

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2018 MTWCC 19

WCC No. 2017-4008

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MICHAEL P. BRIGHT

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

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FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

**Summary:** Petitioner suffered a back injury in 1994 while working at DPHHS. He retired from DPHHS in 2009, but continued his second job at a retail store, where he was frequently required to lift up to 40 pounds and occasionally required to lift up to 100 pounds. His back pain worsened, but Respondent denied further liability for his condition in 2014, relying on Petitioner's treating physician's opinion that his low back was aggravated by lifting at the retail store. Petitioner resigned from the retail store in 2015, claiming that he could no longer work, in part, because of his back condition. Petitioner seeks TTD or PTD benefits from the date he resigned, asserting that his back condition is a natural progression of his 1994 injury. Respondent asserts that it is not liable for TTD or PTD benefits because, *inter alia*, Petitioner's work at the retail store aggravated his low-back condition and he has not returned to baseline.

**Held:** Respondent is not liable for TTD or PTD benefits. Petitioner's asserted inability to work is not the result of a natural progression of his 1994 injury; rather, his work at the retail store aggravated his back condition and he has not returned to baseline.

¶ 1 The trial in this matter was held on April 11, 2018, in Helena, Montana. Petitioner Michael P. Bright was present and represented by John C. Doubek. Melissa Quale represented Respondent Montana State Fund (State Fund). Jacqui Garcia, Claims Manager for State Fund, was also present.

¶ 2 Exhibits: The Court admitted Exhibits 1 through 18 without objection. Bright withdrew Exhibit 19. After trial, State Fund moved to reopen the record to add a response to questions it had sent to Matthew McLaren, MD. This Court ruled that it would allow State Fund to reopen the record on the condition that it depose Dr. McLaren, so he could explain his answer and be subject to cross examination. State Fund declined to depose Dr. McLaren and, therefore, this Court denied its Motion to Reopen the Record.

¶ 3 Witnesses and Depositions: This Court admitted Bright's deposition into evidence. Valerie Bright, Bright, and Garcia were sworn and testified at trial.

¶ 4 Issues Presented: In the Pretrial Order, the parties state that the issues for this Court to decide are whether State Fund is liable for temporary total disability (TTD) or permanent total disability (PTD) benefits from the day Bright stopped working at Dollar Tree. Nonetheless, in Petitioner's Proposed Findings of Fact, Conclusions of Law and Judgment, and at trial, Bright asked this Court to rule that he is currently entitled to medical benefits and that he will be entitled to permanent partial disability benefits at age 67. However, this Court does not address issues that are not presented in the Pretrial Order;<sup>1</sup> thus, this decision is limited to whether State Fund is liable for TTD or PTD benefits.

#### FINDINGS OF FACT

¶ 5 This Court finds the following facts by a preponderance of the evidence.

¶ 6 In 1982 or 1983, prior to the incident giving rise to this claim, Bright worked for the Department of Revenue, Liquor Division, as a warehouseman. While he was working in that capacity, a shipping pallet he was standing on gave out from underneath. He landed on the floor and injured his back.

¶ 7 Orthopedist Brooke Hunter, MD, saw Bright at various times since then for significant flare-ups of his back pain.

¶ 8 In 1990, the Department of Health and Human Services (DPHHS) hired Bright as a case manager. In that position, he was responsible for managing a caseload; he interviewed people and determined their eligibility and continuing eligibility for social programs.

¶ 9 On July 1, 1994, Bright injured his low back while moving some file cabinets at work.

¶ 10 State Fund accepted liability for Bright's low-back injury and paid medical benefits, as well as a 7% whole person impairment.

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<sup>1</sup> *Hopkins v. Uninsured Employers' Fund*, 2010 MTWCC 12, ¶ 5.

¶ 11 Bright returned to work four days after the incident and continued in his time-of-injury position while he underwent treatment for his back.

¶ 12 Dr. Hunter saw Bright on August 24, 1994 and documented the July 1 incident. He noted that Bright had increased back pain going down to his ankles in an L-5 distribution. He gave Bright Tylenol #3 and Ibuprofen and told him to call in if he was not doing better in a few weeks.

¶ 13 Bright returned to see Dr. Hunter in 1995 for a flare-up of his back pain. He also had pain in his lateral calf and down to the toes.

¶ 14 In 1996, Bright became a fraud investigator at DPHHS.

¶ 15 Bright saw Dr. Hunter again in 1997 for a recurrence of low-back pain. Bright had had locking up and pain down into the buttocks, as well as right-leg pain down into the calf, and numbness down into the heel. X-rays were taken of flexion and extension views, which revealed complete obliteration of the L-5, S-1 space with vacuum phenomena but no gross instability.

¶ 16 In February 1998, Sandra H. Rincon, an adjuster for State Fund, wrote to Dr. Hunter to clarify several issues with regard to Bright's claim. In particular, she asked whether Bright's L5-S1 condition was related to the injury of July 1, 1994, to which Dr. Hunter answered "Yes."

¶ 17 Following another flare-up of Bright's back pain, Dr. Hunter ordered a lumbar MRI, which Bright had on May 1, 1998. Dan Alzheimer, MD, had the following impression:

1. Discal desiccation of L3 inferiorly.
2. Significant discal narrowing at L5-1.
3. Modic Type II Endplate changes at L5-S1.
4. No evidence of spinal stenosis.
5. Marked improvement of the herniated discs seen at S1 previously [in a 1993 MRI].

¶ 18 Dr. Hunter referred Bright to see Ronald K. Hull, MD, a pain management consultant, on May 21, 1998. After an evaluation, Dr. Hull made the following assessment:

The patient's symptoms are associated with documented objective degenerative disc disease most severe at L5-S1 with a prior history of a herniated L5-S1 intervertebral disc which has improved since 1993. . . . I suspect he may well have some degree of mechanical low back pain with the associated degenerative disc disease and some degree of facet arthrosis.

More importantly, I am concerned that there is a likelihood of psychologic and emotional factors influencing the patient's perception of pain based on the fact that his pain condition is so long-standing. Plus, he does exhibit four positive Waddell's findings on examination.

Dr. Hull recommended that Bright undergo a chronic pain psychologic evaluation before any other medical investigations or treatment.

¶ 19 Upon review of Dr. Hull's report with Bright, Dr. Hunter explained that Bright did not have a "surgical spine problem," and concurred with Dr. Hull about ordering a psychological evaluation.

¶ 20 On July 20, 1998, Bright met with Mary K. Bogumill, PhD, a Clinical Neuropsychologist. Dr. Bogumill administered a number of psychological tests, reviewed Bright's records, and conducted a clinical interview. Dr. Bogumill's interpretation was that Bright had a pain disorder with both psychological factors and a general medical condition of muscle spasms.

¶ 21 Dr. Hull, Dr. Bogumill, Bright, and Valerie Bright, Bright's wife, met on July 28, 1998, to discuss the results of Dr. Bogumill's evaluation. Dr. Bogumill explained that most of the elements of psychologic distress Bright was experiencing were "likely unconscious on his part" and that "depression or other unresolved psychologic distress could have the effect of intensifying and perpetuating preexisting pain conditions." Both providers recommended that Bright consider a psychiatric consult for medication therapy for depression and sleep disturbance, as well as supportive therapy, before proceeding with attempts at further direct medical interventional treatment for his back pain.

¶ 22 On February 28, 2002, Dr. Hunter placed Bright at maximum medical improvement (MMI), setting no restrictions on his ability to work.

¶ 23 For several years, starting in late December 2005, Bright saw B. Max Iverson, MD, a colleague of Dr. Hunter's, for a series of lumbar MRIs and epidural steroid injections (ESI). Dr. Iverson always released Bright back to regular work, without restrictions.

¶ 24 In 2007, while Bright was still employed at DPHHS, he began working part-time for Dollar Tree, stocking shelves and sweeping the floor for a few hours every night. He took the job because he could move around and feel better, and because it was a "no-brainer job" where he could forget about his caseload. He saw it as a kind of "therapy."

¶ 25 On May 19, 2008, Bright underwent a "Fluoroscopically guided left L3, L4, L5 and S1 (L5 dorsal ramus) medial branch block" with K. Allan Ward, MD, in Great Falls, after which Dr. Ward stated he could work "as tolerated." Dr. Ward described Bright's response to the block as "successful" and "indicating pain generators from medial branch origins."

¶ 26 Thereafter, Dr. Ward performed radiofrequency ablations, or rhizotomies, on June 23, 2008, returning Bright to work on June 25, 2008, and December 22, 2008, returning Bright to work on December 26, 2008.

¶ 27 Bright retired from DPHHS in 2009. As to the timing of his retirement, Bright testified at his deposition that “I just started receiving my pension and was happy.” At trial, however, he elaborated, testifying that “I just couldn’t take the back pain. I had found a part-time job where I could be up and moving. The lifting wasn’t of a major concern because Dollar Tree, I mean, it’s not a color[] TV coming in. It’s a box of soup.”

¶ 28 Thus, Bright continued on at Dollar Tree, and indeed began working approximately 32 hours per week as an assistant manager, assigning employees to different areas, counting the tills, and generally making sure the store ran smoothly. He also filled in doing occasional stocking work, claiming he lifted less than 10 pounds on average. He was constantly able to be up and moving around, and felt that, overall, it was better than sitting. Although his back felt good in the morning, however, it worsened over the course of the day. And, while he did not think his pain changed to any great degree with his activities (e.g., putting things on shelves or helping others), he did acknowledge that, depending on how many lifts he did in a day, lifting even less than ten pounds on a repetitive basis affected his back.

¶ 29 Dr. Ward performed repeat ablations on January 18, 2010, September 20, 2010, and January 20, 2012, each time returning Bright to work the next day.

¶ 30 In November 2012, Bright stepped through a wooden pallet at Dollar Tree, tearing some ligaments in his left ankle. The incident did not hurt his back, but resulted in his needing to have several surgeries with Peter D. Hanson, MD. After the first surgery, in 2012, Dr. Hanson took Bright off work for approximately three months.

¶ 31 Dr. Ward performed a repeat ablation for Bright’s back pain on March 1, 2013, returning Bright to work on March 4, 2013.

¶ 32 On June 27, 2013, Bright sought treatment for his back at St. Peter’s Hospital Urgent Care, explaining that he “noticed pain starting the day after he had to move a number of heavy boxes at work” on June 25, 2013. He was given pain killers and a muscle relaxant, and told to follow up with either Dr. Ward or his primary care physician.

¶ 33 Over time, it became a hassle for Bright to drive to Great Falls for back-pain care. On July 18, 2013, Bright called Dr. Ward and asked him for a referral to Dr. McLaren to take over care as the treating physician for his workers’ compensation claim.

¶ 34 A lumbar spine MRI obtained July 25, 2013, showed “[m]ultilevel lumbar spondylosis with significant narrowing of the central canal noted at the level of L4-L5.”

¶ 35 On September 10, 2013, Bright established care with Dr. McLaren. During his treatment of Bright, Dr. McLaren never gave him a work restriction. Rather, he told Bright to do what he was comfortable doing. The nurse's note for Bright's first visit states:

Pt. visits us primarily regarding a constant sharp low back pain which radiates into his bilateral buttock and bilateral lateral leg pain with numbness. He at times has pain and numbness in his feet bilaterally, L>R. Along with this the pain does at times radiate into his upper back and neck. He explains that with this at times he has a sharp pain lateral to his left spine distal to his left shoulder blade which will radiate anteriorly. This, when it bothers him, makes it hard to breathe. He has had these symptoms to some degree since and [sic] work related injury in 1984 [sic]. . . . Also, of note, pt. has torn a tendon in his left foot, which he plans to have surgically repaired with Dr. Hunter [sic]. His typical pain symptoms have been worse since this injury.

After examining Bright, Dr. McLaren's assessment included: lumbar spondylosis, facet arthropathy, and myofascial pain. He noted:

Mr. Bright demonstrates clear multilevel degenerative changes from his lumbar spine, including broad based disc bulges L2-3 through L5-S1. It would appear that his chief complaint would correspond with a facetogenic source of pain and with that in mind will proceed with consideration of repeating rhizotomies, assuming we undergo successful diagnostic medial branch blocks ahead of that.

Dr. McLaren started Bright on a trial of Lyrica and scheduled him for follow-up in two weeks.

¶ 36 On September 20, 2013, Bright was fitted for a lumbar back brace. The note for the fitting indicates: "Pt. states that he was moving pallets and injured his back." Bright acknowledges that he moved pallets at Dollar Tree.

¶ 37 Dr. McLaren performed an ESI at L5-S1 on September 25, 2013, and thereafter, based on Bright's improvement, recommended physical therapy focused on range of motion and strengthening.

¶ 38 Bright had a second left-foot surgery around November 11, 2013, after which Dr. Hanson took him off work. During much of that time, Bright was required to walk in a boot, which he felt threw him "off kilter," i.e., forced him to favor his right side, and aggravated his back.

¶ 39 In follow-up with Dr. McLaren, Bright noted that his last ESI was 80% effective for several weeks, then his pain started to slowly increase. Thus, on November 25, 2013, Bright underwent a second ESI in L5-S1.

¶ 40 On December 18, 2013, Dr. Hanson released Bright to modified duty at Dollar Tree and indicated he could continuously lift 1-10 pounds, but never anything heavier. Nonetheless, Bright did not return to work for at least several additional months due to functional restraints caused by wearing the boot.

¶ 41 On January 20, 2014, Dr. McLaren's coworker, Nicole L. Todorovich, FNP-BC, saw Bright, indicating that he was having ongoing low-back and lower-extremity pain. Bright reported that his last ESI was 100% effective for one week, but his pain returned to baseline after one month. Todorovich noted that Bright's pain was 5/10 in the morning but progressed throughout the day and rated 8/10 on average. Bright stated that sitting for 30 minutes or more caused his legs and buttocks to go numb. Although his leg symptoms were bothersome, he felt his back pain was more bothersome at this time. As a result of having to walk in the boot, Bright felt his back pain may have increased overall and returned more quickly after his last injection. He reported that he had had some difficulty with vacuuming but otherwise did whatever he had to do. Todorovich recommended that Bright undergo bilateral medial branch blocks L3-S1 with Dr. McLaren to address his back pain.

¶ 42 On February 14, 2014, Kristy George, a claims examiner with State Fund, wrote to Todorovich with several questions. Todorovich responded by letter dated February 24, 2014. In response to George's question, "[D]o you feel medically that Mr. Bright's low-back was aggravated by his need of his post-op boot," Todorovich wrote, in pertinent part, "While it is possible wearing the post operative boot aggravated his low back pain, I feel it is much more likely . . . that Mr. Bright began to have some increase in pain because of the time frame since his last radiofrequency ablation procedure [12 months prior]."

¶ 43 Dr. McLaren performed Bright's medial branch block on March 5, 2014.

¶ 44 Bright saw Dr. McLaren for follow-up on April 15, 2014, by which time he had returned to work at Dollar Tree. He was wearing an ankle brace and thought that he may have increased back pain due to changes in his gait. Bright reported that his medial branch block had been about 90% effective for a couple days, but then decreased to 50% effective in the morning with decreasing effectiveness after working. He described his pain at 2/10 in the morning, but 9-10/10 on days that he worked. At the time of his appointment, he described it as 5/10 and both constant and dull. He explained that he did a lot of lifting, which he felt contributed to his increase in back pain. Dr. McLaren renewed his assessment that Bright had lumbar spondylosis, and the two mutually decided to go forward with radio frequency ablation on his left side.

¶ 45 On April 21, 2014, George wrote to Dr. McLaren with several questions. She asked whether, from a medical standpoint, he felt that Bright's low back was aggravated by lifting due to his current employment, to which Dr. McLaren responded: "Yes." She asked whether Bright's low back was aggravated due to a change in gait arising from his left ankle surgery and the use of a boot postoperatively, to which he responded: "Unknown." And she asked whether these were permanent or temporary aggravations of his low back,

and if temporary, when he expected Bright to return to pre-incident baseline status, to which he responded: “Better assessed following RF [radio frequency ablation].”

¶ 46 In a letter to Bright dated April 23, 2014, George stated, “Per the enclosed response from your treating physician, Dr. McLaren, you have experienced an aggravation to your low back noted on 4/21/14. [State Fund] is not liable for this aggravation and will suspend benefits (treatment and medications) until your provider has notified [State Fund] that you are back to pre-incident baseline status.” State Fund’s payment ledgers indicate that the last medical appointment for which it paid was Bright’s visit with Dr. McLaren on April 15, 2014.

¶ 47 From September 2013 to August 2014, Dollar Tree’s performance appraisal of Bright for the position of Assistant Manager indicated that he met expectations for the following competencies: adaptability, self-control, dependability, drive and initiative, effort and persistence, relationships, direction and management, and customer service skills, and that he needed improvement for the following competency: professionalism.

¶ 48 On December 22, 2014, Dr. McLaren performed a repeat ablation, left versus right L3 through S1, on Bright.

¶ 49 Bright began receiving Social Security Retirement benefits in the month after he turned 62, i.e., March 2015.

¶ 50 From September 2014 to August 2015, Dollar Tree’s performance appraisal of Bright for the position of Assistant Manager indicated that he met expectations for the following competencies: adaptability, professionalism, dependability, relationships, and customer service skills, and that he needed improvement for the following competencies: self-control, drive and initiative, effort and persistence, and direction and management. In a space for comments, Bright wrote that he felt his appraisal had been made in retaliation for his views on the store manager’s shortcomings.

¶ 51 In an Associate Counseling Form dated September 28, 2015, Bright’s supervisor indicated that on September 21, 2015, Bright “violated company policy,” “conducted himself in an unprofessional manner,” was “disrespectful to associates,” and “used foul language on the sales floor.” The form lists a variety of corrective actions that could be taken, and an “X” sits next to the option “Termination.”<sup>2</sup>

¶ 52 Nevertheless, Bright testified that the store manager gave him a choice whether to quit or be terminated, and that he chose to leave on September 28, 2015, of his own volition. He testified that “[t]he [foot and back] pain just started getting out of hand” and he was unable to provide good customer service as a result. He explained:

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<sup>2</sup> The form indicates that District Manager approval is required for Termination, but the only signature on the form is Bright’s supervisor’s. Neither Bright nor a District Manager signed the form.



Just couldn't take the pain anymore. It was -- the pain was to the point where I was turning into a jerk. I mean, I was a jerk at work. I was a jerk at home. And it just got to the point where we were making it on my retirement. I mean, the bills were being paid, but it wasn't worth it.

Bright claims he has been unable to work since and has not sought employment. He testified that he would have continued to work if he could have, both to maximize his Social Security and so that he and his wife could travel in retirement. However, given the compensation, he did not feel that the pain in his back and foot was worth it.

¶ 53 In a work history report for Social Security Disability dated December 27, 2015, Bright wrote that he was required to lift files at DPHHS, but that they weighed less than 10 pounds. For his Assistant Manager position at Dollar Tree, he wrote that he was required to lift food and other merchandise, stock shelves, and unload trucks. He stated that he frequently lifted 40 pounds, and that the heaviest weight he had to lift was 100 pounds or more.

¶ 54 Bright's Social Security Retirement benefits were converted to Disability benefits in March 2016; he continues to receive those benefits today. He will reach full retirement at age 66, in 2019.

¶ 55 Bright had a repeat ablation with Dr. McLaren in 2016.

¶ 56 On June 6, 2017, Bright saw Dr. Hanson complaining of left-ankle pain. Dr. Hanson's impression was that Bright was suffering from "Left midfoot failure status-post tendon transfer and midfoot fusion, collapse." Dr. Hanson presented several treatment options and requested to see Bright back in six weeks.

¶ 57 On July 31, 2017, Bright saw Dr. Hanson, with continued left-ankle pain. Dr. Hanson's revised impression was that Bright had "Left hindfoot failure status-post tendon transfer and osteotomy." He recommended a triple arthrodesis, which is a fusion of three places in the foot. Dr. Hanson's medical status form, from that day, lists lifting restrictions concerning Bright's ankle, as follows: may continuously lift 1-10 pounds, may frequently lift 11-20 pounds, may occasionally lift 21-25 pounds, and may never lift more than that, at least until his follow-up appointment with Dr. Hanson following surgery. However, according to Bright, Dr. Hanson simply told him to limit his activities to what he was comfortable with.

¶ 58 On November 27, 2017, Bright responded to State Fund's First Combined Discovery Request to Petitioner, Interrogatory No. 7, which states, "Please describe in detail and with particularity your job duties as a freight manager<sup>3</sup> at the Dollar Tree," as follows:

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<sup>3</sup> Bright described his first position at Dollar Tree as consisting of part-time shelf stocking and floor sweeping. He later became an Assistant Manager. Only discovery refers to this latter position as "Freight Manager."

While I worked at the Dollar Tree as a freight manager I was required to be on my feet for extended periods of time. I had a lot of bending and lifting and my back hurt terribly by the end of the day. I have really never regained the strength that I had before the 1994 accident. I am always in pain and that pain radiates throughout my back and into my hips and legs.

Bright also responded to Request for Admission No. 2, which states, "Please admit that as the freight manager at the Dollar Tree you were lifting things on a daily basis," as follows:

Admitted in part. My lifting was significantly diminished because my employer was informed that I had difficulties with lifting.

¶ 59 Bright became eligible for Medicare when he turned 65, in February 2018.

¶ 60 Bright last saw Dr. Hanson in March 2018, and also had a repeat ablation with Dr. McLaren that month, paid for by Medicare.

¶ 61 In March 2018, Bright described his back pain at a level 9 out of 10. He explained that the activities that cause his low back to hurt include sitting too much, walking, bending, and lifting. He also stated that his work abilities were restricted due to his ankle condition.

¶ 62 At trial, he described his back pain as an 8 out of 10, or "9 counting the stress." He described activities such as sitting, walking, and laying down as hurting, and stated that he was limited in others, such as vacuuming, mowing the lawn, and shoveling. He further testified that, as a result of his back injury, his knees were starting to give out on him and he experienced sciatica.

¶ 63 Bright's third foot surgery was scheduled for the day after trial.

¶ 64 This Court finds that Bright's work at Dollar Tree, including frequent bending and lifting up to 40 pounds and occasional lifting up to 100 pounds, aggravated his back condition. This Court further finds that as of trial, Bright had not returned to baseline, i.e., the condition in which he would be if his back condition had just naturally progressed.

### CONCLUSIONS OF LAW

¶ 65 This case is governed by the 1993 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Bright's industrial accident.<sup>4</sup>

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<sup>4</sup> *Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶ 32, 365 Mont. 405, 282 P.3d 687 (citation omitted); § 1-2-201, MCA.

¶ 66 When there has been both an industrial injury and a subsequent aggravation, liability depends on several factors. Under § 39-71-407(5), MCA, “If a claimant who has reached maximum healing suffers a subsequent **nonwork-related** injury to the same part of the body, the workers’ compensation insurer is not liable for any compensation or medical benefits caused by the subsequent nonwork-related injury.”<sup>5</sup>

¶ 67 When the subsequent aggravation is **work-related**, the inquiry, for purposes of determining liability, focuses on its duration and severity. This Court has explained:

If a claimant has reached MMI with respect to a first industrial injury and he thereafter suffers a work-related, **permanent, and material aggravation** of his medical condition, then the insurer at risk at the time of the aggravation is liable for compensation and medical benefits attributable to the condition. If, on the other hand, the subsequent **aggravation is temporary or immaterial, and** the disabling condition **results from a natural progression** set in motion by the first injury, then the insurer for the original injury is liable for compensation and medical benefits for the condition.<sup>6</sup>

If a claimant has reached MMI and suffers a work-related temporary aggravation, the insurer at risk at the time of the temporary aggravation is liable for benefits until “resolution of the temporary effects of the injuries.”<sup>7</sup>

¶ 68 If a claimant brings a claim against only the insurer liable for his initial injury and asserts that his current disability is a natural progression of that injury, the claimant has the initial burden of proof that his initial injury is a cause of his present disability.<sup>8</sup> If the claimant meets his burden, the burden shifts to the insurer to prove that a subsequent event or events aggravated claimant’s injury and is or are the actual cause of claimant’s present disability.<sup>9</sup>

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<sup>5</sup> Emphasis added.

<sup>6</sup> *Mont. Contractor Comp. Fund v. Liberty Northwest Ins. Corp. (Re: Rusco)*, 2003 MTWCC 10, ¶ 35 (emphasis added) (citing *Burglund v. Liberty Mut. Fire Ins. Co.*, 286 Mont. 134, 950 P.2d 1371 (1997)); see also *Caekaert v. State Comp. Mut. Ins. Fund*, 268 Mont. 105, 112, 885 P.2d 495, 499 (1994) (applying aggravation rule to occupational diseases and using the terms “materially or substantially contributed” and “direct and natural result”).

<sup>7</sup> *Stacks v. Travelers Prop. Cas.*, 2001 MTWCC 9, ¶ 107 (citing *Allen v. Treasure State Plumbing*, 246 Mont. 105, 110, 803 P.2d 644, 647 (1990)); see also *Barnhart v. Liberty Northwest Ins. Corp.*, 2016 MTWCC 12, ¶ 41 (“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.”).

<sup>8</sup> *Briney v. Pac. Employers Ins. Co.*, 283 Mont. 346, 351, 942 P.2d 81, 84 (1997) (citing *Walker v. United Parcel Serv.*, 262 Mont. 450, 454, 865 P.2d 1113, 1116 (1993)) (holding that claimant has initial burden of proving a work-related injury and producing evidence that that injury is a cause of the present disability); see also *Burglund*, 286 Mont. at 136, 950 P.2d at 1372 (holding that claimant met initial burden “by establishing a clear connection between his current condition and his 1984 injury”).

<sup>9</sup> *Briney*, 283 Mont. at 351, 942 P.2d at 84 (citing *Walker*, 262 Mont. at 456, 865 P.2d at 1117) (explaining, “an insurer who alleges that subsequent events are the actual cause of the claimant’s current disability has the burden of proving that allegation”); see also *Burglund*, 286 Mont. at 136, 950 P.2d at 1372 (citation omitted) (“The burden of proof then shifted to Liberty to establish that Burglund’s degenerative low-back condition was accelerated by a

¶ 69 Bright seeks TTD or PTD benefits from the date he resigned from Dollar Tree, asserting that his back condition is a natural progression of his 1994 injury.

¶ 70 State Fund asserts that it is not liable for TTD or PTD benefits because, *inter alia*, Bright's work at Dollar Tree aggravated his low-back condition and he has not returned to baseline. This Court agrees with State Fund.

¶ 71 Based on the above facts, Bright met his burden of proving that his 1994 industrial accident was a cause of his back condition. His medical records, answers to discovery, and testimony demonstrate that although he reached MMI in 2002, his back never returned to its pre-1994 condition; he has required ongoing treatment, from prescription pain killers and a back brace to ESIs and radio frequency ablations, to keep him at MMI.

¶ 72 The burden then shifted to State Fund to prove that Bright's back condition was not the result of a natural progression of the condition caused by the initial injury, but rather, that his lifting at Dollar Tree was an aggravation of his preexisting back condition. State Fund met its burden. Bright's back condition clearly deteriorated while he was working at Dollar Tree due to lifting, which was much more frequent and heavier than Bright let on at trial. Although he testified that his position at the time, Assistant Manager, entailed only occasional stocking work and lifting less than 10 pounds on average, a plethora of evidence shows that his lifting at Dollar Tree was more frequent and substantially heavier than this, thus capable of, and actually, aggravating Bright's back. And, in 2014, in response to questions by State Fund's claims examiner, Dr. McLaren specifically opined that Bright's low-back condition was aggravated by his lifting at Dollar Tree.

¶ 73 Notwithstanding all of this, as well as State Fund's express offer in 2014 to reinstate medical benefits upon notification that Bright's aggravation was temporary and his condition returned to baseline, Bright has never rebutted Dr. McLaren's opinion with additional medical evidence or opinion, nor produced any evidence that he ever returned to baseline. He was obviously able to work at the time he started at Dollar Tree as a stocker/sweeper; indeed, he was able to maintain two jobs for several years. But by the fall of 2015, he claimed it had simply become too painful to work. And, despite a repeat ablation only weeks before, Bright continued to describe his back condition at his April 2018 trial as hurting at a level 8 or 9 out of 10 and limiting his activities as a result.

¶ 74 For these reasons, this Court concludes that Bright's asserted inability to work is not due to natural progression of his 1994 injury but is a result of the aggravation of his back condition. Thus, State Fund is not liable for TTD or PTD benefits commencing on the day after he resigned from Dollar Tree.

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subsequent occupational disease. More specifically, Liberty had to prove that Burglund's increased disability was not the result of a natural progression of the condition cause by the 1984 injury."); *Chaney v. U.S. Fidelity & Guar.*, 276 Mont. 513, 519, 917 P.2d 912, 915 (1996) (citing *Walker*, 262 Mont. at 456, 865 P.2d at 1117) ("Because Chaney's claim was accepted and his initial burden of proof satisfied, the burden of proof shifted to USF & G to show that other injuries caused the extent of his current condition.").

JUDGMENT

¶ 75 State Fund is not liable for TTD or PTD benefits commencing the day after Bright stopped working at Dollar Tree.

¶ 76 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 1<sup>st</sup> day of November, 2018.

(SEAL)

/s/ DAVID M. SANDLER  
JUDGE

c: John C. Doubek  
Melissa Quale

Submitted: April 11, 2018