

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2013 MTWCC 22

WCC No. 2010-2620

TED BENSON

Petitioner

vs.

UNINSURED EMPLOYERS' FUND

Respondent/Third-Party Petitioner

vs.

McCORMICK SUNSET GUEST RANCH, LLC

Employer/Third-Party Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Petitioner claims a bite from a tick carrying Rocky Mountain spotted fever infected him with the disease while employed as a hunting guide. Employer and Respondent dispute the claim on the basis that Petitioner did not contract the disease and that if he did, he cannot prove that he became infected while at work.

Held: Petitioner has failed to prove by a preponderance of the evidence that he is entitled to the benefits he seeks.

Topics:

Causation: Medical Condition. Petitioner failed to meet his burden in proving he contracted Rocky Mountain spotted fever (RMSF) through his work as a hunting guide in November 2009. Although one physician who had never treated RMSF diagnosed him with the condition due to the presence of one of the disease's antibodies, a specialist who had treated patients with RMSF testified it was more probable than not that Petitioner did not have the disease because: RMSF usually occurs in the spring and early summer; Petitioner did not exhibit the typical symptoms of the

disease; and the RMSF antibody found in Petitioner can remain for years and likely represented an old infection. Because Petitioner later developed reactive arthritis which is not known to be caused by RMSF but which is caused by prostatitis, it is just as likely, if not more likely, that Petitioner was suffering from prostatitis, the condition with which he was initially diagnosed.

Medical Conditions: Rocky Mountain spotted fever. Petitioner failed to meet his burden in proving he contracted Rocky Mountain spotted fever (RMSF) through his work as a hunting guide in November 2009. Although one physician who had never treated RMSF diagnosed him with the condition due to the presence of one of the disease's antibodies, a specialist who had treated patients with RMSF testified it was more probable than not that Petitioner did not have the disease because: RMSF usually occurs in the spring and early summer; Petitioner did not exhibit the typical symptoms of the disease; and the RMSF antibody found in Petitioner can remain for years and likely represented an old infection. Because Petitioner later developed reactive arthritis which is not known to be caused by RMSF but which is caused by prostatitis, it is just as likely, if not more likely, that Petitioner was suffering from prostatitis, the condition with which he was initially diagnosed.

¶ 1 The trial in this matter was held on April 18, 2012, at 8:30 a.m. in the Workers' Compensation Court in Helena, Montana. Petitioner Ted Benson was present and represented by John T. Johnston. Respondent Uninsured Employers' Fund (UEF) was represented by Leanora O. Coles. Bernadette Rice was also present for the UEF. Employer McCormick Sunset Guest Ranch, LLC (McCormick) was represented by Douglas G. Skjelset.

¶ 2 Exhibits: I admitted Exhibits 1 through 8, 11, 16 through 18, 20, and 24 without objection. I overruled all relevancy objections and admitted Exhibits 15 and 19 pursuant to this ruling. I sustained the UEF's foundation objection and did not admit Exhibit 9; however, the exhibit shall be retained in the exhibit book and will be considered for demonstrative purposes only. McCormick withdrew its foundation objection and I admitted Exhibit 10.

¶ 3 I sustained Benson's hearsay objection and did not admit Exhibit 12 as to the first-party claim. I admitted Exhibit 12 as to the third-party claim between the UEF and McCormick. Benson's objection that Exhibit 12 was not disclosed in the exchange of exhibits was deemed moot. I sustained Benson's hearsay objections and did not admit Exhibits 13, 25, 27, and 29; the objections that the exhibits were not disclosed in the exchange of exhibits were deemed moot.

¶ 4 I overruled Benson's objection that the exhibit was not disclosed in the exchange of exhibits and admitted Exhibit 14.

¶ 5 McCormick withdrew Exhibits 26 and 28, and the exhibits were not admitted.

¶ 6 As a result of the following stipulation, Benson withdrew his objections that the exhibits were not disclosed in the exchange of exhibits and I admitted Exhibits 21, 22, and 23.

¶ 7 Stipulations: Counsel stipulated that Benson would not pursue a claim for benefits for reactive arthritis as a resulting complication of his claim of contracting Rocky Mountain spotted fever (RMSF).

¶ 8 Witnesses and Depositions: The parties agreed that the depositions of Benson, Fredrick J. Bartoletti, M.D., Claude Tonnerre, M.D., and Leslie F. Whitney, M.D., can be considered part of the record. Benson, Bernadette Rice, John Beckman, Jodi Feltz, and Lori McCormick were sworn and testified. Benson was recalled to testify on rebuttal.

¶ 9 Issues Presented: The Pretrial Order sets forth the following issues:¹

Issue One: Whether on or about November 17, 2009, or November 19, 2009, Petitioner sustained an accident resulting in an injury as defined by § 39-71-119, MCA (2009) during the course and scope of employment as defined by § 39-71-407, MCA (2009).

Issue Two: Whether Petitioner is entitled to benefits under the Workers' Compensation Act as a result of an industrial injury.

Issue Three: Whether Third-Party Respondent, McCormick Sunset Guest Ranch, LLC, is obligated to indemnify the UEF for all benefits paid or payable by the UEF to Petitioner pursuant to § 39-71-504, MCA (2009) and § 39-71-541, MCA (2009).

FINDINGS OF FACT

¶ 10 On or around December 15, 2009, Benson filed a First Report of Injury, alleging he sustained an injury on or about November 17, 2009, while employed with McCormick in Helmville, Powell County, Montana.²

¹ Pretrial Order at 4, Docket Item No. 59.

² Uncontested Facts, Final Pretrial Order.

¶ 11 At the time of Benson's alleged injury, McCormick was not enrolled under Montana Compensation Plan No. 1, No. 2, or No. 3.³

¶ 12 On or around December 29, 2009, the UEF put McCormick on notice of Benson's claim for benefits and its potential liability for all medical and compensation benefits if Benson's claim was found compensable.⁴

¶ 13 At the time of Benson's alleged injury, McCormick was an "uninsured employer" within the meaning of § 39-71-501, MCA.⁵

¶ 14 On January 26, 2010, the UEF denied Benson's claim for benefits.⁶

¶ 15 McCormick employed Benson as a hunting guide from September 15, 2009, through November 24, 2009, during which time Benson worked 44 days. McCormick paid Benson a flat rate of \$75.00 for each day he worked. From October 29 through November 10, 2009, Benson worked 13 consecutive days. From November 15 through November 24, 2009, Benson worked 10 consecutive days.⁷

¶ 16 On November 17, 2009, while in the course and scope of his employment with McCormick, Benson handled an elk and a deer that had been shot by one of McCormick's customers.⁸

¶ 17 On November 19, 2009, while in the course and scope of his employment with McCormick, Benson handled a deer that had been shot by one of McCormick's customers.⁹

¶ 18 Benson handled an elk on November 10 and again on November 11, 2009 outside the course and scope of his employment with McCormick.¹⁰

¶ 19 Ted Benson testified at trial. I found Benson to be a credible witness. Benson stated that he was born and raised in the Phillipsburg area where he attended grade

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

school, then was homeschooled until grade 8 or 9. After that, Benson went to work with his father, logging in the woods.¹¹

¶ 20 Benson was raised as a hunter, and he testified that most of his family's meat came from hunting. In the fall of 2009, Benson was hired by McCormick to guide hunters on the guest ranch and surrounding lands and to help retrieve game animals. He also performed other work around the ranch, repairing cattle guards and splitting firewood.¹²

¶ 21 On a typical day at McCormick's ranch, Benson woke before daylight and ate breakfast at the McCormick's house. After leading hunters out in the morning following breakfast, Benson would return to the ranch house around noon to eat lunch. Benson would then leave again around 2:00 p.m. for the evening hunt.¹³

¶ 22 Benson testified that he used the sanitary gloves provided by McCormick on occasion when gutting and skinning game animals on the ranch. Benson further testified, however, that he did not believe he was required to use them and he did not use them every time he worked on an animal.¹⁴

¶ 23 On the last day of the last hunt on November 24, 2009, Benson testified that he began to feel ill. He was nauseous after dinner, and he felt lightheaded and weak. On the drive home from McCormick's ranch, Benson stated that he began to sweat heavily, and upon arriving home he developed a high fever with vomiting and diarrhea. Benson also described an aching all over his body, with the pain mostly centered in his low back, above his belt.¹⁵

¶ 24 The following day, Benson went to the Granite County Medical Center (GCMC). The medical records of the GCMC reflect that Benson presented with severe low-back pain, extremely tender testicles, moderate blood in his urine, a temperature of 102.2 degrees, and his prostate was "quite large, warm, and extremely painful to palpation." Benson was diagnosed with acute prostatitis and was administered the antibiotic Cipro intravenously. He was also given an oral Cipro prescription and told to return the next day.¹⁶

¹¹ Trial Test.

¹² Trial Test.

¹³ Trial Test.

¹⁴ Trial Test.

¹⁵ Trial Test.

¹⁶ Ex. 1 at 3.

¶ 25 Benson returned to the GCMC two days later on November 27, 2009, complaining of nausea, vomiting, diarrhea, and low grade fever. He was also complaining of wide spread itching, without a rash. Benson was again diagnosed with acute prostatitis, and told to follow-up the next day either with GCMC or to consider transferring his care to another facility for further evaluation.¹⁷

¶ 26 Benson next presented at the Missoula Community Medical Center (MCMC) on November 28, 2009. His chief complaint was abdominal pain and he had a urticarial-type rash on his torso.¹⁸ During Benson's stay at the MCMC, he had an infectious disease consultation with Leslie F. Whitney, M.D.¹⁹

¶ 27 Dr. Whitney testified by deposition. Dr. Whitney testified that he was consulted due to Benson's fever and enlarged lymph nodes.²⁰ It was believed by some of the physicians who had seen Benson that Benson might be suffering from a zoonotic illness caused by an animal or insect from his work as an outfitter.²¹ Dr. Whitney prescribed doxycycline as a precaution, since the drug, a tetracycline, was known to be an effective agent against many zoonotic illnesses.²²

¶ 28 Benson did not have a rash by the time Dr. Whitney saw him on December 1, 2009.²³ Dr. Whitney suspected that the rash Benson had when he first arrived at the MCMC could have been a reaction to Cipro.²⁴

¶ 29 Dr. Whitney had no firm diagnosis for Benson's condition. However, Benson showed signs of a connective tissue disease, such as a rheumatoid condition, and it would have been Dr. Whitney's practice to refer someone with those symptoms to a rheumatologist.²⁵ He believed that there was minimal danger that Benson was suffering an infectious process at the time of his discharge.²⁶ Dr. Whitney opined that if they had

¹⁷ Ex. 1 at 8-9.

¹⁸ Ex. 2 at 1-2.

¹⁹ Ex. 2 at 9-11.

²⁰ Whitney Dep. 25:12-21.

²¹ Ex. 2 at 9; Whitney Dep. 26:6-24.

²² Whitney Dep. 27:11 - 28:7.

²³ Whitney Dep. 39:17-22.

²⁴ Whitney Dep. 28:20 - 29:17.

²⁵ Whitney Dep. 43:24 - 44:15; 45:20-25.

²⁶ Whitney Dep. 45:4-7.

discontinued the drugs Benson was taking, such as Ceftriaxone, an antibiotic,²⁷ and the doxycycline, it would have done Benson no harm.²⁸

¶ 30 Dr. Whitney did his fellowship in infectious diseases and has been a board certified physician in both internal medicine and infectious disease, although he allowed his certifications to expire.²⁹ His *curriculum vitae* shows that he has a clinical practice in infectious diseases, and has been Chairman of the MCMC's Infection Control Committee since 2002.³⁰ Dr. Whitney testified that he has treated three to four patients in Montana for RMSF, the last being four to five years ago. Dr. Whitney has also treated patients for RMSF on the East Coast, which has a higher incidence of RMSF than Montana.³¹

¶ 31 When Dr. Whitney first saw Benson, RMSF was likely brought to the top of the potential diagnostic lists by the concerns of other physicians.³² However, Dr. Whitney testified that he did not reference RMSF in his consultation report, since he believed it was no longer a concern after he evaluated Benson and reviewed Benson's lab results.³³

¶ 32 Benson was discharged from MCMC on December 3, 2009.³⁴ Benson testified that he felt well enough to go to work with his uncle in the woods, running a chainsaw. However, by the second day he felt ill again, nauseous and weak and his heart was racing.³⁵

¶ 33 On December 6, 2009, Benson presented himself to the emergency room at Anaconda Community Hospital (ACH), complaining of feeling "rundown." He also had a rash on his back and the skin was peeling off his palms and the soles of his feet.³⁶

¶ 34 Benson was treated at the ACH emergency room by Frederick J. Bartoletti, M.D. Dr. Bartoletti has worked in the emergency room at the ACH since completing his residency in 2007.³⁷ He is board certified in emergency medicine.³⁸

²⁷ Whitney Dep. 30:10-21.

²⁸ Whitney Dep. 55:14-25.

²⁹ Whitney Dep. 8:9-15; 66:17 - 67:3.

³⁰ Whitney Dep. Ex. 4 at 1, 3.

³¹ Whitney Dep. 16:11 – 17:11.

³² Whitney Dep. 54:19 - 55:10.

³³ Whitney Dep. 60:11-23.

³⁴ Ex. 2 at 13.

³⁵ Trial Test.

³⁶ Trial Test.; Ex. 3 at 9, 10.

¶ 35 Dr. Bartoletti testified by deposition. He recalled treating Benson in the emergency room because of the peculiar nature of Benson's illness, Benson's recent hospitalization in Missoula, his unusual rash, and the peeling of the skin on Benson's palms and the soles of his feet.³⁹ Dr. Bartoletti requested Benson's medical records from MCMC and they were faxed to him.⁴⁰

¶ 36 After reviewing the Missoula records and seeing what tests had been ordered, Dr. Bartoletti testified that he began suspecting that Benson might be suffering from RMSF.⁴¹ Dr. Bartoletti contacted an infectious disease physician at St. Patrick's Hospital in Missoula by phone and discussed doing a blood test for RMSF.⁴² Dr. Bartoletti then had blood drawn from Benson and sent it to Salt Lake City to be tested for RMSF.⁴³

¶ 37 The blood test ordered by Dr. Bartoletti came back with a low positive result for one of the RMSF antibodies. Dr. Bartoletti then concluded that, with the test results and Benson's symptoms, Benson was probably suffering from RMSF.⁴⁴

¶ 38 In his deposition, Dr. Bartoletti explained the basis for his opinion. He testified that he suspected Benson had RMSF because RMSF is difficult to diagnose, it mimics many infectious or other disease processes, and because he saw no other definitive explanation for Benson's illness.⁴⁵

¶ 39 Dr. Bartoletti admitted he has never seen a case of RMSF except, "potentially," Benson.⁴⁶ He also agreed that the time of year when Benson presented his symptoms was a contraindication for RMSF, as "the season was very peculiar", and RMSF is "most commonly seen throughout the spring and summer months."⁴⁷

³⁷ Bartoletti Dep. 9:9 - 10:1.

³⁸ Bartoletti Dep. 63:7-12.

³⁹ Bartoletti Dep. 19:9-20; 21:17 - 22:2; 24:10-14.

⁴⁰ Bartoletti Dep. 24:23 - 25:17.

⁴¹ Bartoletti Dep. 25:20 - 27:4.

⁴² Bartoletti Dep. 27:5-18.

⁴³ Bartoletti Dep. 27:24 - 28:10.

⁴⁴ Bartoletti Dep. 29:7-21; 30:4-10; 33:13 - 34:1.

⁴⁵ Bartoletti Dep. 34:4-19.

⁴⁶ Bartoletti Dep. 38:17-20; 60:8-12.

⁴⁷ Bartoletti Dep. 39:17 - 40:5.

¶ 40 Dr. Bartoletti testified that the only time he interacted with Benson for his symptoms was in the emergency room on December 6, 2009.⁴⁸

¶ 41 Dr. Bartoletti agreed that the doxycycline prescribed by Dr. Whitney can also be used to treat prostatitis.⁴⁹ Dr. Bartoletti also agreed that the presence of the RMSF antibody is common in people who had been exposed to the disease in the past, even if they are not in an acute stage of infection. Dr. Bartoletti testified that the IgG antibody stays in the system a long time, but the IgM antibody does not. Benson's test came back low positive for the IgG antibody and negative for the IgM, "suggestive of current or past infection."⁵⁰

¶ 42 Dr. Bartoletti did not know if RMSF could cause reactive arthritis, but he knew that prostatitis could cause the condition.⁵¹ After reviewing the records from the GCMC where the diagnosis of prostatitis was made, Dr. Bartoletti testified that he had seen a lot of cases of prostatitis, but he had never seen one that caused a patient to be as ill as Benson.⁵²

¶ 43 Dr. Bartoletti testified that there was no way to tell on what day Benson became infected with RMSF. The best he could estimate was that Benson's symptoms would have developed between 2 and 14 days after being infected by the disease-bearing tick.⁵³

¶ 44 Benson followed up for his medical treatment with John E. Moore, M.D., on December 7, 2009, still complaining of weakness.⁵⁴ On December 15, 2009, Benson again saw Dr. Moore, complaining of body aches, back pain, joint aches and pains, and fatigue.⁵⁵ On December 31, 2009, Dr. Moore prescribed continuing doxycycline treatment for a total of six weeks because Benson was still in pain.⁵⁶

¶ 45 On February 2, 2010, Dr. Moore wrote on a prescription tablet that Benson "was bitten on or around 11/17/09 – he is left with residual rheumatoid arthritis."⁵⁷ Dr. Moore's

⁴⁸ Bartoletti Dep. 43:20-25; 46:19-21; 61:19-25.

⁴⁹ Bartoletti Dep. 44:11-18.

⁵⁰ Bartoletti Dep. 45:6-16; 47:12 - 48-15; Ex. 3 at 11.

⁵¹ Bartoletti Dep. 51:17 - 52:4.

⁵² Bartoletti Dep. 53:23 - 54:10.

⁵³ Bartoletti Dep. 50:22 - 51:3.

⁵⁴ Ex. 4 at 1.

⁵⁵ Ex. 4 at 2.

⁵⁶ Ex. 4 at 3.

⁵⁷ Ex. 17 at 1.

chart notes of that date state simply that Benson came to the doctor's office needing paperwork filled out because he "wants to go to work."⁵⁸ Dr. Moore was never deposed; therefore, the record contains no explanation for the opinion he expressed in the February 2, 2010, prescription note.

¶ 46 On August 23, 2011, Benson again presented himself to MCMC, complaining of fever, and joint and body aches.⁵⁹

¶ 47 On August 24, 2011, Rebecca L. Danforth, M.D., performed a rheumatology consultation at MCMC. Dr. Danforth reviewed the serologic studies conducted on Benson from his prior hospitalization at MCMC in the fall of 2009, and noted "no serologic evidence for an infectious etiology."⁶⁰ Dr. Danforth concluded that Benson's condition was most suggestive of reactive arthritis consistent with his sacroiliac pain. Dr. Danforth also wrote that RMSF is not a commonly known cause of reactive arthritis, but that Benson had "a potential prostatitis with the initial event, which may have been the inciting event for reactive arthritis."⁶¹

¶ 48 Benson testified that he thought he was having a resurgence or relapse of RMSF in August of 2011 when he was seen again at MCMC, because he was suffering from the same symptoms he had in the fall of 2009.⁶²

¶ 49 Claude Tonnerre, M.D., is a board certified physician in internal medicine and infectious disease.⁶³ McCormick's attorney asked Dr. Tonnerre to review Benson's medical records.⁶⁴ Dr. Tonnerre testified by deposition following his records review. He has never met Benson and has never treated Benson.⁶⁵

¶ 50 Dr. Tonnerre has been a hospitalist at St. Patrick's Hospital in Missoula since 2007⁶⁶ and has treated patients in Montana for RMSF in the past. Dr. Tonnerre sees

⁵⁸ Ex. 4 at 5.

⁵⁹ Ex. 18 at 14, 15, and 16.

⁶⁰ Ex. 18 at 18.

⁶¹ Ex. 18 at 19.

⁶² Benson Dep. 43:22 - 45:8.

⁶³ Tonnerre Dep. 8:2-11.

⁶⁴ Tonnerre Dep. 12:17-20.

⁶⁵ Tonnerre Dep. 71:1-5.

⁶⁶ Tonnerre Dep. Ex. A at 1.

perhaps half a dozen suspicious RMSF cases each year, but on average, only one or two are ultimately diagnosed as RMSF.⁶⁷

¶ 51 In reviewing Benson's admission records for MCMC on November 28, 2009, Dr. Tonnerre opined that the form of rash that Benson had at the time is more indicative of a possible reaction to Cipro prescribed for Benson at the GCMC rather than suggestive of RMSF.⁶⁸

¶ 52 Dr. Tonnerre stated that some of the things he looks for in a suspicious case of RMSF is outdoor exposure and the time of year, as ticks are more active in late spring and early summer, possibly as late as September.⁶⁹

¶ 53 Dr. Tonnerre testified that, on reviewing Dr. Whitney's infectious consult, the fact that Benson's platelet count was normal leads away from a finding of RMSF, since someone with the disease would typically have a low platelet count.⁷⁰ Dr. Tonnerre testified that the same was true of the normal platelet test results done when Benson presented himself to the Anaconda emergency room on December 6, 2009.⁷¹

¶ 54 In reviewing the MCMC discharge summary of December 3, 2009, Dr. Tonnerre opined that even though the attending physicians were uncertain of the etiology of Benson's condition, the fact that Benson was being prescribed prednisone suggested to Dr. Tonnerre that they were treating a rheumatologic condition.⁷²

¶ 55 Dr. Tonnerre reviewed the low positive result on the RMSF test ordered by Dr. Bartoletti in Anaconda in December 2009 and explained that if someone had an acute case of RMSF, the body forms two antibodies to fight the disease: IgM and IgG. The body makes the IgM antibody first, which can last for months, then later, IgG, which can remain in the body for years. Dr. Tonnerre testified that he would expect to see evidence of the IgM antibody in an acute case of RMSF, either alone or together with the IgG antibody. If only the IgG is present, as it was in Benson's case, Dr. Tonnerre opined that the test result most probably represented an old infection.⁷³

⁶⁷ Tonnerre Dep. 9:19 - 10:3.

⁶⁸ Tonnerre Dep. 20:24 - 21:18.

⁶⁹ Tonnerre Dep. 10:13 - 11:4; 54:15-23.

⁷⁰ Tonnerre Dep. 22:1 - 25:7; 26:13-24; 61:1-11.

⁷¹ Tonnerre Dep. 38:18 - 41:6.

⁷² Tonnerre Dep. 25:15 - 26:7; Ex. 2 at 13.

⁷³ Tonnerre Dep. 35:2 - 38-17; 67:3 - 68:8; Tonnerre Dep. Ex. B.

¶ 56 According to Dr. Tonnerre, RMSF is a disease that does not go into remission, like malaria.⁷⁴ Dr. Tonnerre testified: “[Y]ou get it, it’s gone. . . . [I]t’s not a [disease] that persists and comes back and relapses. You have it, treat it, it’s gone.”⁷⁵

¶ 57 In reviewing Dr. Danforth’s rheumatologic consultation of August 24, 2011⁷⁶ when Benson was hospitalized again at MCMC, Dr. Tonnerre agreed with Dr. Danforth’s assessment that RMSF is not a commonly known cause of reactive arthritis.⁷⁷

¶ 58 Based upon his review of Benson’s medical records, Dr. Tonnerre testified that, on a more probable than not basis, Benson was not suffering from RMSF in the fall of 2009.⁷⁸ One of the reasons for Dr. Tonnerre’s opinion was that, in the medical records from the GCMC during Benson’s early treatment for his condition,⁷⁹ Benson had no complaints of headaches. In Dr. Tonnerre’s experience, in more than 90 percent of the RMSF cases he has seen, an early symptom of the disease is headaches.⁸⁰ Also, Dr. Tonnerre testified, the form of rash Benson had upon admission to MCMC was not typical of an RMSF rash; nor was it typical that an RMSF rash would clear up as quickly as it did in this case, as the medical records reflected that by the time Benson was seen by Dr. Whitney several days after admission, the rash was gone.⁸¹

¶ 59 According to Dr. Tonnerre, a tick bite is often not discernible because the ticks are usually the size of the head of a pin, and 90 percent of individuals bitten by a tick will not remember having a tick bite.⁸²

¶ 60 Dr. Tonnerre further opined that if Benson had contracted RMSF, there was no way to know on which day he was bitten by an infected tick.⁸³

¶ 61 John Beckman testified at trial. I found Beckman to be a credible witness. He has lived on the McCormick ranch approximately 8 to 10 years, fixing equipment,

⁷⁴ Tonnerre Dep. 42:16 - 43:7.

⁷⁵ Tonnerre Dep. 43:8-13.

⁷⁶ Ex. 18 at 17-20.

⁷⁷ Tonnerre Dep. 45:1-24; 51:5-14.

⁷⁸ Tonnerre Dep. 49:5-10.

⁷⁹ Ex. 1.

⁸⁰ Tonnerre Dep. 56:18 - 57:17.

⁸¹ Tonnerre Dep. 58:7 - 60:12; 62:24 - 63:6.

⁸² Tonnerre Dep. 47:15 - 48:10.

⁸³ Tonnerre Dep. 49:16-24; 69:12-19.

assisting with the cattle and performing other general chores. He is married to Lori McCormick.⁸⁴

¶ 62 Beckman testified that the McCormick ranch consists mostly of flood plain, and the ranch flood irrigates its crops. Beckman has hunted deer and elk on the property, which consists of around 1600 acres. Beckman has never encountered a tick on the ranch.⁸⁵

¶ 63 Beckman stated that all ranch employees are required to use gloves when gutting and skinning animals. The employees wear a long plastic under-glove that extends up to the shoulder, and a surgical, wrist-length latex glove over the top of the longer glove. The employees wear gloves on each arm and hand for sanitary purposes, and so that the customers will be assured their game meat is being handled in a sanitary manner.⁸⁶

¶ 64 Beckman testified that from the first day he met Benson, he noticed that Benson sweated profusely and, in Beckman's opinion, always looked under the weather. However, Benson did not appear ill to Beckman when Benson stopped by Beckman's house after the last day of hunting to say goodbye and to thank Beckman and his wife for letting him guide on the ranch.⁸⁷

¶ 65 Jodi Feltz testified at trial. I found Feltz to be a credible witness. She lives at the McCormick ranch and has been a cook there for the past four years. She worked there during the 2009 hunting season while Benson guided at the ranch. In addition to cooking and cleaning up after meals, Feltz did general chores around the ranch.⁸⁸

¶ 66 Feltz testified that Benson complained often about stomach problems bothering him during the fall of 2009, but that it never seemed to affect his appetite. Benson did not appear ill to her on the last day of the last hunt on November 24, 2009.⁸⁹

¶ 67 Lori McCormick testified at trial. I found Lori to be a credible witness. Lori keeps the records for both the ranch and the outfitting business, and is the ranch foreman.⁹⁰

⁸⁴ Trial Test.

⁸⁵ Trial Test.

⁸⁶ Trial Test.

⁸⁷ Trial Test.

⁸⁸ Trial Test.

⁸⁹ Trial Test.

⁹⁰ Trial Test.

¶ 68 Lori testified that she is a licensed guide, and had guided hunters on the ranch earlier in 2009 but had eased off of guiding due to tendinitis in her knees. Lori testified that when Benson came back from his three days off to guide the last ten-day hunt, he told her that he was feeling nauseous and ill. Because Lori had already released her lead guide to do other jobs, she was concerned that she was going to have to take the hunters out for the last ten days.⁹¹

¶ 69 As the hunters were just arriving, Lori decided to let Benson see if his condition improved. According to Lori, Benson appeared pale and did not seem eager to go to work, so she relied on Feltz's son, Jesse, who was staying at the ranch, to pitch in and help out for the next couple of days.⁹²

¶ 70 Lori stated that during the last hunt they did all of their hunting on the ranch as the elk were there and the deer were starting to rut. The hunters were able to get an elk and a deer early in the hunt.⁹³

¶ 71 According to Lori, everyone who works on the ranch is required to wear the gloves the ranch provides in order to keep the meat sanitary and the guides' clothes clean. Lori explained that the hunting customers are always watching their animals get skinned and cleaned, and because her ranch is in an archery-only hunting area, it was important to keep the smell down on the guides and their clothes clean as they have to take hunters out the next morning.⁹⁴

¶ 72 Lori testified that she never saw Benson work on an animal without wearing gloves. If she saw anyone working on an animal without gloves, Lori would bring him a pair and require that the gloves be worn. Lori stated that on the last day of the last hunt, Benson appeared better than he did on the first day, but he was still complaining that his stomach hurt.⁹⁵

¶ 73 Lori testified that she had two telephone conversations with Benson's mother after the end of the hunting season. In the first call, Benson's mother told Lori that her son was hospitalized and the doctors were testing him for cancer. Lori testified that Benson's mother advised her that because Benson got cut while working on a deer the last night he was at McCormick's and got sick on the way home, Benson was considering filing a workers' compensation claim. Lori stated that she was unaware that

⁹¹ Trial Test.

⁹² Trial Test.

⁹³ Trial Test.

⁹⁴ Trial Test.

⁹⁵ Trial Test.

Benson had sustained a cut on his last night at the ranch. Lori testified that in her second phone call with Benson's mother, Benson's mother asserted that Benson had contracted RMSF as a result of working on a deer that last night.⁹⁶

CONCLUSIONS OF LAW

¶ 74 This case is governed by the 2009 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Benson's alleged injury.⁹⁷

ISSUE ONE: Whether on or about November 17, 2009, or November 19, 2009, Petitioner sustained an "accident" resulting in an injury as defined by § 39-71-119, MCA (2009) during the course and scope of employment as defined by § 39-71-407, MCA (2009).

¶ 75 The injured worker bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.⁹⁸

¶ 76 "Causation is an essential element to benefit entitlement. The claimant has the burden to prove a causal connection by a preponderance of the evidence."⁹⁹

¶ 77 Under § 39-71-407(2)(a)(i), MCA, an insurer is liable for an injury if the injury is established by objective medical findings, and if the injured worker establishes that it is more probable than not that the claimed injury occurred.

¶ 78 Reviewing the evidence in its entirety, I cannot conclude that it is more probable than not that Benson contracted RMSF in the course and scope of his employment with McCormick.

¶ 79 The only objective medical finding which supports Benson's theory of contracting RMSF while working for McCormick is the low positive blood test result for the presence of IgG, one of the two antibodies formed to combat the disease. Dr. Bartoletti testified that this finding supported a conclusion that Benson was suffering from RMSF in the fall of 2009.

⁹⁶ Trial Test.

⁹⁷ *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

⁹⁸ *Ricks v. Teslow Consol*, 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wicken Bros. Constr. Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

⁹⁹ *Hash v. Montana Silversmith*, 256 Mont. 252, 257, 846 P. 2d 981, 983 (1993).

¶ 80 Benson treated with Dr. Bartoletti on one occasion. Dr. Bartoletti testified that he has never seen nor treated a case of RMSF before or since seeing Benson. Although I certainly understand Dr. Bartoletti's suspicion that the presence of the IgG antibody indicated that Benson was exposed to RMSF, in determining whether he contracted the disease while employed by McCormick, I must consider Dr. Tonnerre's unrefuted testimony that the IgG antibody can remain in an infected individual's system for years after infection. Dr. Tonnerre further explained that in cases of a more recent RMSF infection, he would expect to see the presence of the IgM antibody, which remains in the system for months. Benson tested negative for the IgM antibody.

¶ 81 Both Dr. Whitney and Dr. Tonnerre have treated patients with RMSF in the course of their medical practice, and neither believed Benson was suffering from the disease. Dr. Whitney, who performed an infectious disease consultation with Benson at MCMC, recognized that RMSF may have been a concern of the physicians who treated Benson upon his admission. However, after examining Benson and reviewing the lab records available to him, he discounted RMSF as a concern.

¶ 82 Dr. Tonnerre testified that in light of the time of year Benson alleged he contracted RMSF, Benson's normal platelet tests, and the absence of the IgM antibody, he concluded that Benson had possibly suffered a case of RMSF sometime in the past, but was not suffering from it in the fall of 2009. For someone who spent much of his life hunting and logging in the woods, the fact that Benson had a low positive test result for the RMSF antibody is not wholly unexpected.

¶ 83 In light of Benson's complaints of tenderness in his testicles, blood in his urine, and a swollen prostate when he was first seen at the GCMC in November 2009, it is as likely – if not more likely – that he was suffering from prostatitis rather than RMSF, as he was initially diagnosed. In that regard, I note that when Dr. Danforth treated Benson at MCMC in August 2011, she diagnosed him with reactive arthritis. According to her rheumatologic consult, prostatitis is a known cause of reactive arthritis, while RMSF is not. Dr. Tonnerre offered the same opinion in his deposition.

¶ 84 Having concluded that Benson has failed to meet his burden of proof in establishing an entitlement to the benefits he seeks, this conclusion is dispositive of this matter and I do not reach the remaining issues outlined in the Pretrial Order.

JUDGMENT

¶ 85 Petitioner has failed to meet his burden of proof that he sustained an accident resulting in an injury in the course and scope of his employment with his employer, McCormick Sunset Guest Ranch, LLC.

¶ 86 Pursuant to ARM 24.5.348(2), this Judgment is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

DATED in Helena, Montana, this 21st day of August, 2013.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: John T. Johnston
Leanora O. Coles
Douglas G. Skjelset
Submitted: April 18, 2012