Y. 1960); *see also Ins. Co. of N. Am. v. Myers,* 411 S.W.2d 710, 713 (Tex. 1966) ("Reasonable probability ... is determinable by consideration of the substance of the testimony of the expert witness and does not turn on semantics or on the use by the witness of any particular term or phrase."). Doctors are not lawyers and may on occasion phrase medical opinions in medical, rather than legal, terminology.
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> ¶ 43 What is essential is that *the WCC* applies the correct standard in determining whether there was an accident in the course of employment, whether the claimant suffered an injury or an aggravation of a preexisting condition, and whether there is a causal connection between the accident and the injury/aggravation. That standard is more probable than not. . . .[27]

¶ 33 When reasonable inferences are drawn in Kirk's favor, he has presented sufficient evidence to create a material issue of fact as to whether he suffered a sprain/strain to his lumbar spine in the course of his employment on May 15, 2015, on a more probable than not basis. Dr. Layman's records infer a cause and effect relationship between Kirk's employment and his lumbar sprain/strain. Dr. Layman's records show that he knew that Kirk worked in the concrete industry and it is reasonable to infer that Dr. Layman knows that concrete work is hard manual labor. Dr. Layman noted that Kirk's onset of low-back pain began after work on May 15, 2015, and increased while "raking mud" on May 18, 2015. Dr. Layman's records recite that Kirk had abnormal elements to his physical examinations including "spasm/tenderness of paraspinal muscles." Dr. Layman placed work restrictions upon Kirk and referred him to a physical therapist, who noted inflammation. Muscle spasms and inflammation are objective medical findings, as defined in § 39-71-116(22), MCA. A reasonable inference can be drawn from Dr. Layman's records that he was opining it was more probable than not that Kirk suffered a lumbar sprain/strain in the course of his employment. Dr. Layman did not express any doubt that a concrete worker could suffer a lumbar sprain/strain, nor identify any other potential causes. While MCCF is correct that Dr. Layman did not identify in his records a specific mechanism of injury, this gap in the evidence goes to the weight to be given to Dr. Layman's opinion, and this Court does not assign weight to evidence when deciding a summary judgment motion.[28]

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[27] *Ford,* ¶¶ 42-43 (emphasis in original).

[28] *Tidyman's Mgmt. Servs. Inc. v. Davis*, 2014 MT 205, ¶ 71, 376 Mont. 80, 330 P.3d 1139 (citations omitted) ("It is inappropriate for a court deciding a motion for summary judgment to weigh evidence, to choose one disputed fact over another, or to assess the credibility of the witnesses.").

¶ 34 In addition, Dr. Ross testified that he did not dispute Dr. Layman's findings or diagnosis. A reasonable inference can be drawn that Dr. Ross agrees with Dr. Layman that Kirk suffered a lumbar sprain/strain as a result of a work-related activity.

¶ 35 Accordingly, summary judgment is not appropriate because there are issues of material fact as to whether Kirk suffered a lumbar sprain/strain in the course of his employment.

ORDER

¶ 36 Respondent's Motion for Summary Judgment is **denied**.

DATED this 6th day of June, 2016.

/s/ DAVID M. SANDLER
JUDGE

c: Norman L. Newhall
Oliver H. Goe
Submitted: June 15, 2016