

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2007 MTWCC 58

WCC No. 2007-1811

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RICH BARNEA

Petitioner

vs.

ACE AMERICAN INSURANCE COMPANY

Respondent/Insurer.

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FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

**Summary:** On May 17, 2004, Petitioner was injured while lifting a heavy beam as part of his job duties as a boilermaker. At the time, he primarily felt pain in his lower back and right hip. However, he also asserted that he had neck and shoulder pain which worsened significantly over time and when he decreased his pain medication. Petitioner's treating physician did not make note of Petitioner's neck and shoulder pain until July 21, 2004, although he later asserted that Petitioner had complained of neck and shoulder pain at the outset. A January 23, 2006, cervical MRI revealed a herniated disk or protrusion, and surgery was recommended. Respondent denied liability for Petitioner's neck and shoulder condition.

**Held:** Although Petitioner's neck and shoulder pain was not mentioned in Petitioner's medical records until two months after the industrial accident, the Court has no reason to doubt the assertion of Petitioner's doctor that he had simply failed to record it as he was focused on Petitioner's more severe lumbar complaints. Furthermore, Petitioner's subsequent treating physician also opined that Petitioner's cervical and shoulder conditions were likely caused by the industrial accident. Respondent is therefore liable.

**Topics:**

**Credibility.** Petitioner's treating physician did not testify, but asserted by letter that Petitioner's neck pain, while absent from Petitioner's initial post-accident medical records, existed from the time of the industrial accident. While the Court cannot assess the doctor's credibility since he did not testify,

Respondent urges the Court to doubt the veracity of the doctor's assertion, although it has given the Court no reason to do so.

**Physicians: Conflicting Evidence.** Where the opinions of two physicians conflict as to whether Petitioner's neck was injured during an industrial accident, the Court finds more persuasive the opinion of the doctor who is not only entitled to more weight because he is Petitioner's treating physician, but also because the Court finds his credentials more significant.

¶ 1 The trial in this matter was held on April 24, 2007, in Helena, Montana. Petitioner Rich Barnea was present and represented by Rex Palmer. Respondent was represented by Leo S. Ward.

¶ 2 Exhibits: Exhibits 1 through 26 were admitted without objection.

¶ 3 Witnesses and Depositions: The depositions of Petitioner, Dr. Bret A. Dirks, and Dr. Thomas S. Dietrich were submitted to the Court and can be considered part of the record. Petitioner was sworn and testified at trial.

¶ 4 Issue Presented: The Court restates the issues set forth in the Pretrial Order as follows:

¶ 4a Whether Petitioner is entitled to medical benefits for the neck surgery recommended by his treating physician;

¶ 4b Whether Petitioner is entitled to temporary total disability (TTD) benefits until he reaches maximum medical improvement (MMI) following neck surgery;

¶ 4c Whether Petitioner is entitled to a penalty, attorney fees, and costs.<sup>1</sup>

#### FINDINGS OF FACT

¶ 5 Petitioner was 58 years old at the time of trial.<sup>2</sup>

¶ 6 After high school, Petitioner joined the U.S. Navy where he trained and performed work as a boilerman. After leaving the Navy, Petitioner attended community college for a

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<sup>1</sup> Pretrial Order at 2.

<sup>2</sup> Trial Test.

year and a half. He eventually moved to Alaska and trained to be a boilermaker. Later, in Oregon, he obtained a Class III license which allowed him to work as a supervisor.<sup>3</sup>

¶ 7 Petitioner has not worked since May 17, 2004.<sup>4</sup> He currently resides in Clarkston, Washington.<sup>5</sup>

¶ 8 I find Petitioner's testimony to be credible.

¶ 9 On May 17, 2004, Petitioner was working in Colstrip, Montana, as a journeyman boilermaker. He had been on that job for about a month. On that day, the job was almost over, and Petitioner and the rest of the crew were cleaning up and removing scaffolding.<sup>6</sup>

¶ 10 Petitioner was removing needle beams from the boiler at the direction of his foreman. Each beam weighed between 200 and 300 pounds. To remove the beams, Petitioner hooked one end and lowered it, then hooked the other end and pulled it up on a rope. Petitioner was standing on a board and had to raise the beam about 6 to 8 feet before there was adequate room for a second person to assist in holding the beam. Petitioner removed three beams, and on the second or third beam, he reached a point where he did not feel well and he asked Bob Rule (Rule), the foreman, to rotate another crew member into the job.<sup>7</sup>

¶ 11 Petitioner felt short of breath and a straining sensation in the middle of his back. He told his foreman that he had injured himself. Petitioner also told David Sullivan (Disco), the safety director, that he had pulled a muscle while moving the needle beams.<sup>8</sup> Petitioner did not tell Rule or Disco, that he had pain in his shoulder or neck. Most of the pain was in the midsection of his body, although at the time he did not identify it as pain, but rather a strange sensation.<sup>9</sup>

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Petitioner Dep. 6:8-11.

<sup>6</sup> Trial Test.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Petitioner Dep. 68:14 - 69:8.

¶ 12 Petitioner finished his shift by assisting the rest of the crew move the needle beams to their final location outside the boiler.<sup>10</sup> Petitioner then formally reported his on-the-job injury to one of the safety managers.<sup>11</sup>

¶ 13 The First Report of Injury (FROI) describes the injury as “Back/Hip Pain.”<sup>12</sup> An additional form identifies the injury as “Back/Hip Pain” affecting Petitioner’s “Back/Hip.”<sup>13</sup> The Employee Accident Report, dated May 19, 2004, describes Petitioner’s injury as “PAIN TO BACK AND UNSPECIFIED HIP” and explains, “EMPLOYEE STATES HE WAS PULLING NEEDLE BEAMS WHEN HE FELT PAIN IN HIS BACK AND HIP.”<sup>14</sup> Petitioner believes the FROI and the Employee Accident Report are both accurate.<sup>15</sup>

¶ 14 At the end of his shift, Petitioner began to drive home to Clarkston, Washington. He was feeling uncomfortable, so he stopped in Billings and bought an over-the-counter pain medication. The medication did not relieve the pain, and he stopped again in Bozeman and purchased another pain medication. He continued to feel worse and took another dose of medication in Missoula, and then continued on to Clarkston.<sup>16</sup>

¶ 15 The morning after Petitioner arrived home, he called Dr. J.B. Brown III in Moscow, Idaho, about 30 miles away. Petitioner arrived at Dr. Brown’s office at approximately 8 a.m. Petitioner did not feel well and he had pain in his hip, leg, and lower back. Petitioner thought he told Dr. Brown about problems with his neck and shoulder, but he admitted may not have because the pain in his hip and back were more severe. At that time, his neck and shoulder felt cramped, with pain between his shoulder blades and under his right shoulder blade.<sup>17</sup> Petitioner does not recall exactly when he informed Dr. Brown about his neck and shoulder pain, but he believes he mentioned it during the first couple of visits.<sup>18</sup>

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<sup>10</sup> Petitioner Dep. 69:15-25.

<sup>11</sup> Petitioner Dep. 70:14-15.

<sup>12</sup> Petitioner Dep., Ex. 1 at 1.

<sup>13</sup> Petitioner Dep., Ex. 1 at 3.

<sup>14</sup> Petitioner Dep., Ex. 1 at 4.

<sup>15</sup> Petitioner Dep. 72:10-25.

<sup>16</sup> Trial Test.

<sup>17</sup> *Id.*

<sup>18</sup> Petitioner Dep. 84:4-8.

¶ 16 On May 18, 2004, Dr. Brown noted that Petitioner complained of “sudden onset of severe low back pain” and “tingling sensation and numbness in his buttock and leg.” Dr. Brown apparently x-rayed Petitioner’s lumbar spine and noted some degenerative joint disease. Dr. Brown also observed “paraspinal muscle spasm.”<sup>19</sup> Dr. Brown prescribed a pain reliever which significantly reduced Petitioner’s pain. However, Petitioner became concerned about the medication because it required him to get periodic blood tests to ensure that his liver was not being damaged. He began to reduce his dosage. As his dosage decreased, his shoulder pain increased.<sup>20</sup>

¶ 17 Notes from follow-up appointments continued to reference lower back or lumbar pain.<sup>21</sup> However, on July 21, 2004, Dr. Brown noted:

Is a 55-year-old while male with shoulder and back pain. . . . He is still having significant back pain and some mild radicular symptoms into his legs.

. . . Positive paraspinal muscle spasm. Decreased ROM about the neck and low back. . . .

. . . Neck and low back pain, improving slowly. Continue current care measures. . . .<sup>22</sup>

Notes from follow-up appointments on August 10, 2004, and August 30, 2004 reference only his low back and hip pain and do not discuss Petitioner’s neck and shoulder pain.<sup>23</sup>

¶ 18 By August 2004, Petitioner had begun to treat with a chiropractor for his neck and shoulder at the suggestion of Dr. Brown. In her treatment note of August 11, 2004, Joan P. Burrow, D.C., noted:

[Petitioner] suffered a primary low back injury and initially diagnosis and treatment was directed at that injury. In recent weeks, as effective treatment for the low back pain has been found, a secondary set of symptoms in the mid and upper back have become dominant. . . . He presented to my office . . . for evaluation and treatment of mid and upper back pain.

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<sup>19</sup> Ex. 4 at 1.

<sup>20</sup> Trial Test.

<sup>21</sup> Ex. 4 at 6.

<sup>22</sup> Ex. 4 at 9.

<sup>23</sup> Ex. 4 at 11, 14.

Mr. Barnea's primary complaints today are of sharp mid back pain which causes him difficulty drawing a deep breath or being comfortable in any position . . . mild right shoulder pain and occasional moderate occipital headache radiating into the temples bilaterally.<sup>24</sup>

¶ 19 Dr. Burrow noted upon examination that Petitioner had a moderately restricted range of motion in his cervical spine, with restricted bilateral scapular movement, more pronounced on the right, and painful but not restricted adduction and lateral rotation of the right shoulder.<sup>25</sup> Dr. Burrow's impression was, "Chronic traumatically induced cervical and thoracic injuries resulting in neurospinal compression syndromes with associated paravertebral muscle splinting, localized tenderness, palpable edema and loss of mobility."<sup>26</sup>

¶ 20 Dr. Burrow continued to treat Petitioner on a regular basis. While Petitioner felt that the treatment helped somewhat, Dr. Burrow ultimately recommended that Petitioner return to Dr. Brown because the chiropractic treatment was not fixing the neck and shoulder problems.<sup>27</sup> On October 14, 2004, she noted:

I cannot justify further palliative treatment of Mr. Barnea under this claim, and once again ask Mr. Barnea to return to his primary physician for further evaluation of the right shoulder. It is my opinion that this problem does relate to the industrial accident of May 17, 2004, and that, while further chiropractic treatment may help to relieve continuing symptoms in the short term, it will be palliative rather than curative in nature.<sup>28</sup>

¶ 21 During this period of time, Petitioner's neck and shoulder pain affected his routine at home. He slept poorly because of the need to change positions to relieve pressure on his neck and shoulders.<sup>29</sup> An October 14, 2004, treatment note of Dr. Brown discusses right shoulder pain and Dr. Brown notes his intention to refer Petitioner to a specialist for it.<sup>30</sup>

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<sup>24</sup> Ex. 5 at 1.

<sup>25</sup> *Id.*

<sup>26</sup> Ex. 5 at 2.

<sup>27</sup> Trial Test.

<sup>28</sup> Ex. 5 at 7.

<sup>29</sup> Trial Test.

<sup>30</sup> Ex. 4 at 16.

¶ 22 In an undated note which by its content and location in the record apparently was written between October 14, 2004, and December 9, 2004, Dr. Brown noted:

He has had some chronic shoulder complaints and neck complaints that have been minor but need to be assessed. They have been present every [sic] since the accident. We have definitely focused on his back primarily. He saw Dr. Dirks who would like him to have an orthopedic evaluation of his shoulder before they operate on his back. . . .

Chronic low back pain and shoulder pain following an industrial accident. . .

<sup>31</sup>

¶ 23 Dr. Brown's subsequent examination notes generally mention Petitioner's neck and shoulder pain and associated difficulties.<sup>32</sup>

¶ 24 On November 11, 2004, Dr. Brown wrote a letter to Linda Noble (Noble) and "Lori Weeklick." Laurie Weidlich-Kuntz, claims adjuster, works for ESIS, Incorporated, which managed Petitioner's workers' compensation claim.<sup>33</sup> Linda Noble, RN, MS, is a case manager for Intracorp.<sup>34</sup> Dr. Brown's letter stated:

I am writing at the request of Richard Barnea. We have been following him in our office since May 18, 2004 for a work-related accident. His primary complaints have been severe low back pain with radiculopathy. He also has had some low grade neck and shoulder pain that accompanied this injury. We have not focused on these injuries because his back pain was so significant and required more of our attention. He has been referred to Dr. Dirks, a local neurosurgeon who would like to have his shoulder cleared by an orthopedist prior to possible operative interventions. There is no doubt in my mind that the patient's shoulder, neck and back symptoms are all related to his accident.<sup>35</sup>

¶ 25 Noble responded to Dr. Brown's letter on November 30, 2004, stating that she required more specific information to support Dr. Brown's claim that Petitioner's shoulder

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<sup>31</sup> Ex. 4 at 17.

<sup>32</sup> Ex. 4 at 19, 22-24, 27, 31.

<sup>33</sup> Ex. 23 at 2.

<sup>34</sup> Ex. 23 at 19.

<sup>35</sup> Ex. 4 at 18.

problem related back to his industrial accident.<sup>36</sup> Dr. Brown responded on December 9, 2004, reiterating that Petitioner has had “neck and right shoulder pains that have resulted” from the industrial accident.<sup>37</sup>

¶ 26 Whether Petitioner is entitled to the benefits he seeks is controlled by whether he can prove that his neck and shoulder conditions were caused by his industrial accident on May 17, 2004. Petitioner maintains that pain and stiffness in his neck and shoulder were present from the outset, but overshadowed by his lumbar complaints, while Respondent maintains that the neck and shoulder conditions developed later for unknown reasons not connected with the industrial accident. In support of its theory, Respondent points out that the first time Petitioner’s neck and shoulder pain are mentioned in the medical record is in Dr. Brown’s treatment note of July 21, 2004. However, in a November 11, 2004, letter, Dr. Brown stated that the neck and shoulder pain had been present from the outset but were not addressed as he focused on treating Petitioner’s lumbar pain. Respondent argues that the Court should ignore Dr. Brown’s assertion, but it offers no evidence that Dr. Brown was inaccurate in his recollection or untruthful in this letter.<sup>38</sup>

¶ 27 Although Dr. Brown has not testified in this matter and I therefore cannot assess his credibility, Respondent has not put forth any reason why I should doubt the veracity of Dr. Brown’s records. Dr. Brown offered an explanation for his failure to mention Petitioner’s neck and shoulder difficulties until two months after the industrial accident, and I have no reason to question this explanation. Further supporting Dr. Brown’s assertion is the wording of the July 21, 2004, treatment note, specifically, “neck and low back pain, improving slowly.”<sup>39</sup> This language implies that the neck pain was ongoing – hence able to improve slowly. Notably, this language does *not* suggest that the neck pain’s onset was sudden, severe, or recent.

¶ 28 Dr. Brown sent Petitioner for a CT scan and referred him to Dr. Bret A. Dirks, a neurosurgeon.<sup>40</sup> Dr. Dirks informed Petitioner that he had several bad disks in his back and recommended surgery.<sup>41</sup> Petitioner was reluctant to have the procedure, but he was

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<sup>36</sup> Ex. 4 at 20.

<sup>37</sup> Ex. 4 at 21.

<sup>38</sup> Ex. 4 at 18.

<sup>39</sup> Ex. 4 at 9.

<sup>40</sup> Petitioner Dep. 84:1-3.

<sup>41</sup> Petitioner Dep. 88:12-24.

concerned about the long-term effects of his pain medication.<sup>42</sup> He eventually had lumbar surgery, although he still experiences back pain.<sup>43</sup> However, he also takes less pain medication.<sup>44</sup>

¶ 29 On cross-examination, counsel for Respondent asked Petitioner about a few medical records describing previous injuries which Petitioner did not reveal in his discovery responses. This included an injury in 2002 in which, according to the medical record, Petitioner injured his back while jumping out of a boat. Petitioner testified that he has no memory of this incident and that his girlfriend also does not remember Petitioner having suffered this injury. Petitioner further testified that while one of the medical records states that he treated with a Dr. Johnson for his back 10 or 12 years ago, that he never treated with a Dr. Johnson and he believes the information in the medical report is inaccurate.<sup>45</sup> Petitioner further testified that while he did receive chiropractic treatments for a work injury in April 1997, while the medical record indicates that he received 19 treatments, he believes that this number is inaccurate because his son treated with the same chiropractor and the chiropractor's office has confused their records on at least one other occasion.<sup>46</sup> Although Respondent attempted to impeach Petitioner's credibility with medical records which contradict Petitioner's testimony, I am not convinced that all of these records are Petitioner's, nor am I convinced that they contain accurate histories. Therefore, I assign them little weight.

¶ 30 Dr. Dirks is a board certified neurosurgeon based in Coeur d'Alene, Idaho. He primarily performs spinal surgery.<sup>47</sup> Dr. Dirks first saw Petitioner on November 2, 2004, at the request of Dr. Brown.<sup>48</sup> At the time, Petitioner reported pain which went down his right hip and into his knee and ankle. Petitioner also reported some pain between his shoulder blades and into his right shoulder, which he also attributed to his industrial accident.<sup>49</sup>

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<sup>42</sup> Petitioner Dep. 89:1-9.

<sup>43</sup> Petitioner Dep. 89:18-22.

<sup>44</sup> Petitioner Dep. 90:6-9.

<sup>45</sup> Trial Test.

<sup>46</sup> *Id.*

<sup>47</sup> Dirks Dep. 5:11 - 6:5.

<sup>48</sup> Dirks Dep. 8:17-19.

<sup>49</sup> Dirks Dep. 9:2-9.

¶ 31 A CT scan of Petitioner's cervical spine was performed on January 23, 2006. The radiology report indicates that Petitioner was found to have a mild disk bulge and marginal osteophyte complex on the right at C3-4, degenerative changes in the articular facet on the left at C4-5, and disk space narrowing with posterial central disk protrusion and a right neural foraminal encroachment at C5-6.<sup>50</sup>

¶ 32 A CT scan of Petitioner's lumbar spine was also performed on January 23, 2006.<sup>51</sup> Dr. Dirks concluded that Petitioner required lower back surgery which related to his May 2004 industrial injury. Dr. Dirks performed a lumbar laminectomy and fusion on March 8, 2006.<sup>52</sup> Respondent does not dispute liability for Petitioner's lumbar condition.

¶ 33 Based on his x-ray examination and CT scan, Dr. Dirks opined that Petitioner has degenerative changes consistent with a chronic problem, but that he further has a herniated disk or protrusion at C5-6, which is indicative of an acute occurrence.<sup>53</sup> Dr. Dirks concluded that Petitioner would benefit from an anterior cervical disectomy and fusion at C5-6.<sup>54</sup> Dr. Dirks believes that Petitioner's shoulder pain is caused by his cervical condition because Petitioner's pain complaints are primarily in his neck and radiate into his right arm without specific point tenderness at the shoulder. Dr. Dirks finds this to be consistent with a nerve impingement.<sup>55</sup> Dr. Dirks testified that it was probable that the pain medication Petitioner was taking for his lower back would have also provided pain relief in his neck.<sup>56</sup> Dr. Dirks also stated that he found Petitioner's claim that he had neck and shoulder pain from the date of the industrial accident forward, but that it was overshadowed by his more severe back pain, to be believable because he found Petitioner's history, physical exam, and radiological studies to be consistent with each other.<sup>57</sup>

¶ 34 On May 30, 2006, Dr. Dirks stated in his examination notes:

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<sup>50</sup> Ex. 7 at 15-16.

<sup>51</sup> Ex. 7 at 16.

<sup>52</sup> Dirks Dep. 10:11-25.

<sup>53</sup> Dirks Dep. 13:6-17.

<sup>54</sup> Dirks Dep. 11:1-10.

<sup>55</sup> Dirks Dep. 11:21 - 12:7.

<sup>56</sup> Dirks Dep. 41:8-16.

<sup>57</sup> Dirks Dep. 38:1-20.

Mr. Barnea clearly suffered a workman's compensation injury a couple of years ago in Montana, which related to his entire spine as I stated previously in his initial History and Physical examination. As his entire spine was affected, his neck is also affected by all of this and should be covered under this workman's compensation injury I believe. On a more probable than not basis his neck was injured at the time of his workman's compensation injury. . . .<sup>58</sup>

Dr. Dirks reiterated this opinion in an examination note on November 14, 2006.<sup>59</sup>

¶ 35 On August 29, 2006, Dr. Dirks addressed a letter "To Whom It May Concern" in which he stated:

[Petitioner] continues to hurt in his neck and down into his arm. On a more probable than not basis this is related to his worker's compensation injury of May 17, 2004. He complained of neck pain and arm pain at that time as well. The back pain was the overriding complaint that he had following that injury; however, he continued to have the neck problems as well.<sup>60</sup>

¶ 36 Dr. Dirks testified that cervical and lumbar paraspinal muscle spasms which were recorded in Dr. Brown's medical notes and the spinal films which were taken of Petitioner's spine are objective medical findings consistent with Petitioner's reports and consistent with a traumatic injury from a lifting event that could have happened on May 17, 2004.<sup>61</sup> In reviewing Petitioner's medical records, Dr. Dirks further noted that at one early chiropractic treatment, Petitioner's chiropractor noticed that Petitioner had cervical symptoms which were more pronounced on the right, and that she observed this without the benefit of any cervical films. Dr. Dirks explained that this is also consistent with Petitioner's cervical injury dating back to his May 2004 industrial accident.<sup>62</sup> However, Dr. Dirks admitted that prior to the day of his deposition, he had not reviewed Petitioner's medical records from other providers.<sup>63</sup> Dr. Dirks also admitted that it is possible for the protrusion at C5-6 to be

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<sup>58</sup> Ex. 4 at 87.

<sup>59</sup> Ex. 4 at 93.

<sup>60</sup> Ex. 7 at 48.

<sup>61</sup> Dirks Dep. 19:3 - 20:7.

<sup>62</sup> Dirks Dep. 22:12 - 23:17.

<sup>63</sup> Dirks Dep. 27:11-13.

normal wear and tear, or the normal course of degenerative disk disease.<sup>64</sup> Dr. Dirks opined that with a reasonable degree of medical certainty, on a more probable than not basis, that Petitioner's neck symptoms are related to his May 17, 2004, industrial accident.<sup>65</sup>

¶ 37 Dr. Thomas S. Dietrich is a neurosurgeon located in Vancouver, Washington.<sup>66</sup> He is board certified in neurosurgery, but he does not have hospital privileges and has not performed spinal surgery since 1994.<sup>67</sup> Dr. Dietrich performed an independent medical examination (IME) of Petitioner on October 19, 2006.<sup>68</sup> On that day, Petitioner reported that he was having problems with his neck, right shoulder, and right arm, but that his back was better than it had been.<sup>69</sup> Dr. Dietrich diagnosed Petitioner with degenerative cervical disk disease at C5-6.<sup>70</sup> Dr. Dietrich found the disk space to be narrowed with spurring, with a soft disk protrusion to the right.<sup>71</sup> He stated that it is not possible to tell whether the protrusion was caused by normal wear and tear or by a traumatic incident.<sup>72</sup>

¶ 38 On October 19, 2006, Dr. Dietrich reported the results of his IME of Petitioner which occurred that same day.<sup>73</sup> Dr. Dietrich diagnosed Petitioner with degenerative cervical disk disease at C5-6 with probable right C6 radiculopathy. He further opined:

This gentleman indicates that the injury he sustained on May 17, 2004, resulted not only in back pain, which is uncontested, but pain in the neck, right shoulder, and arm. There is no indication of any shoulder or arm symptoms for approximately two months following the injury. The mechanism of injury is compatible with the development of a soft cervical disc protrusion, but it would appear highly unlikely that he would sustain two

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<sup>64</sup> Dirks Dep. 34:14-25.

<sup>65</sup> Dirks Dep. 20:8-14.

<sup>66</sup> Dietrich Dep. 7:13 - 8:14.

<sup>67</sup> Dietrich Dep. 32:13-23.

<sup>68</sup> Dietrich Dep. 13:8-11.

<sup>69</sup> Dietrich Dep. 13:13-18.

<sup>70</sup> Dietrich Dep. 22:12-17.

<sup>71</sup> Dietrich Dep. 22:20-25.

<sup>72</sup> Dietrich Dep. 23:6-10.

<sup>73</sup> Ex. 6.

injuries simultaneously to the back and neck. . . . [T]here is no evidence that this problem is related to the work incident of May 17, 2004.<sup>74</sup>

¶ 39 Dr. Dietrich testified that the vast majority of people who have cervical disk protrusion are not able to relate it to a specific incident.<sup>75</sup> He explained that over time, the fibers that confine the disk weaken and a minor event such as bending over may cause a rupture.<sup>76</sup> Dr. Dietrich further testified that a soft cervical disk protrusion is generally extremely painful and that it is difficult to obtain pain relief from it.<sup>77</sup>

¶ 40 Dr. Dietrich opined that it is highly unlikely that Petitioner would have sustained both a lumbar and cervical injury as the result of the same lifting incident because “two links in a chain don’t break at the same time.”<sup>78</sup> Dr. Dietrich found no evidence that Petitioner’s cervical problem was caused by his May 17, 2004, industrial accident and opined that it was highly unlikely that the accident had anything to do with the cervical condition.<sup>79</sup> He also believes that it is unlikely that Petitioner’s cervical pain was present from shortly after the industrial accident because it would have been too severe to ignore.<sup>80</sup>

¶ 41 On November 29, 2006, Barbara Sawyer, RN, MN (Sawyer), medical services consultant for Crawford Integrated Services, wrote a letter to Dr. Dirks as a follow-up to Dr. Dirks’ receipt of Dr. Dietrich’s IME report. Sawyer requested that Dr. Dirks comment on the report. Dr. Dirks responded, “I disagree. Mr. Barnea clearly relates his neck injury to his industrial injury.”<sup>81</sup>

¶ 42 Dr. Dietrich disagrees with Dr. Dirks’ testimony that Petitioner’s cervical protrusion may have been asymptomatic for a time, because in his experience cervical protrusions are extremely painful when they occur although the pain may subside over time.<sup>82</sup> However, Petitioner testified that he has never experienced the kind of constant,

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<sup>74</sup> Ex. 6 at 8.

<sup>75</sup> Dietrich Dep. 12:14-16.

<sup>76</sup> Dietrich Dep. 12:3-10.

<sup>77</sup> Dietrich Dep. 27:17-25.

<sup>78</sup> Dietrich Dep. 24:2-17.

<sup>79</sup> Dietrich Dep. 25:18 - 26:6.

<sup>80</sup> Dietrich Dep. 28:4-7.

<sup>81</sup> Ex. 7 at 85.

<sup>82</sup> Dietrich Dep. 28:8-22.

excruciating pain in his neck which Dr. Dietrich described in his report.<sup>83</sup> I have not found anywhere in the medical records before the Court any reference to Petitioner experiencing this type of pain, and yet clearly, Petitioner does have a cervical disk protrusion. In spite of Dr. Dietrich's opinion that a cervical disk protrusion cannot occur without the immediate onset of excruciating pain, that does in fact appear to be exactly what occurred in Petitioner's case, whether the injury occurred at the time of his industrial accident or otherwise.

¶ 43 Furthermore, although I find Dr. Dietrich to be generally qualified to render an opinion in Petitioner's case, I find Dr. Dirks' credentials to be more significant. Unlike Dr. Dietrich, Dr. Dirks is a currently practicing neurosurgeon, while Dr. Dietrich no longer has hospital privileges and in fact has not performed surgery in over 10 years. Additionally, Dr. Dirks is Petitioner's treating physician, and therefore his opinion is entitled to greater weight in this circumstance.<sup>84</sup> Accordingly, I find the testimony and opinions of Dr. Dirks more persuasive than those of Dr. Dietrich.

#### CONCLUSIONS OF LAW

¶ 44 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 industrial accident.<sup>85</sup>

¶ 45 Petitioner bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.<sup>86</sup> I conclude that Petitioner has met this burden.

¶ 46 The weight of the evidence in this case falls in favor of Petitioner. It is undisputed that Petitioner has a cervical condition which includes a protrusion or bulge at C5-6. I am persuaded by the explanation that the pain medications Petitioner took for his lumbar condition also alleviated the pain of his cervical and shoulder condition so that he was unaware of the severity of his pain until he reduced his pain medication dosages. I also find Dr. Brown's letter persuasive in which he asserts that Petitioner's neck and shoulder pain were present from the beginning, but that his attention was focused on Petitioner's lumbar complaints. Dr. Brown also opined in a letter to Respondent's claims adjuster that Petitioner's shoulder, neck, and back symptoms were all related to his industrial accident.

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<sup>83</sup> Trial Test.

<sup>84</sup> *Pepion v. Blackfeet Tribal Industries*, 257 Mont. 485, 489-90, 850 P.2d 299, 302 (1993), *citing Snyder v. San Francisco Feed & Grain*, 230 Mont. 16, 27, 748 P.2d 924, 931.

<sup>85</sup> *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

<sup>86</sup> *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).

I also have the opinion of Dr. Dirks that it is more probable than not that Petitioner's neck was injured at the time of his industrial accident.

¶ 47 Conversely, I have Dr. Dietrich's opinion that Petitioner's cervical conditions cannot be attributed to Petitioner's industrial accident. As I found above, I am more persuaded by Dr. Dirks' opinions and testimony than by Dr. Dietrich's. Therefore, where these two doctors disagree, I am inclined to accept Dr. Dirks' opinion over Dr. Dietrich's. Accordingly, I conclude that by a preponderance of the evidence, Petitioner has proven his case and he is therefore entitled to the benefits he seeks.

¶ 48 As the prevailing party, Petitioner is entitled to his costs.<sup>87</sup> As to the issue of attorney fees, pursuant to § 39-71-611, MCA, an insurer shall pay reasonable attorney fees if the insurer denies liability for a claim for compensation, the claim is later judged compensable by this Court, and this Court determines the insurer's actions in denying liability were unreasonable. In light of the absence of any mention of neck and shoulder pain in Dr. Brown's medical notes immediately following Petitioner's industrial accident, I do not believe Respondent's actions in denying liability for the neck and shoulder condition were unreasonable.

¶ 49 Similarly, pursuant to § 39-71-2907, MCA, I may increase by 20% the full amount of benefits due a claimant during the period of delay or refusal to pay if the insurer's delay or refusal to pay is unreasonable. For the same reasons as I find attorney fees are not owed, I decline to award a penalty.

### JUDGMENT

¶ 50 Petitioner is entitled to medical benefits for the neck surgery recommended by his treating physician.

¶ 51 Petitioner is entitled to TTD benefits until he reaches MMI following neck surgery.

¶ 52 Petitioner is entitled to his costs.

¶ 53 Petitioner is not entitled to his attorney fees.

¶ 54 Petitioner is not entitled to a penalty.

¶ 55 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.

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<sup>87</sup> *Marcott v. Louisiana Pac. Corp.*, 1994 MTWCC 109 (*aff'd after remand at 1996 MTWCC 33*).

¶ 56 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 21st day of December, 2007.

(SEAL)

/s/ JAMES JEREMIAH SHEA  
JUDGE

c: Rex Palmer  
Leo S. Ward  
Submitted: April 24, 2007