

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2016 MTWCC 12

WCC No. 2015-3552

DENNIS BARNHART

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Summary: Petitioner, who has an extensive history of neck injuries, claimed a work-related neck injury in November 2011. Respondent accepted liability and paid benefits. Petitioner and Respondent settled his claim, reserving medical benefits. However, Respondent then ceased paying medical benefits after an IME examiner opined that Petitioner suffered no injury in the work-related incident. Petitioner thereafter petitioned this Court for reinstatement of his medical benefits.

Held: Petitioner's industrial accident permanently aggravated his pre-existing neck condition and, therefore, Respondent remains liable for medical benefits. Although Petitioner has reached MMI, he is entitled to reasonable medical services under § 39-71-704, MCA, and Respondent is liable for those primary medical services Petitioner needs to sustain MMI.

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-407. Where the claimant had an extensive history of neck injuries, this Court concluded that the insurer was liable for medical benefits after an accident – in which the claimant turned his head quickly to

the side while kneeling and tugging on a latch – permanently aggravated his pre-existing condition.

Proof: Burden of Proof: Aggravations. The claimant’s burden to establish an accident, an injury or aggravation of a pre-existing condition, and a causal connection between the accident and the injury or aggravation is “more probable than not.”

Physicians: Treating Physician: Weight of Opinions. While a treating physician’s opinion is generally entitled to greater weight, here, the treating physician was also well-informed about the claimant’s medical history due to the extensive records review he conducted as part of an IME he performed prior to becoming the claimant’s treating physician.

Physicians: Treating Physician: Weight of Opinions. Where the insurer offered no reasons as to why an IME doctor’s opinion should outweigh the treating physician’s, this Court was unpersuaded by the IME doctor’s conflicting opinion. The insurer did not argue that the IME doctor had superior credentials, nor superior evidence at his disposal, and the insurer had initially relied upon the opinions of the treating physician in adjusting the claimant’s claim.

Proof: Conflicting Evidence: Medical. Where an IME doctor downplayed the severity of the claimant’s industrial accident and offered flawed reasoning for why he believed the accident could not have aggravated the claimant’s pre-existing condition, this Court was not persuaded to assign greater weight to the opinions of the IME doctor over those of the treating physician.

Physicians: Treating Physician: Weight of Opinions. This Court gave no weight to the “concurrence” of a physician who signed a prepared statement that he agreed with the “findings” of an IME report where this Court could not determine whether the physician agreed only with the diagnoses – which largely agreed with his own – or with the IME doctor’s opinions – which conflicted with the physician’s own recent treatment recommendations.

Medical Evidence: Subjective Complaints of Pain. Where the claimant’s subjective complaints of increased pain and other symptoms were consistent with the objective medical findings, no issue existed, as it had in

Ford v. Sentry Cas. Co., regarding a lack of correlation between the claimant's subjective complaints and the objective medical findings.

Injury and Accident: Aggravation: Generally. A condition need not be symptomatic prior to an industrial accident in order for the accident to permanently aggravate it.

Proof: Causation. Where the treating physician opined that the industrial accident permanently aggravated the claimant's pre-existing neck condition, and the claimant's subjective complaints of increased pain and other symptoms were consistent with the objective medical findings, and the alleged aggravation occurred in the same cervical disks which the claimant had injured previously, this Court concluded that, via medical evidence and his own credible testimony, the claimant had proven that his industrial accident permanently aggravated his pre-existing condition.

Claims: Acceptance. Where the insurer accepted liability for the claimant's injury and settled the indemnity portion of the claim while reserving medical benefits, it cannot then un-accept the claim by soliciting a contrary medical opinion.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-704. This Court rejected the insurer's position that it should not be held liable for any future medical treatment of the claimant's neck condition because it alleged that previous treatment had been ineffective, stating that this Court could not give an advisory opinion when it did not know what treatment the claimant's physicians might recommend in the future.

Benefits: Medical Benefits: Primary Medical Services. An insurer may deny authorization if it has legitimate grounds to argue that a particular recommended treatment may be maintenance or palliative care. However, this Court rejected the insurer's position that all future medical treatment of the claimant's neck condition would be maintenance or palliative care: this Court cannot give an advisory opinion when it does not know what treatment the claimant's physicians might recommend in the future.

¶ 1 The trial in this matter was held on August 27, 2015, in Kalispell. Petitioner Dennis Barnhart was present and represented by Garry D. Seaman. Michael P. Heringer represented Respondent Liberty Northwest Insurance Corporation (Liberty). Sandy Scholl, claims adjuster for Liberty, also attended.

¶ 2 Exhibits: This Court admitted Exhibits 1 through 22.

¶ 3 Witnesses and Depositions: This Court admitted the depositions of Barnhart and John A. Vallin, MD, into evidence. Barnhart and Scholl were sworn and testified.

¶ 4 Issues for Determination:

Issue One: Did Petitioner's industrial accident permanently aggravate his pre-existing neck condition?

Issue Two: Is Respondent relieved of liability for Petitioner's ongoing medical care because it is palliative or maintenance care under § 39-71-704(1)(g), MCA?

FINDINGS OF FACT

¶ 5 The following facts are established by a preponderance of the evidence.

¶ 6 Barnhart has a history of significant neck injuries, beginning with a work-related accident on April 17, 1990, for which he attained maximum medical improvement (MMI) on May 13, 1992, with a 17% whole person impairment rating and a permanent restriction to light- to medium-duty work. From 1990 onward, Barnhart experienced occasional flare-ups of neck pain. He took over-the-counter pain relievers and sought medical treatment if the pain became intolerable. Barnhart periodically participated in physical therapy and pursued other conservative treatments.

¶ 7 On August 17, 2004, Barnhart suffered a second industrial injury to his neck for which he attained MMI on January 27, 2005, with a 12% whole person impairment rating.

¶ 8 On June 8, 2006, Barnhart was rear-ended in a motor vehicle accident and sustained a whiplash injury. He settled his claim against the negligent driver. Beginning in December 2006, Barnhart occasionally underwent facet injections and epidural steroid injections. At times, medical providers suggested that Barnhart consider neck surgery, but Barnhart found his pain manageable with conservative treatment and he did not want to take months off work to recover from surgery.

¶ 9 In 2008, Barnhart began working as a bus driver for Flathead County. Barnhart credibly testified that he had experienced neck problems from his earlier injuries when he began working for Flathead County. However, he successfully performed his job duties. He understood that he was at MMI from the previous neck injuries because he was "as good as [he] was going to get."

¶ 10 On January 29, 2010, Barnhart underwent a cervical MRI which revealed: severe narrowing of the interspace at C4-5 with a mild posterior disk bulge and facet arthropathy with mild foraminal encroachment; narrowing of the disk and a broad-based posterior disk

bulge causing moderately severe bilateral foraminal encroachment at C5-6; and an extruded disk herniation indenting the thecal sac with degenerative spurring at C6-7.

¶ 11 On March 31, 2010, Douglas Griffith, MD, a neurosurgeon, recommended a discectomy with fusion at the C4-5 level. However, Barnhart again decided against surgery because he could not afford to take several months off work for recovery.

¶ 12 On April 28, 2011, approximately six months prior to his industrial accident, Barnhart saw Matthew K. Bailey, MD, at the Flathead Valley Orthopedic Clinic, for neck and shoulder pain. Dr. Bailey had treated Barnhart after the 2004 industrial accident. He noted that although Barnhart had gradually improved after the 2004 industrial accident, Barnhart had suffered from neck problems since the 2006 car accident.

¶ 13 On November 3, 2011, Barnhart suffered an injury to his neck in the course of his employment with Flathead County. Barnhart was kneeling and pulling on a latch to secure a wheelchair on the bus. While firmly pulling the latch, Barnhart quickly turned his head to the right in response to a yell from another passenger. Barnhart felt a “ripping” or pulling sensation in his neck and heard a snapping sound. He worked the rest of his shift and later filed an incident report with his employer.

¶ 14 On November 23, 2011, Tacey E. Griffin, PA-C, at Northern Rockies Neurosurgical Associates, saw Barnhart, noting he had last treated with her for cervical issues in 2010. Griffin noted that Barnhart had “tweaked” his neck at work, causing right-sided trapezial pain. Griffin found restricted cervical range of motion and a palpable involuntary spasm of the right trapezial region. Her diagnosis was a recent aggravation of neck pain and cervical spondylosis with marked degeneration at C5-6 and C6-7, and a .5 cm dynamism at C4-5. Griffin recommended updated cervical films and a cervical MRI.

¶ 15 On December 5, 2011, Liberty accepted liability for Barnhart’s industrial injury.

¶ 16 On December 7, 2011, Barnhart underwent a cervical MRI. The impressions included borderline central canal narrowing with 2-3 mm anterior spondylolisthesis and mild right foraminal narrowing at C4-5, a mild progression of central canal narrowing with associated moderate disk protrusion at C5-6 with foraminal narrowing, and a moderate protrusion with mild central canal narrowing and right foraminal narrowing at C6-7.

¶ 17 On December 13, 2011, Griffin saw Barnhart for follow-up. She reviewed his MRI report and found it not remarkably changed from his previous MRI. She recommended physical therapy. On that day, Barnhart also underwent a series of cervical x-rays which revealed moderate degenerative disk disease at C5-6 and C6-7 with multilevel facet joint arthropathy throughout the cervical spine, and a likely degenerative, stable anterolisthesis of C4 on C5.

¶ 18 By January or February 2012, Barnhart found his neck pain intolerable. The pain was worse than it had been prior to November 2011, and it radiated down his neck and

made it difficult to turn his head, which affected his ability to perform his job duties. Barnhart did not miss any work until February 15, 2012, when Griffin took him off work. Griffin noted that Barnhart experienced increased symptoms from turning his head, which he needed to do to drive a bus. Barnhart still wanted to pursue conservative treatment and avoid surgery. Griffin recommended that he take time off work, participate in physical therapy, and undergo an orthopedic evaluation.

¶ 19 On March 8, 2012, Greg Vanichkachorn, MD, performed an independent medical examination (IME) of Barnhart at Liberty's request. Among other qualifications, Dr. Vanichkachorn is a board-certified independent medical examiner and a board-certified family physician. As part of the IME, Dr. Vanichkachorn interviewed and examined Barnhart and reviewed his medical records from 1981 to the present, including the records pertaining to his previous neck injuries and subsequent treatment. Dr. Vanichkachorn described the industrial accident as: "He was attempting to secure a wheelchair to the base of his bus when he twisted his neck 'too quickly' to the right."

¶ 20 After conducting the IME, Dr. Vanichkachorn opined that Barnhart's subjective complaints of pain were consistent with Dr. Vanichkachorn's objective medical findings, and he found Barnhart's subjective complaints of pain with movement of his neck consistent with the mechanism of injury. Dr. Vanichkachorn opined that Barnhart's industrial accident had exacerbated his multilevel cervical degenerative disk disease, anterolisthesis of C4-5, and cervicgia, and that his symptoms were more probably than not related to the industrial injury. He further stated that while Barnhart had suffered "at least" a temporary aggravation to his pre-existing condition as a result of the November 3, 2011, industrial accident, he could not determine if the aggravation was temporary or permanent because Barnhart also had an unrelated shoulder condition, preventing Dr. Vanichkachorn from differentiating Barnhart's pain due to the shoulder condition from his neck pain. Dr. Vanichkachorn recommended that Barnhart first resolve the non-work-related shoulder problems and then obtain additional diagnoses and treatment on his neck, possibly including an epidural steroid injection.

¶ 21 In March 2012, Barnhart took time off work to have surgery for his unrelated shoulder condition.

¶ 22 On May 8, 2012, based on the opinions of Griffin and Dr. Vanichkachorn, Liberty concluded that Barnhart's industrial accident had caused a temporary aggravation of his pre-existing condition and authorized certain medical treatment.

¶ 23 On July 5, 2012, Barnhart underwent a bilateral C4-5 facet block followed by a cervical CT scan which revealed a moderate to severe degenerative facet change at C3-4, moderate degenerative changes at C4-5, and marginal osteophytic changes at C5-6 and C6-7.

¶ 24 On July 18, 2012, Douglas Griffith, MD, examined Barnhart and noted decreased range of motion in his neck upon physical examination. Dr. Griffith opined that Barnhart

was at MMI and not currently a surgical candidate, although he might benefit from injection therapy.

¶ 25 Although Dr. Vanichkachorn initially saw Barnhart for an IME, he later became Barnhart's treating physician. On August 2, 2012, Barnhart saw Dr. Vanichkachorn for treatment. Since the IME, Barnhart had gotten his shoulder surgically repaired and he had undergone two steroid injections for his neck condition. However, Barnhart's neck pain had worsened and included tingling and numbness in his right arm and headaches. Dr. Vanichkachorn opined that Barnhart's symptoms had worsened secondary to his November 3, 2011, industrial injury, and thought it likely that Barnhart had suffered a permanent aggravation of his pre-existing cervical condition. Dr. Vanichkachorn recommended that Barnhart undergo an epidural steroid injection/facet injection at a lower cervical level and referred him to Camden Kneeland, MD, at The Montana Center for Wellness & Pain Management. He also released Barnhart to return to work, but with restrictions limiting turning and twisting his neck.

¶ 26 On September 20, 2012, Barnhart returned to Dr. Vanichkachorn and reported that Dr. Kneeland's injections had provided him little relief. Dr. Vanichkachorn released Barnhart to return to work for three four-hour shifts per week with no repetitive neck motion and referred him for work hardening.

¶ 27 On October 23, 2012, Dr. Vanichkachorn found that Barnhart was largely unimproved, although he was capable of maintaining a tolerable level of neck pain while working 12 hours per week on modified duty. Although Dr. Kneeland recommended another steroid injection, Barnhart did not wish to pursue additional injections. Dr. Vanichkachorn stated, "At this time, I have no treatment recommendations that I feel would significantly improve the examinee's functional ability other than time and continued work." He considered Barnhart at MMI and found that Barnhart had suffered a permanent aggravation of his cervical pathology from the November 3, 2011, industrial injury.¹ Dr. Vanichkachorn assessed Barnhart with a 2% whole person impairment for the permanent aggravation to his pre-existing condition, which he based on the MRI evidence of cervical degenerative disk disease and non-verifiable radiculopathy complaints. Dr. Vanichkachorn continued the work restrictions already in place.

¶ 28 After Dr. Vanichkachorn found Barnhart at MMI, Barnhart returned to work for Flathead County in a light-duty position. Barnhart answered the phone, performed dispatching duties, worked at the library, and worked at the fairgrounds. Barnhart never returned to his bus driving position.

¶ 29 By January 2013, Barnhart's neck pain had worsened in spite of acupuncture, physical therapy, and medications. Barnhart could not identify any particular incident after

¹ In his medical report, Dr. Vanichkachorn referred to the date of Barnhart's industrial injury as February 2011. Neither party disputes that Dr. Vanichkachorn erred as to the date of injury, nor that he meant the industrial accident which is the subject of the present litigation.

his industrial accident which may have caused his symptoms to intensify. Dr. Vanichkachorn opined that although Barnhart could work full-time, his restrictions were permanent.

¶ 30 In February 2013, Flathead County terminated Barnhart's employment because he could not return to his time-of-injury position as a bus driver and it no longer had alternative job duties available for him.

¶ 31 On February 14, 2013, Dr. Vanichkachorn recommended another MRI and an EMG of the upper extremities because Barnhart continued to report worsening pain.

¶ 32 On March 11, 2013, Barnhart and Liberty settled his claim, reserving Barnhart's medical benefits.

¶ 33 On March 18, 2013, Barnhart underwent another cervical MRI which revealed uncovertebral joint spurring, anterolisthesis of C2 on C3 and posterior bulge and spur complex with a moderate bilateral foraminal encroachment, increasing findings at C3-4 with severe facet joint arthrosis, anterolisthesis of C3 on C4 and uncovertebral joint spurring contributing to bilateral foraminal encroachment, as well as worsening findings at C4-5 with severe facet joint arthrosis.

¶ 34 On July 15, 2013, John A. Vallin, MD, performed an IME of Barnhart at Liberty's request. Dr. Vallin is board-certified in physical medicine and rehabilitation and in pain medicine and is a certified independent medical examiner. During the IME, he interviewed and examined Barnhart, reviewed Barnhart's medical records, made diagnoses, and answered questions posed by Liberty. Dr. Vallin described Barnhart's industrial accident as follows:

[H]e was securing a wheelchair on the bus that he was driving. Mr. Barnhart states as he bent down on one knee, a passenger in the bus to his right asked him a question. Mr. Barnhart states as he turned his head to the right in order to answer the passenger's question he experienced sudden onset of recurrent neck pain stating, "I aggravated it." When I asked Mr. Barnhart to clarify exactly how he injured his neck, he . . . stated that he merely rotated his head to the right . . . when he experienced neck pain.

Dr. Vallin noted that Barnhart completed a "pain drawing" which was consistent with his subjective complaints of pain and which did not reflect any symptom magnification. Although Dr. Vallin concluded that Barnhart suffered from multi-level cervical degenerative disk disease with spondylosis, a cervical disk herniation at C6-7, severe degenerative disk disease at C4-5, multilevel disk bulging, and right cervical radiculopathy secondary to multilevel cervical degenerative disk disease, he opined that these conditions were all pre-existing and were not aggravated by Barnhart's November 3, 2011, industrial accident.

¶ 35 Dr. Vallin disagreed with Dr. Vanichkachorn's opinion that Barnhart's industrial accident caused a permanent aggravation of his pre-existing condition because of Barnhart's significant pre-existing condition, the fact that medical providers had previously suggested surgery, and because Barnhart had last received care for his neck months before the industrial accident. Dr. Vallin noted that Barnhart had suffered several significant neck injuries and received medical treatment for neck problems for 20 years prior to the industrial accident. Dr. Vallin further noted that Barnhart had a long history of increased neck pain caused by turning his head from side to side, and that his advanced spondylosis and neural foraminal stenosis indicated that he would experience neck pain with any neck motion. He opined that Barnhart's act of turning his head to the right while kneeling was insufficient to cause either a temporary or permanent aggravation of his pre-existing condition.

¶ 36 On September 4, 2013, Frank Bishop, MD, examined Barnhart on Dr. Vanichkachorn's referral. Among other findings, Dr. Bishop noted limited cervical range of motion in rotation, flexion, and extension. Dr. Bishop recommended that Barnhart undergo another series of facet injections. However, Barnhart did not receive this treatment because Liberty refused to authorize it.

¶ 37 On October 8, 2013, Anna Waller, Senior Claims Specialist for Liberty, sent Dr. Bishop a letter which advised him that Liberty had sent a copy of Dr. Vallin's IME report to his office. The letter provided signature and date lines after the sentence, "I concur with the doctors' findings, as outlined in the attached Independent Medical Examination." The letter further stated that if Dr. Bishop disagreed with the IME report, he should provide Liberty with his treatment recommendations. Dr. Bishop signed and dated the concurring statement on November 4, 2013.

¶ 38 On November 27, 2013, Waller sent Barnhart Dr. Vallin's IME report and the signed concurrence from Dr. Bishop. In an enclosed letter, Waller wrote:

Dr. Vallin has indicated that no future medical treatment is necessary related to the 11/3/2013 [sic] claim and Dr. Bishop has concurred.

This letter is to advise you that no further medical treatment will be approved related to this claim.

¶ 39 Sandy Scholl, a claims adjuster for Liberty, testified at trial. Scholl became the adjuster on Barnhart's claim in March 2015. By that time, the parties had settled the indemnity portion and Waller had terminated Barnhart's medical benefits based on Dr. Vallin's IME report and Dr. Bishop's concurrence. Scholl maintains that Liberty is not liable for any further medical treatment for Barnhart's November 3, 2011, industrial accident.

CONCLUSIONS OF LAW

¶ 40 This case is governed by the 2011 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Barnhart's industrial accident.²

Issue One: Did Petitioner's industrial accident permanently aggravate his pre-existing neck condition?

¶ 41 Under § 39-71-407(3)(a)(ii), MCA, an insurer is liable for an injury if the injury is established by objective medical findings and if the claimant establishes that it is more probable than not that the claimed injury occurred and aggravated a pre-existing condition. The Montana Supreme Court has explained:

The well established rule in Montana is that an employer takes his employee subject to the employee's physical condition at the time of employment. The fact that an employee is suffering from or afflicted with pre-existing disease or disability does not preclude compensation if the disease or disability is aggravated or accelerated by an industrial accident.³

If an industrial accident causes only a temporary aggravation to a pre-existing condition, the insurer at risk is liable for the injury only until the injured worker returns to baseline.⁴ In aggravation cases, this Court weighs the evidence to determine whether an industrial injury permanently aggravated a pre-existing condition.⁵ A claimant is required to establish injury and causation through objective medical findings.⁶ The claimant's burden to establish an accident, an injury or aggravation of a pre-existing condition, and a causal connection between the accident and the injury or aggravation is "more probable than not."⁷ Therefore, Liberty remains liable for Barnhart's neck condition if it is more probable than not that the November 3, 2011, industrial accident caused a permanent aggravation.

¶ 42 Barnhart argues that Liberty remains liable for his neck condition. Barnhart contends that he has met his burden of proving by a preponderance of the evidence that "there is a causal connection between his current condition and his injury."⁸ He relies on

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

³ *Robins v. Anaconda Aluminum Co.*, 175 Mont. 514, 518, 575 P.2d 67, 70 (1978) (citations omitted).

⁴ *Stacks v. Travelers Prop. Cas.*, 2001 MTWCC 9, ¶ 107.

⁵ See, e.g., *Fleming v. Montana Sch. Grp. Ins. Auth.*, 2010 MTWCC 13 (insurer liable for permanent aggravation of pre-existing low-back condition); *Healy v. Liberty Northwest Ins. Corp.*, 2007 MTWCC 43 (insurer liable for permanent aggravation of pre-existing back condition).

⁶ *Ford*, 2012 MT 156, ¶ 44.

⁷ *Ford*, 2012 MT 156, ¶ 38.

⁸ *Narum v. Liberty Northwest Ins. Corp.*, 2009 MT 127, ¶ 28, 350 Mont. 252, 206 P.3d 964 (citing *Best v. State Comp. Ins. Fund*, 276 Mont. 302, 305, 916 P.2d 108, 110 (1996)). See also *Ford*, 2012 MT 156, ¶ 48 ("[A

the opinion of Dr. Vanichkachorn, his treating physician, who opined that Barnhart's industrial accident permanently aggravated his pre-existing neck condition. Barnhart points out that Dr. Vanichkachorn relied on objective medical findings, including Barnhart's MRI results, in assigning him an impairment rating of 2% for the permanent aggravation of his pre-existing cervical condition. In addition to Dr. Vanichkachorn's opinions, Griffin, Dr. Griffith, and Dr. Bishop all noted objective medical findings consistent with an injury shortly after November 3, 2011, including decreased cervical range of motion on examination and involuntary spasms. Furthermore, Barnhart's condition worsened after his industrial accident and has not returned to baseline. Barnhart credibly testified that, prior to the November 3, 2011, incident, he was able to perform his job duties as a bus driver successfully, and he is now restricted from returning to his time-of-injury position.

¶ 43 Although Liberty accepted liability for the industrial accident, initially relying upon Dr. Vanichkachorn's opinion that Barnhart suffered an aggravation to his pre-existing condition, Liberty now relies on Dr. Vallin's IME report and maintains that the aggravation, if any, caused by the November 3, 2011, industrial accident has resolved and that Barnhart's neck is in the same condition as it would have been if the industrial accident had not occurred. Liberty argues that this Court should rely on Dr. Vallin's opinion instead of Dr. Vanichkachorn's.

¶ 44 This Court gives Dr. Vanichkachorn's opinion greater weight. As a general rule, this Court gives a treating physician's opinion greater weight.⁹ In addition, Dr. Vanichkachorn was well-informed about Barnhart's medical history due to the extensive records review he conducted during his IME. Although at that time he could not determine whether the aggravation to Barnhart's pre-existing neck condition was permanent, Dr. Vanichkachorn found that Barnhart's symptoms were more probably than not related to his November 3, 2011, industrial injury. After Barnhart's shoulder problems were surgically corrected, Dr. Vanichkachorn opined that Barnhart's November 3, 2011, industrial accident caused a permanent aggravation of his pre-existing neck condition and assigned Barnhart a 2% impairment rating, in addition to Barnhart's previous impairment ratings, for the permanent aggravation. Dr. Vanichkachorn also continued the work restrictions he had placed on Barnhart.

¶ 45 In *Ford v. Sentry Casualty Co.*, this Court disagreed that the opinion of Ford's IME physician should outweigh his treating physician's opinion, explaining:

In determining whether the weight of conflicting medical opinions outweighs the opinion of a treating physician, this Court has considered such factors

causal connection between the claimant's physical condition and a work-related accident is an integral part of establishing a compensable 'injury' under [the statute].")

⁹ *Kloepfer v. Lumbermen's Mut. Cas. Co.*, 276 Mont. 495, 498, 916 P.2d 1310, 1312 (1996) (citations omitted) (As a general rule, treating physicians' opinions are entitled to greater weight, although the Workers' Compensation Court remains the finder of fact.)

as the relative credentials of the physicians, and the quality of evidence upon which the physicians based their respective opinions. In the present case, no evidence has been presented which gives [this Court] grounds to assign greater weight to the opinion of [the IME physician] than to that of [the treating physician].¹⁰

¶ 46 Similarly here, Liberty offers no reasons why Dr. Vallin's opinion should outweigh Dr. Vanichkachorn's. It has not argued in favor of Dr. Vallin's credentials over Dr. Vanichkachorn's, nor does it contend that Dr. Vallin had superior evidence at his disposal. In fact, Liberty obtained an IME from Dr. Vanichkachorn before he became Barnhart's treating physician, and it relied on Dr. Vanichkachorn's IME opinions in adjusting Barnhart's claim. Dr. Vallin's findings are largely consistent with the findings of Dr. Vanichkachorn and the other medical records in evidence. During his deposition, Dr. Vallin testified that every diagnosis he reviewed in Barnhart's medical records is consistent with the diagnoses he has made. However, Dr. Vallin disagrees with Dr. Vanichkachorn's causation opinions and maintains that Barnhart turning his head to the right was insufficient to aggravate his pre-existing neck condition. He further contends that since Barnhart usually experienced pain from turning his head from side to side, the November 3, 2011, incident could not have aggravated his pre-existing neck condition. This Court is unpersuaded by Dr. Vallin's contentions. As to the former, Dr. Vallin's description of the industrial accident as Barnhart simply turning his head to the side while kneeling, while not wholly inaccurate, downplays Barnhart's credible description of the incident which involved him pulling a latch while turning his head quickly to investigate why another passenger was yelling. As to the latter, this Court finds Dr. Vallin's reasoning flawed: it is akin to saying that if a worker with a bad back regularly experiences some pain from lifting heavy boxes, that worker could not aggravate his pre-existing back condition as the result of one particular lift. This Court finds Dr. Vallin's opinions less persuasive for these reasons. Therefore, this Court has no grounds to reject the general rule entitling the treating physician's opinion to greater weight.

¶ 47 Furthermore, this Court gives no weight to Dr. Bishop's "concurrence" with Dr. Vallin's findings. From the evidence presented, this Court does not know what Dr. Bishop meant when he signed the statement that he concurred with the "findings" of the report; i.e., did Dr. Bishop merely agree with Dr. Vallin's diagnoses or did he agree with Dr. Vallin's statement that Barnhart did not aggravate his underlying condition and that further treatment was unwarranted at that time? This Court concludes it is more likely that Dr. Bishop merely agreed with the diagnoses, as Dr. Bishop had treated Barnhart and recommended further injections a month before he reviewed Dr. Vallin's report. Dr. Bishop's signature does not inform this Court as to whether Dr. Vallin's IME report changed Dr. Bishop's mind about the injections, or if Dr. Bishop was merely agreeing with Dr. Vallin's medical findings — as Waller asked — and not necessarily the conclusions in the IME report.

¹⁰ *Ford*, 2011 MTWCC 19, ¶ 42 (citations omitted), *aff'd*, 2012 MT 156.

¶ 48 Relying on *Ford*,¹¹ Liberty also argues that Barnhart did not manifest any objective medical findings due to his industrial injury. However, unlike Ford, whose subjective complaints did not correlate well with the cervical pathology revealed on his MRI,¹² Barnhart's subjective complaints of increased pain and other symptoms are consistent with the objective medical findings. Dr. Vanichkachorn opined that Barnhart's subjective complaints were consistent with the objective medical findings and with the reported mechanism of injury. Although Dr. Vallin did not agree that the November 3, 2011, incident caused Barnhart's complaints, he also found Barnhart's subjective reports of pain consistent with his physical findings. Therefore, no issue exists here, as it did in *Ford*, regarding the correlation between Barnhart's subjective complaints and his objective medical findings.

¶ 49 The chain of events in Barnhart's case is similar to *Narum v. Liberty Northwest Ins. Corp.*¹³ Narum developed hip pain after falling out of a semi-truck.¹⁴ Although, unlike Barnhart, Narum had not had pain previously, like Barnhart, he had a pre-existing degenerative condition.¹⁵ As in the present case, Liberty accepted liability for Narum's condition and paid benefits.¹⁶ Liberty and Narum settled the claim while reserving Narum's medical benefits.¹⁷ However, Liberty ceased paying Narum's medical bills after it solicited a contrary medical opinion and determined that his need for additional treatment was due to a natural progression of his pre-existing condition.¹⁸ In reaching its decision in *Narum*, this Court concluded that the cause of Narum's condition was no longer at issue because Liberty had accepted liability for it.¹⁹ This Court ruled, "Respondent cannot accept liability for a claim, settle the claim, and then un-accept the claim at a later date because it has changed its mind about whether it should have accepted liability in the first place."²⁰ This Court determined that Liberty was liable for further medical benefits under the language of the settlement agreement.²¹

¶ 50 Similarly, Liberty accepted liability for Barnhart's claim, settled the indemnity portion of the claim, and now attempts to un-accept the claim because it has changed its mind due to a contrary medical opinion it solicited. Liberty argues that *Narum* is

¹¹ *Ford*, 2012 MT 156, ¶ 44.

¹² *Ford*, 2012 MT 156, ¶ 52.

¹³ 2008 MTWCC 30, *aff'd*, 2009 MT 127.

¹⁴ *Narum*, 2008 MTWCC 30, ¶ 9.

¹⁵ *Narum*, 2008 MTWCC 30, ¶¶ 10, 13.

¹⁶ *Narum*, 2008 MTWCC 30, ¶ 10.

¹⁷ *Narum*, 2008 MTWCC 30, ¶ 31.

¹⁸ *Narum*, 2008 MTWCC 30, ¶ 33.

¹⁹ *Narum*, 2008 MTWCC 30, ¶ 40.

²⁰ *Narum*, 2008 MTWCC 30, ¶ 42.

²¹ *Narum*, 2008 MTWCC 30, ¶ 43.

distinguishable since Barnhart was not asymptomatic prior to the November 3, 2011, industrial accident. However, the distinction is immaterial since a condition need not be symptomatic for it to be permanently aggravated. Furthermore, as in *Narum*, Liberty already accepted liability for the injury as a permanent aggravation, and Barnhart's medical benefits were reserved under the language of the settlement agreement. This Court's ruling in *Narum* applies here.

¶ 51 On appeal, the Montana Supreme Court affirmed *Narum* on other grounds which also apply here. The court held that although this Court had based its determination primarily upon the terms of the settlement, ample evidence existed for Narum to meet his burden of proving that his industrial accident permanently aggravated his pre-existing condition.²² The evidence in this case is also more than sufficient for Barnhart to meet his burden of proof.

¶ 52 This Court also disagrees with Liberty's argument that this case is analogous with *Gary v. Montana State Fund*, in which this Court held that a claimant's disk herniation was not an aggravation of a pre-existing back condition in spite of his treating physician's opinion that it was.²³ This Court finds *Gary* distinguishable: in *Gary*, the treating physician provided no explanation as to how Gary's disk herniation at L4-5 could be an aggravation of an injury to a different disk five years earlier and this Court therefore did not rely on his opinion.²⁴ In the present case, far less time passed between Barnhart's industrial accident and Dr. Vanichkachorn's causation opinion, and the aggravation occurred in the same cervical disks in which Barnhart had suffered earlier injuries. Therefore, the facts which led to this Court's conclusion in *Gary* are dissimilar from the present case.

¶ 53 Here, this Court has weighed Barnhart's medical evidence and found it sufficient to prove that the subject industrial accident permanently aggravated his pre-existing condition.²⁵ Barnhart has met his burden of proving, via medical evidence and his own credible testimony, that he suffered a permanent aggravation to his pre-existing neck condition.

Issue Two: Is Respondent relieved of liability for Petitioner's ongoing medical care because it is palliative or maintenance care under § 39-71-704(1)(g), MCA?

¶ 54 Section 39-71-704(1), MCA, provides, in relevant part:

(a) After the happening of a compensable injury or occupational disease and subject to other provisions of this chapter, the insurer shall

²² *Narum*, 2009 MT 127, ¶ 31.

²³ 2012 MTWCC 38.

²⁴ *Gary*, ¶¶ 36, 37.

²⁵ See also *Healy*, ¶ 49.

furnish reasonable primary medical services, including prescription drugs for conditions that are a direct result of the compensable injury or occupational disease, for those periods specified in this section.

. . . .
(g) Notwithstanding subsection (1)(a), the insurer may not be required to furnish, after the worker has achieved medical stability, palliative or maintenance care²⁶

¶ 55 Section 39-71-116(20), MCA, defines “maintenance care” as “treatment designed to provide the optimum state of health while minimizing recurrence of the clinical status.” Section 39-71-116(25), MCA, defines “palliative care” as “treatment designed to reduce or ease symptoms without curing the underlying cause of the symptoms.”

¶ 56 While considering the meaning of the provision relieving insurers from liability for palliative or maintenance care, in *Hiett v Missoula County Public Schools*,²⁷ the Montana Supreme Court held:

“Achieving” a level of tolerable pain . . . is not such a discrete “end.” Rather, it is an ongoing process. Temporary freedom from pain is meaningless if eight hours later intolerable pain and depression have returned. Reaching a level of tolerable physical and mental health after a chronic injury can be “achieved” only when it can be sustained.

. . . [Palliative or maintenance care] come into play only *after* one has “achieved” medical stability as we interpret the phrase here. . . .

[A] claimant is entitled to such “primary medical services” as are necessary to permit him or her to *sustain* medical stability.²⁸

¶ 57 Barnhart maintains that the issues before this Court concern Liberty’s general denial of additional liability for his industrial injury. Barnhart asks this Court for a ruling that Liberty remains liable for primary medical services under § 39-71-704, MCA, and *Hiett*.

¶ 58 Liberty contends that the issue is narrower; it asks this Court to determine whether it is liable for Dr. Bishop’s September 4, 2013, request for authorization for injections, and whether it may be liable for neck surgery in the future. Liberty argues that it should not be held liable for Barnhart’s treatment which has been both ongoing and ineffective and that future medical services would be palliative or maintenance care.

²⁶ Subsections 39-71-704(1)(g)(i)-(iii), MCA, provide for exceptions not applicable here.

²⁷ 2003 MT 213, 317 Mont. 95, 75 P.3d 341.

²⁸ *Hiett*, ¶¶ 33-35 (emphasis in original).

¶ 59 This Court agrees with Barnhart that the issue is broadly whether he is entitled to additional medical benefits under § 39-71-704, MCA. Given the passage of time between Dr. Bishop's request for authorization and this trial, Barnhart's condition may have changed and his medical providers may recommend different diagnostic testing and treatment. This is not to say that Liberty is liable for any and all treatments. As this Court stated in *Koch v. Employers Ins. Group*, liability is not a blank check written out to the medical providers.²⁹ If Liberty has legitimate grounds to argue that a particular treatment recommended by Barnhart's physicians is maintenance or palliative care, it can deny authorization. This Court cannot give an advisory opinion, particularly when it does not know what treatments Barnhart's physicians will recommend. However, Liberty is liable for primary medical services under § 39-71-704, MCA.

JUDGMENT

¶ 60 Petitioner's industrial accident permanently aggravated his pre-existing neck condition.

¶ 61 Respondent is not relieved of liability for Petitioner's ongoing medical care because it is not palliative or maintenance care under § 39-71-704(1)(g), MCA.

¶ 62 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 this 13th day of September, 2016.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: Garry D. Seaman
Michael P. Heringer

Submitted: September 4, 2015

²⁹ 2014 MTWCC 14, ¶ 39.