

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2014 MTWCC 8

WCC No. 2013-3203

LARRY BOLAND

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Summary: Petitioner suffered an industrial injury in November 2007. He then worked as a janitor from February to May of 2010. In 2011, he worked part-time for the employer with whom he suffered the November 2007 industrial injury. In January 2012, he suffered a non-work-related fall for which he sought chiropractic treatment. In July 2012, he filed an occupational disease claim, alleging that the janitorial work permanently aggravated his pre-existing condition. Respondent denied the claim, arguing that Petitioner's claim was untimely, that he was last injuriously exposed to the conditions which gave rise to his occupational disease at a subsequent employer, and that the non-work-related fall severed liability.

Held: Petitioner has not met his burden of proving that the janitorial work he performed in 2010 is the major contributing cause of his condition. The Court did not reach the issue of the timeliness of his claim.

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-407. Although the statute requires that an occupational disease be established by objective medical findings, the Court was unable to determine which objective medical findings Petitioner's treating physician and an IME physician relied upon in reaching their respective opinions. This, in part, led to the Court concluding that Petitioner had not met his burden of proving that he suffered from an occupational disease arising out of certain employment.

Medical Evidence: Objective Medical Findings. Although the statute requires that an occupational disease be established by objective medical findings, the Court was unable to determine which objective medical findings Petitioner's treating physician and an IME physician relied upon in reaching their respective opinions. This, in part, led to the Court concluding that Petitioner had not met his burden of proving that he suffered from an occupational disease arising out of certain employment.

Evidence: Conflicting. Where the Court found that neither Petitioner's treating physician nor an IME physician had full knowledge of the facts regarding activities Petitioner engaged in subsequent to the subject employment, the Court found that the record did not support Petitioner's contention that he suffered from an occupational disease arising out of the employment at issue.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-407. After reviewing Petitioner's treating physician's medical records, the Court found that the physician did not have full knowledge of the facts regarding Petitioner's subsequent employment, a non-work-related fall, and chiropractic treatment. The Court further found that an IME physician believed that Petitioner's subsequent employment lasted for six weeks when it actually lasted for several months, and that the IME physician made no objective medical findings. The Court therefore concluded that Petitioner did not meet his burden of proving that this particular employment was the major contributing cause of his back condition, and therefore he did not prove that he suffers from an occupational disease under the statute.

Proof: Causation. After reviewing Petitioner's treating physician's medical records, the Court found that the physician did not have full knowledge of the facts regarding Petitioner's subsequent employment, a non-work-related fall, and chiropractic treatment. The Court further found that an IME physician believed that Petitioner's subsequent employment lasted for six weeks when it actually lasted for several months, and that the IME physician made no objective medical findings. The Court therefore concluded that Petitioner did not meet his burden of proving that this particular employment was the major contributing cause of his back condition, and therefore he did not prove that he suffers from an occupational disease under the statute.

Proof: Burden of Proof: Causation. After reviewing Petitioner's treating physician's medical records, the Court found that the physician did not have full knowledge of the facts regarding Petitioner's subsequent employment, a non-work-related fall, and chiropractic treatment. The Court further found that an IME physician believed that Petitioner's subsequent employment lasted for six weeks when it actually lasted for several months, and that the IME physician made no objective medical findings. The Court therefore concluded that Petitioner did not meet his burden of proving that this particular employment was the major contributing cause of his back condition, and therefore he did not prove that he suffers from an occupational disease under the statute.

¶ 1 The trial in this matter occurred on November 7, 2013, at the Civic Center in Great Falls. Petitioner Larry Boland appeared and was represented by William O. Bronson. Kevin Braun represented Respondent Montana State Fund (State Fund).

¶ 2 Exhibits: I admitted Exhibits 1 through 6 and 8 through 14 without objection. I overruled Boland's objections to Exhibit 7 and admitted it into evidence.

¶ 3 Witnesses and Depositions: I admitted Boland's deposition into evidence. Boland was sworn and testified at trial.

¶ 4 Issues Presented: The parties present the following issues for resolution:

Issue One: Does Petitioner suffer from an occupational disease arising out of his employment with the employer?

Issue Two: Was the claim for occupational disease timely filed?

FINDINGS OF FACT

¶ 5 On or about July 25, 2012, Boland filed a First Report of Injury or Occupational Disease (FROI) with the Employment Relations Division of the Montana Department of Labor & Industry. Boland alleged an occupational disease arising out of his employment with St. Luke's Parish (St. Luke's) in Great Falls.¹

¶ 6 Boland testified at trial. I found Boland's testimony to be somewhat inconsistent. While I do not find Boland wholly incredible, in observing and evaluating his testimony it appeared to me that in many instances he answered questions in a manner designed more to put his claim in the most favorable light rather than being forthright. After

¹ Pre-Trial Order, Uncontested Facts, at 2, Docket Item No. 15.

comparing his testimony to the documentary evidence, I find that he minimized the work he performed for his cousin in 2011 as well as the effects of the January 2012 fall, and I question whether he disclosed certain pertinent information to his medical providers.

¶ 7 Prior to working for St. Luke's, Boland worked for his cousin Paul Boland performing water-well labor for approximately 15 years. Boland suffered an industrial injury in 2007 and was taken off work.² Boland injured himself while lifting a roll of wire onto a trailer, causing pain in his back and neck.³

¶ 8 After the November 26, 2007, injury, Boland treated with Richard A. Reynolds, D.C., for about a year.⁴ On November 20, 2008, Patrick E. Galvas, D.O., Ph.D., saw Boland for an initial evaluation including diagnosis, maximum medical improvement (MMI) assessment, impairment rating, and work restrictions. Dr. Galvas diagnosed Boland with a cervicothoracic strain, cervicogenetic headaches resolving, and thoracolumbar strain. Dr. Galvas opined that Boland was not at MMI and that he had not been appropriately imaged and diagnosed.⁵ Boland continued to treat with Dr. Galvas and Dr. Galvas' associates after this consultation.

¶ 9 On March 3, 2009, Dr. Galvas' associate noted that x-rays revealed a bridging osteophyte at L2-3 and an MRI revealed a wedging fracture at T12.⁶ On March 25, 2009, additional x-rays revealed a loss of height at either T9 or T10 with an intravertebral disk herniation.⁷ After additional treatment including steroid injections and prescription medication, Boland was prescribed a series of physical therapy sessions.⁸

¶ 10 On July 14, 2009, Dr. Galvas found Boland to be at MMI and calculated an 8% whole person impairment rating for his thoracic, lumbar, and cervical injuries.⁹ On August 19, 2009, Dr. Galvas reviewed job analyses and approved pizza delivery driver and parking booth cashier, but disapproved pump installer/landscaper (presumably Boland's time-of-injury position) and cable assembler.¹⁰

² Boland Dep. 17:2 - 18:2.

³ Boland Dep. 30:6 - 31:4.

⁴ Trial Test.

⁵ Ex. 3 at 1-4.

⁶ Ex. 3 at 9.

⁷ Ex. 3 at 10.

⁸ Ex. 3 at 7-8, 12-14, 17.

⁹ Ex. 3 at 20-22.

¹⁰ Ex. 3 at 24-27.

¶ 11 On August 24, 2009, an associate of Dr. Galvas saw Boland for a follow-up appointment. Boland had been treated and released for severe back pain at an emergency room a few days earlier. Boland reported that he had pain radiating into his buttocks, which was a new symptom. Boland was prescribed a series of physical therapy sessions.¹¹

¶ 12 On October 14, 2009, Boland reported that physical therapy had significantly reduced his pain, but he had used up his authorized sessions and now had decreased cervical range of motion. Dr. Galvas' associate recommended continuation of physical therapy.¹²

¶ 13 On January 7, 2010, Boland again treated with an associate of Dr. Galvas. Boland complained of a two-week-long flare-up of back pain with pain and tightness in his low- and mid-back. Boland reported that he had increased his use of Percocet to three tablets per day, and he was staying home and avoiding activities because of pain. Boland received a prescription for OxyContin.¹³ On January 21, 2010, Boland returned and reported significant improvement in his pain levels. He was scheduled for a follow-up appointment in March.¹⁴

¶ 14 On February 1, 2010, Boland began working for St. Luke's.¹⁵ Boland provided maintenance and janitorial services for two locations. He spent the morning at St. Joseph's and the afternoon at St. Luke's for an eight-hour workday.¹⁶ His job duties included sweeping and mopping floors, trash removal, vacuuming, and general maintenance.¹⁷ He also maintained the boiler rooms, replaced lighting, and fixed broken items.¹⁸ Boland testified that his job duties at St. Luke's were significantly easier than the duties he had performed for his cousin prior to his 2007 industrial injury.¹⁹

¶ 15 Boland testified that he did well physically during his first month working for St. Luke's. However, in late February, he developed low-back pain.²⁰ Boland testified that at the time these symptoms began, he was focused on his job because he wanted

¹¹ Ex. 3 at 28.

¹² Ex. 3 at 30.

¹³ Ex. 3 at 32.

¹⁴ Ex. 3 at 33.

¹⁵ Boland Dep. 16:16-19.

¹⁶ Boland Dep. 16:3-7.

¹⁷ Boland Dep. 16:8-15.

¹⁸ Trial Test.

¹⁹ Trial Test.

²⁰ Trial Test.

to remain employed. Boland did not give much thought to the possible cause of his symptoms, but assumed they were from his 2007 industrial injury.²¹

¶ 16 On March 9, 2010, Boland saw Dr. Galvas for a follow-up appointment. Dr. Galvas had last personally seen Boland on July 14, 2009. Dr. Galvas noted that Boland had been working for the past six weeks at St. Luke's:

His duties requir[e] him to clean the bathrooms, vacuum the carpets and clean the floors. He does some minor maintenance work. He has complaints of increasing back pain and right upper extremity pain. The upper extremity pain has been since he has been working. I do not think this is related to his old injuries. I believe the patient is deconditioned and some of his complaints may be due to deconditioning. I told him that he will have to decide whether he is able to continue working or not. It appears that the duties are within his capabilities.²²

¶ 17 Boland testified that by late March 2010, he had leg pain and numbness which began at about 11:30 each morning on workdays.²³ After he reported these symptoms to Dr. Galvas, Dr. Galvas prescribed medication which improved his condition for a few months.²⁴ Boland testified that he had never experienced this type of leg pain prior to working for St. Luke's.²⁵ Boland further testified that he believed that walking on hard surfaces brought on his leg pain, and his symptoms are aggravated by walking on hard surfaces, which he tries to avoid.²⁶

¶ 18 On May 20, 2010, Dr. Galvas and Sonya Gilson, FNP, APRN, saw Boland for a follow-up appointment. Boland reported increased back pain in the last month, with increased pain after a longer or strenuous workday. Boland received samples of Celebrex and FLECTOR Patches and was advised to follow up in three months.²⁷

¶ 19 Boland worked for St. Luke's until May 22, 2010.²⁸ Boland testified that he quit his job at St. Luke's, and that at the time he quit, he was no longer physically capable of

²¹ Trial Test.

²² Ex. 3 at 34.

²³ Trial Test.

²⁴ Trial Test.

²⁵ Trial Test.

²⁶ Trial Test.

²⁷ Ex. 3 at 36.

²⁸ Boland Dep. 16:16-19.

performing his job duties.²⁹ However, Boland admitted that he also had a “falling out” with his employer and if he had not quit, he would have been fired.³⁰

¶ 20 On June 4, 2010, Matt Mandell, a State Fund claims examiner, asked Gilson about Boland’s condition. Gilson opined that Boland’s employment with St. Luke’s was causing a temporary aggravation to his back condition and she expected that three months of Celebrex use would return Boland to pre-aggravation status.³¹

¶ 21 On August 24, 2010, Boland returned to Dr. Galvas’ office for a follow-up appointment. Boland complained of neck pain radiating into his upper left arm.³² He was found at MMI.³³

¶ 22 On December 27, 2010, Dr. Galvas wrote to Mandell and opined that Boland had not returned to baseline from his May 2010 aggravation, and it was more probable than not that Boland’s need for physical therapy was related to the May 2010 aggravation.³⁴

¶ 23 After leaving the St. Luke’s job, Boland eventually returned to work for his cousin. During his deposition, Boland testified that he worked for Paul Boland during the summer of 2010.³⁵ At trial, Boland testified that he was mistaken about the year and that he actually worked for his cousin in 2011.³⁶ Boland testified that the job was a landscaping project and his job duties were to keep track of inventory and act as a gofer. Boland testified that the job was light-duty.³⁷ Boland testified that he and his cousin had an understanding when he accepted the job that Boland needed light-duty tasks because of the back problems he suffered while working for St. Luke’s. Boland testified that his cousin was willing to hire him because Boland was experienced and knowledgeable about the job.³⁸

¶ 24 Boland testified that the lifting involved with the job was minimal and less than 25 pounds.³⁹ He further testified that his job duties required a significant amount of walking

²⁹ Boland Dep. 35:10-15.

³⁰ Boland Dep. 35:21 - 36:1.

³¹ Ex. 3 at 37.

³² Ex. 3 at 43.

³³ Ex. 3 at 46.

³⁴ Ex. 3 at 48.

³⁵ Boland Dep. 6:6-9.

³⁶ Trial Test.

³⁷ Boland Dep. 6:10-15.

³⁸ Boland Dep. 8:13-22.

³⁹ Boland Dep. 6:16-18.

on level ground.⁴⁰ Boland testified that he usually worked an average of four hours per day although he worked nearly full-time during one week.⁴¹ Boland claimed he only worked on the landscaping project for four or five weeks.⁴² At trial, Boland testified that it was possible that the job lasted a little longer than five weeks, but not by much.⁴³

¶ 25 Boland testified that his cousin's business offers both landscaping work and water-well work and when he worked for his cousin in 2011, he may have done a small well job on one occasion, but he could not recall with certainty.⁴⁴ Boland testified that he occasionally performed other job duties to fill in for employees who did not show up for work. Boland stated that any time he felt "stress," he stopped working for the day.⁴⁵ Boland testified that he never ended a shift early because of back pain, but left if he felt fatigued.⁴⁶

¶ 26 Boland testified that he found it difficult to sustain walking on hard surfaces, and by noon each day, he usually needed to rest.⁴⁷ Boland testified that the job duties required "quite a bit of walking" because the workers were spread out around the grounds, and that he walked on even terrain consisting of flattened-out dirt, cement, and pavement, including a paved parking lot where the job trailer was parked.⁴⁸ At trial, however, Boland testified that his time spent walking across hard surfaces was "very limited" and that the trailer was parked at the edge of the parking lot, allowing him to spend most of his time walking on soft dirt.⁴⁹ Boland testified that after the landscaping crew began to lay sod, he spent three or four days on another project for his cousin where he completed some light residential plumbing work.⁵⁰

¶ 27 Boland testified that the work he performed for his cousin in 2011 was less strenuous than the work he performed for St. Luke's and he was very careful not to

⁴⁰ Boland Dep. 9:9-21.

⁴¹ Boland Dep. 9:22 - 10:1.

⁴² Boland Dep. 7:4-6.

⁴³ Trial Test.

⁴⁴ Trial Test.

⁴⁵ Boland Dep. 8:4-9. At trial, Boland clarified that when he referred to feeling "stress," he meant physical strain on his back.

⁴⁶ Trial Test.

⁴⁷ Boland Dep. 10:2 - 11:5.

⁴⁸ Boland Dep. 9:9-21.

⁴⁹ Trial Test.

⁵⁰ Trial Test.

reinjure his back.⁵¹ He further testified that at his cousin's job, he never experienced the severe radiating pain that he had at St. Luke's.⁵²

¶ 28 From payroll reports submitted by Boland Well Systems, Inc., to State Fund, it appears that Boland was classified as an employee and earned wages during the report periods of January 1 to April 1, 2011, April 1 to July 1, 2011, and July 1 to October 1, 2011. Boland's earnings were sometimes listed in the "Landscape Gardening & Drivers" category, and sometimes in the "Plumbing NOC & Drivers" category. During the first quarter, he earned \$123.04 under "Plumbing NOC & Drivers." During the second quarter, he earned \$1,670.50 under "Landscape Gardening & Drivers" and \$808.75 under "Plumbing NOC & Drivers." During the third quarter, he earned \$150.00 under "Landscape Gardening & Drivers" and \$1,552.50 under "Plumbing NOC & Drivers."⁵³

¶ 29 Boland continued to treat with Dr. Galvas and Dr. Galvas' staff on a regular basis. On June 20, 2011, Dr. Galvas responded to questions posed by Boland's counsel. Dr. Galvas opined that Boland had reached MMI "regarding the condition noted by you in your chart note of May 20, 2010." Dr. Galvas further opined that Boland had returned to pre-May 2010 status and had not suffered a permanent aggravation of his underlying condition.⁵⁴ None of Dr. Galvas' medical records mention Boland's employment with his cousin. In fact, on August 22, 2011, Dr. Galvas responded to an inquiry from Boland's attorney regarding Boland's employability in which he rescinded his earlier approval of certain job analyses and opined, "Mr. Boland has had several return to work trials and has failed. I recommend apply for SSDI."⁵⁵

¶ 30 During his deposition, Boland testified that he ceased working for his cousin when the "project was over."⁵⁶ At trial, Boland testified that he ceased working for his cousin when the project changed to sod installation because those job duties were too strenuous for him.⁵⁷ Boland testified that his cousin has not asked him to return to work on another project since then.⁵⁸ Boland testified that he did not have any problems with

⁵¹ Trial Test.

⁵² Trial Test.

⁵³ Ex. 10.

⁵⁴ Ex. 3 at 53-54.

⁵⁵ Ex. 3 at 55-56.

⁵⁶ Boland Dep. 20:22 - 21:2.

⁵⁷ Trial Test.

⁵⁸ Boland Dep. 21:16-20.

low-back pain or pain radiating into his legs while he worked for his cousin in 2011.⁵⁹ Boland further testified that he has not worked for anyone since the summer of 2011.⁶⁰

¶ 31 On August 24, 2011, Rodney T. Lutes, PA-C, an associate of Dr. Galvas, saw Boland for a follow-up examination. Lutes opined that Boland was having a flare of back pain which was probably related to his November 26, 2007, industrial injury.⁶¹ On September 23, 2011, Dr. Galvas opined that Boland was at MMI but that he would require continued use of his prescriptive medications to remain there.⁶²

¶ 32 On December 22, 2011, Dr. Galvas wrote to Mandell and opined that it was more probable than not that Boland's May 20, 2010, aggravation caused a permanent worsening of his back condition.⁶³

¶ 33 On January 18, 2012, Bruce R. Belleville, MD, MPH, FACOEM, CIME, conducted an independent medical examination (IME) of Boland. Dr. Belleville reviewed Boland's medical records and interviewed him. Dr. Belleville noted that Boland worked for St. Luke's from early February 2010 through late May 2010, and Boland reported that "they let me go" because "they did not like my work." Dr. Belleville also noted that Boland did some part-time work for six weeks in 2011, but that he was no longer working.⁶⁴ Dr. Belleville noted that Boland saw a chiropractor (Dr. Reynolds) during the first year after his 2007 industrial injury, but that Boland had not received any chiropractic care since November 2008.⁶⁵

¶ 34 Dr. Belleville opined that Boland suffered from axial spine pain in the thoracic region with intermittent symptoms to the lumbar spine and chronic pain syndrome. Dr. Belleville also stated:

This patient was stable and was released to several modified duty positions prior to his work with the Catholic Diocese. However after his work with the Catholic Diocese, he experienced a worsening of condition. This worsening of condition was reflected by a flare in his symptoms, a change in his medications to begin a more potent medication regimen,

⁵⁹ Trial Test.

⁶⁰ Trial Test.

⁶¹ Ex. 3 at 57.

⁶² Ex. 3 at 58.

⁶³ Ex. 3 at 64.

⁶⁴ Ex. 7 at 2.

⁶⁵ Ex. 7 at 5.

then being relieved of his duties due to an inability to perform (an inability that had not previously cost him a job).⁶⁶

Dr. Belleville stated that he believed Boland's condition was permanently aggravated by his work for St. Luke's. He explained:

The permanent nature of the aggravation includes the fact that his symptoms became more intense. His tolerance of work tasks that were usually painful became less. His medication regimen changed to include a greater amount of pain medication. Dr. Galvas changed from approving modified duty job tasks to disapproving modified duty job tasks.⁶⁷

¶ 35 On January 23, 2012, Boland tripped and fell over a raised sidewalk edge. Boland testified that he injured his hand, wrist, and right knee, and that he treated these injuries by incorporating them into chiropractic sessions he was already undergoing for low-back pain with Lee S. Hudson, DC, DABCO.⁶⁸ On January 26, 2012, Boland saw Dr. Hudson, who reported that Boland had low-back pain, predominately on the left which was a constant dull ache, cramping in the thighs, stiffness and sharp pain in the right knee, right-neck pain, and some spasms in the right arm.⁶⁹ Contrary to Boland's testimony, Dr. Hudson's treatment note does not indicate that Boland was already undergoing treatment for his low back, or that his back pain was not caused by the fall.⁷⁰ Rather, it appears that Dr. Hudson took a history of Boland on that day, and Boland did not submit into evidence any records from Dr. Hudson which predate this appointment. Moreover, at Dr. Belleville's IME only eight days earlier, Boland had reported participating in no chiropractic care since 2008.⁷¹

¶ 36 On January 27, 2012, Boland returned to Dr. Hudson for a follow-up treatment. Boland reported that his main complaint was lower-back pain and pain in the right elbow.⁷² Boland received additional chiropractic treatments on January 30, February 1, 6, 8, 10, 13, 15, 17, 22, 24, 27, and March 5. In all of these sessions except February 10 and 24, he reported that his lower back was his main complaint.⁷³

⁶⁶ Ex. 7 at 9.

⁶⁷ Ex. 7 at 10.

⁶⁸ Boland Dep. 39:8 - 40:17.

⁶⁹ Ex. 4 at 1.

⁷⁰ *See id.*

⁷¹ Ex. 7 at 5.

⁷² Ex. 4 at 6.

⁷³ Ex. 4 at 7-18.

¶ 37 On July 26, 2012, State Fund received Boland's FROI. Boland indicated that his injury developed in March 2010, and that his last day of work was May 22, 2010.⁷⁴ Boland testified that he indicated March 1, 2010, as his date of injury on the FROI because he recalled that as the date on which he first began to experience symptoms.⁷⁵ In the FROI, Boland described his injury as follows:

I had a work injury in 2007 with a different employer. This injury was to my low back. When I went back to work, this time at the Parish, I started to feel more back pain and pain in my legs after the first month or so of work. I thought this was all related to the 2007 injury, and my original doctor (Galvas) thought so for a time. Then he changed his mind, after a doctor from the State Fund saw me and told me that my problems that I have now go back to when I was working at the church.⁷⁶

¶ 38 Boland stated that he did not file his claim while he worked for St. Luke's because he believed his problems were related to the 2007 industrial injury.⁷⁷ Boland testified that he decided to file this claim after Dr. Belleville issued his IME report.⁷⁸ Boland testified that although Dr. Galvas may have noted in his medical records that he had concluded Boland's employment at St. Luke's had permanently aggravated his back condition, Dr. Galvas did not discuss this with him.⁷⁹ Boland also testified that he did not file a claim for the landscaping work he performed for Paul Boland in 2011 because he did not receive an injury there.⁸⁰

¶ 39 On July 31, 2012, Boland again treated with Dr. Hudson. He reported low-back swelling and pain radiating to his anterior lateral thigh and occasionally down the leg into the foot.⁸¹ Boland saw Dr. Hudson for additional treatments on August 1, 3, 8, 10, 13, and 16.⁸²

¶ 40 On August 17, 2012, Boland visited the emergency room at Benefis Health System in Great Falls. He reported a gradual onset of back pain radiating into his legs over the previous ten days. The history taken was that Boland had injured his lower

⁷⁴ Ex. 1 at 1.

⁷⁵ Boland Dep. 29:10-22.

⁷⁶ Ex. 1 at 2.

⁷⁷ Trial Test.

⁷⁸ Trial Test.

⁷⁹ Trial Test.

⁸⁰ Trial Test.

⁸¹ Ex. 4 at 19.

⁸² Ex. 4 at 21-26.

back from lifting in 2007 “and has had lower back problems since then and has not returned to work.” Boland was diagnosed with an acute exacerbation of chronic pain and was instructed to see Dr. Galvas in seven to ten days.⁸³

¶ 41 On August 24, 2012, Boland returned to Dr. Galvas’ practice for the first time since December 22, 2011. He reported visiting the emergency room on August 17, 2012, and that he had been having moderate to severe pain for about ten days which was located in his middle and lower lumbar spine and radiating into his right leg.⁸⁴

¶ 42 On September 19, 2012, Boland underwent an EMG and nerve conduction study which found mild abnormal electrodiagnostic findings in a number of muscle groups bilaterally, in groups innervated predominantly by L5 and/or S1.⁸⁵

¶ 43 On October 10, 2012, Boland underwent a lumbar spine MRI without contrast. The impression noted was mild degenerative changes within the lower lumbar spine without disk herniation or nerve impingement.⁸⁶

¶ 44 Boland testified that he suffers from arm, leg, and back pain from his work for St. Luke’s.⁸⁷ Boland testified that he had never had leg pain prior to working at St. Luke’s.⁸⁸ Boland testified that the only activity he currently engages in is light walking which was recommended to him after his 2007 industrial injury.⁸⁹ He testified that he would like to return to work, but he does not believe he can hold any job in his current condition.⁹⁰ Boland testified that he believes that his leg and back pain preclude him from maintaining employment.⁹¹

CONCLUSIONS OF LAW

¶ 45 This case is governed by the 2009 version of the Montana Workers’ Compensation Act since that was the law in effect on Boland’s last day of employment.⁹²

⁸³ Ex. 6 at 11-13.

⁸⁴ Ex. 3 at 67.

⁸⁵ Ex. 5.

⁸⁶ Ex. 3 at 71.

⁸⁷ Boland Dep. 22:3-22.

⁸⁸ Boland Dep. 23:22 - 24:3.

⁸⁹ Boland Dep. 40:18-23.

⁹⁰ Boland Dep. 41:9-13.

⁹¹ Trial Test.

⁹² *Hardgrove v. Transp. Ins. Co.*, 2004 MT 340, ¶ 2, 324 Mont. 238, 103 P.2d 999 (citing *Grenz v. Fire & Cas.*, 278 Mont. 268, 272, 924 P.2d 264, 267 (1996)).

Boland bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.⁹³

Issue One: Does Petitioner suffer from an occupational disease arising out of his employment with the employer?

¶ 46 Under § 39-71-407(9), MCA, occupational diseases are considered to arise out of employment if the disease is established by objective medical findings and the events occurring on more than a single day or work shift are the major contributing cause of the occupational disease in relation to other factors contributing to the occupational disease. Under § 39-71-407(10), MCA, the only employer liable for an occupational disease is the employer in whose employment the employee was last injuriously exposed to the hazard of the disease.⁹⁴

¶ 47 In the present case, the evidence presented allows for four theories of causation regarding Boland's back condition: (1) Boland's 2007 industrial injury; (2) an occupational disease which occurred while Boland worked for St. Luke's in the early part of 2010; (3) an occupational disease for which liability would rest with Boland's 2011 employment with his cousin's business under the last injurious exposure rule; and (4) Boland's January 2012 non-work-related fall which may have severed liability. The issue before the Court, however, is only whether Boland suffered an occupational disease arising out of his employment at St. Luke's; therefore, the question I must ask is whether Boland has proven by a preponderance of the evidence that his work for St. Luke's is the major contributing cause of his condition.

¶ 48 I have closely considered the medical records and opinions of Boland's treating physician, Dr. Galvas. As a general rule, the opinion of a treating physician is accorded greater weight than the opinions of other expert witnesses. However, a treating physician's opinion is not conclusive. To presume otherwise would quash this Court's role as fact-finder in questions of an alleged injury.⁹⁵ As set forth in the findings above, Boland worked for St. Luke's from February through May of 2010 and he treated with Dr. Galvas before, during, and after this employment. As recently as June 20, 2011, Dr. Galvas was under the impression that Boland had suffered only a temporary aggravation to his underlying condition. However, by December 22, 2011, Dr. Galvas had changed his mind and concluded that Boland's aggravation was permanent in nature.

⁹³ *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).

⁹⁴ See also *Liberty Nw. Ins. Corp. v. Montana State Fund*, 2009 MT 386, ¶ 25, 353 Mont. 299, 219 P.3d 1267.

⁹⁵ *EBI/Orion Group v. Blythe*, 1998 MT 90, ¶¶ 12-13, 288 Mont. 356, 957 P.2d 1134. (Citation omitted.)

¶ 49 From my review of Dr. Galvas' medical records, it appears that Dr. Galvas and his staff were unaware of the work Boland performed for his cousin during the first three quarters of 2011. While Boland maintains that he worked, at most, part-time for six weeks performing primarily "gofer" job duties, the payroll reports submitted to State Fund indicate that Boland worked for his cousin for several months and that he performed other job duties including some plumbing work. I further note that on June 20, 2011 – clearly within the timeframe when Boland worked for his cousin – Dr. Galvas found Boland at MMI for his aggravation and found that he had returned to pre-May 2010 status. When Dr. Galvas later changed his mind and opined on December 22, 2011, that Boland had suffered a permanent aggravation while working for St. Luke's, he did so while believing that Boland had been unemployed since May 2010. I therefore must question whether, had Dr. Galvas been aware that Boland was in fact employed after June 20, 2011, he would have still attributed Boland's condition to the St. Luke's employment.

¶ 50 Furthermore, Dr. Galvas was apparently unaware of Boland's January 2012 fall or his subsequent series of chiropractic treatments for low-back pain. From the evidence presented, it is difficult for me to assess whether the problems Boland suffered after this fall could constitute a non-work-related injury that would sever liability.

¶ 51 Finally, I cannot rule out the possibility that Boland's back condition remains attributable to his 2007 industrial injury. Section 39-71-407(9)(a), MCA, requires that an occupational disease must be established by objective medical findings, and it is not clear to me what objective medical findings Dr. Galvas relied upon, nor do I find Dr. Belleville's rationale in his IME report to be based on objective medical findings. Rather, Dr. Belleville bases his rationale on Boland's subjective reports of increased pain and decreased tolerance for work, the fact that Boland's prescriptions changed, and the fact that Dr. Galvas disapproved some specific job duties.

¶ 52 The parties have not asked me to determine the specific causation regarding Boland's back condition. Rather, I am tasked only with determining whether Boland suffered an occupational disease arising out of his employment with St. Luke's. The evidence indicates that Dr. Galvas did not have full knowledge of the facts regarding Boland's subsequent employment, non-work-related fall, and chiropractic treatment. Although Dr. Belleville's IME occurred prior to the non-work-related fall, which therefore could not have been a factor in his conclusions, he believed Boland's work for his cousin in 2011 lasted only six weeks, while the payroll report indicates it was for a significantly longer time period. Moreover, Dr. Belleville based his opinions not on objective medical findings but on the actions of Dr. Galvas. The evidence further leads me to believe that Boland's 2011 employment with his cousin's business was both more lengthy and more strenuous than Boland admits. For these reasons, and on consideration of the record in its entirety, I have concluded that Boland has not met his

burden of proving that his employment with St. Luke's is the major contributing cause of his back condition. I therefore conclude he has not proven that he suffers from an occupational disease arising out of his employment with St. Luke's and pursuant to § 39-71-407(9), MCA.

Issue Two: Was the claim for occupational disease timely filed?

¶ 53 Since I have determined that Boland did not suffer an occupational disease arising out of his employment with St. Luke's, I do not reach this issue.

JUDGMENT

¶ 54 Petitioner did not suffer an occupational disease arising out of his employment with the employer.

¶ 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.

DATED in Helena, Montana, this 21st day of March, 2014.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: William O. Bronson
Kevin Braun

Submitted: November 7, 2013