

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2017 MTWCC 4

WCC No. 2016-3748

DANIAL FLOYD

Petitioner

vs.

ZURICH AMERICAN INSURANCE CO. OF ILLINOIS

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Summary: Petitioner claims that he is not at MMI from his December 2014 injury, and that he is entitled TTD and medical benefits from the time Respondent terminated them. Petitioner further claims that he is entitled to reasonable costs, attorney fees, and a penalty. Although Respondent accepted liability for Petitioner's injury, Respondent argues that Petitioner's current complaints are not a result of the incident at work, Petitioner has achieved MMI, and Respondent is no longer liable for benefits. Respondent also contends that its conduct has been reasonable because Petitioner's presentation has been unique.

Held: Petitioner proved by a preponderance of the evidence that he suffered a compensable injury and that he has not reached MMI. Petitioner is entitled to TTD and medical benefits from the time Respondent terminated them, and, as the prevailing party, Petitioner is entitled to reasonable costs. Respondent's actions in terminating Petitioner's benefits were unreasonable because it disregarded the treating physician's opinions and seized upon the IME physician's opinions despite their obvious faults. Respondent's actions in failing to reinstate Petitioner's benefits after the IME physician's deposition were unreasonable because the IME physician testified on a more-probable-than-not basis that Petitioner's injury was compensable. Therefore, Petitioner is entitled to attorney fees and a penalty.

¶ 1 The trial in this matter was held on July 12, 2016, in Billings. Paul E. Toennis represented Petitioner Danial Floyd. Charles G. Adams represented Respondent Zurich American Insurance Co. of Illinois (Zurich). Claims adjuster Penny Hart was also present on behalf of Zurich.

¶ 2 Exhibits: This Court admitted Exhibits 1 through 52 without objection.

¶ 3 Witnesses and Depositions: This Court admitted Floyd's discovery deposition, his videotaped deposition and written transcript, and the depositions of Shawn M. Henry, DO, and Bernie L. McCaskill, MD, into evidence. Hart was sworn and testified at trial.

¶ 4 Issues Presented: This Court restates the following issues from the Pretrial Order.

Issue One: Is Floyd at maximum medical improvement (MMI) for his injury and if so, when did he reach such status?

Issue Two: If Floyd is not at MMI, for what period is he entitled to temporary total disability (TTD) benefits?

Issue Three: Is Floyd entitled to further medical benefits from the time Zurich terminated those benefits?

Issue Four: Is Floyd entitled to costs, attorney fees, and a penalty?

FINDINGS OF FACT

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

Background

¶ 6 At the time of his industrial injury, Floyd was 50 years old. Floyd had smoked for more than 35 years, and developed osteoporosis and osteopenia, meaning that his bone density was lower than normal, to an extent that was unusual for men of his age. Floyd's osteoporosis and osteopenia made him more susceptible to fractures, and he had developed chronic thoracic compression fractures.

¶ 7 However, before his industrial injury, Floyd had never experienced any significant back problems. At most, his back occasionally felt sore and stiff from a hard day's work, and he took an over-the-counter pain reliever.

¶ 8 This Court viewed Floyd's testimony, which was videotaped, and he was a credible witness.

¶ 9 Floyd began working for Hiland Partners LP, based in Oklahoma, in October 2014 as a gauger. The position required heavy labor activity.

¶ 10 On December 18, 2014, while Floyd was en route between jobsites in Montana, his work truck developed a flat tire. While changing the tire, he could not get one of the

lug nuts loose. Thus, he bent over to try to get more force on the lug wrench. While jerking up, he twisted wrong, the wrench slipped, and he felt several pops in his back. He had severe pain in his legs, his groin, his lower back, and between his shoulder blades. His legs folded on him and went numb, and he fell to the ground. He lay in the snow for approximately 30 to 45 minutes. Floyd called his supervisors, who arrived and took him to the hospital.

¶ 11 On the First Report of Injury, Hiland Partners LP indicated it did not have any reason to question the accident, and agreed Floyd was injured during his employment. As set forth in the Pretrial Order, it is an uncontested fact: “That on December 18, 2014, Petitioner suffered an industrial injury arising from his employment with Hiland Partners LP as he was removing lug nuts on a piece of equipment (truck) near Sidney, Montana.”¹

¶ 12 Upon receiving Floyd’s claim of a work-related injury, Zurich accepted liability. Penny Hart, who has been a workers’ compensation claims adjuster in Montana for more than 15 years, adjusted Floyd’s claim.

Floyd’s Treatment in Montana

¶ 13 On December 18, 2014, at the Sidney Health Center Emergency Department, Linda R. Klein, MD, noted that Floyd had pain, “10/10,” in his mid and low back with radiation down the entirety of both legs. After detecting paravertebral spasms in Floyd’s mid thoracic and lumbar spine on physical exam, Dr. Klein ordered a CT scan of those areas. The CT scan showed three compression fractures in Floyd’s thoracic spine, and a compression fracture at L4, with anterior wedging, meaning that the L4 vertebrae was crushed and compressed, as opposed to being broken apart.

¶ 14 Floyd first saw Alan K. Dacre, MD, at Ortho Montana Spine Clinic in Billings on January 7, 2015, “with a chief complaint of mid back and low back pain.” Floyd reported that since his injury, he had pain between his shoulder blades, above his belt-line, and in his low back, legs, and groin. He also had numbness on the outside of both legs, which, over time, affected his groin and full thighs all the way to his knees.

¶ 15 Dr. Dacre ordered AP and lateral thoracic spine x-rays, which demonstrated degenerative disk disease in Floyd’s mid thoracic spine, and compression fractures of T7, T8, and T9. Dr. Dacre also ordered AP and lateral lumbar spine x-rays, which demonstrated an L4 compression fracture with approximately 25% anterior column height loss. Dr. Dacre prescribed a brace and pain medication, and recommended that Floyd

¹ Pretrial Order, Docket Item No. 35, at 2.

have MRIs of his thoracic and lumbar spine to identify which compression fractures were acute.

¶ 16 Floyd underwent the recommended MRIs on January 9, 2015. The MRI of Floyd's thoracic spine revealed chronic compression fractures of T7, T8, and T9. The MRI of Floyd's lumbar spine revealed an L4 compression fracture with soft tissue edema in the interspinous ligaments at L3-4. The radiologist noted, "Edema at the fracture site suggests this is an acute injury." Thus, the radiologist concluded: "I appreciate an acute mild superior endplate compression fracture of L4. Edema of the interspinous ligaments, facet joints and compression fracture is consistent with an acute compression fracture secondary to hyperflexion injury."

¶ 17 Dr. Dacre reviewed the MRI at a follow-up appointment with Floyd on February 13, 2015. He ordered new lumbar spine x-rays, but perceived no change from previous films and noted that there was no additional collapse of Floyd's L4 fracture. Dr. Dacre noted that Floyd's low-back pain persisted "despite observation and conservative bracing" and, "Oral pain medications at this point are not helping." Dr. Dacre explained that the next treatment option would be a surgical procedure called "kyphoplasty," which Floyd agreed to consider. In the meantime, Dr. Dacre instructed him to continue with the brace and prescribed new pain medication. Dr. Dacre informed Zurich that Floyd was not released to return to work.

Floyd's Treatment in Texas

¶ 18 In March 2015, Floyd moved back to Texas. Hart authorized Dr. Henry, a board-certified orthopedic spine surgeon at the Texas Back Institute, to take over Floyd's treatment.

¶ 19 Dr. Henry first saw Floyd on April 7, 2015. He took a medical history, reviewed Floyd's MRIs and x-rays, and stated that he agreed with the radiologists' findings. Upon physical examination of Floyd's spine, Dr. Henry noted, "The patient demonstrates poor range of motion with flexion, extension, side bending and rotation." Dr. Henry conducted Waddell's tests, but they were negative. Dr. Henry assessed Floyd as having "Low back pain secondary to work-related injury [in] which patient sustained a compression fracture of L4 back in early December." Dr. Henry confirmed at his deposition that this was his diagnosis of Floyd throughout the time he treated him.

¶ 20 Dr. Henry recommended a physical therapy program for 6 to 8 weeks, ordered lumbar spine x-rays as well as a bone density study, and prescribed a Medrol Dosepak, a non-steroidal anti-inflammatory, a muscle relaxer, pain medication, and a neuromuscular stimulation unit to reduce spasm and pain, and to help with atrophy in his lumbar spine.

¶ 21 Floyd began a course of physical therapy on April 14, 2015.

¶ 22 On June 3, 2015, Floyd had a bone densitometry assessment, which revealed osteoporosis in one area and osteopenia, or low bone mass density, in several others, including L1-L4.

¶ 23 Dr. Henry saw Floyd again on June 16, 2015. Dr. Henry prescribed Floyd additional medication for osteoporosis and referred him to an endocrinologist. Dr. Henry explained that it is unusual “for a 50-year-old working male to have osteoporosis and start developing compression fractures.” Dr. Henry filled out a Texas Workers’ Compensation Work Status Report Form, in which he checked the box indicating that the “injured employee’s medical condition resulting from the workers’ compensation injury . . . has prevented and still prevents the employee from returning to work”

¶ 24 On July 23, 2015, Zurich refused to authorize additional physical therapy. Although the physical therapist thought Floyd had “Fair” rehabilitation potential, Zurich determined that Floyd had not shown sufficient progress.

¶ 25 On July 28, 2015, Floyd returned to see Dr. Henry with complaints of worsening low-back pain, radiating to his legs. Dr. Henry recommended an epidural steroid injection to “cool down the nerve root inflammation and radicular pain that he . . . is experiencing in bilateral legs.” Dr. Henry filled out another Texas Workers’ Compensation Work Status Report, again stating that Floyd could not work as a result of his workers’ compensation injury.

¶ 26 In July 2015, Hart wrote to Dr. Henry, asking if Floyd was capable of returning to a modified-duty job, which would have required him to regularly bend and stoop, lift up to 50 pounds, carry a 30-pound tool tray up and down stairs and ladders, and walk, on average, 5 miles per day. Dr. Henry sent a handwritten note back stating: “No the patient does not meet the requirements to perform modified duties listed. He cannot perform any lifting, bending, or stooping.”

¶ 27 Dr. Henry performed a lumbar epidural steroid injection on Floyd on September 8, 2015.

¶ 28 On September 28, 2015, Dr. Henry again filled out a Texas Workers’ Compensation Work Status Report. He again indicated that Floyd could not work as a result of his workers’ compensation injury. He also stated that Floyd could not lift more than 5 pounds, and could not sit, stand, or walk for more than an hour at a time.

¶ 29 At a follow-up visit on October 2, 2015, Dr. Henry noted, “[Floyd] feels the epidural steroid injection did not help him at all,” and rated his low-back pain, leg pain, and middle-

back pain each at a level “10.” Dr. Henry explained that Floyd may need to have surgery to improve his pain and function, but first referred him to the North Texas Pain Recovery Center to see if he was a candidate for a pain management program. Dr. Henry noted that he wanted Floyd to first try a conservative pain management because the surgery Dr. Henry contemplated, which included a fusion, was “a big operation.” Dr. Henry filled out another Texas Workers’ Compensation Work Status Report, stating that Floyd could not return to work as a result of his workers’ compensation injury.

¶ 30 On October 20, 2015, Floyd underwent an evaluation to determine if he was a candidate for a pain management program at the North Texas Pain Recovery Center. Floyd saw Kenneth N. Walker, PhD, a psychologist. Dr. Walker noted that Floyd perceives himself as fragile, but that Floyd’s “thoughts were logical, reality-based, and goal-directed,” and that Floyd “responded in a general honest manner with no obvious distortions.” Dr. Walker diagnosed Floyd with chronic pain syndrome. Dr. Walker concluded that Floyd was “an appropriate candidate for an interdisciplinary rehabilitation program,” the goal of which is to “increas[e] physical functioning, improv[e] his ability to perform physical tasks, as well as increas[e] strength, mobility, and endurance.”

¶ 31 Floyd also saw Brian Caplan, MD, who reviewed Floyd’s medical records and accurately set forth his treatment history. Dr. Caplan diagnosed Floyd with “Chronic pain syndrome due to osteoporotic compression fractures of the thoracic and lumbar spine with marked and subsequent restriction of range of motion of the back, possibly related to the fact that he had not received physical therapy for a prolonged period following the injury.” Dr. Caplan concluded that Floyd was an appropriate candidate for the pain management program.

¶ 32 In November 2015, North Texas Pain Recovery Center requested authorization of 80 hours of pain management treatment for Floyd. Zurich denied the request, as it had scheduled Floyd for an independent medical examination (IME).

¶ 33 At his next, and last, visit with Dr. Henry on December 15, 2015, Floyd continued to report severe pain in his low back and legs. Dr. Henry concluded that Floyd was not at MMI. He reiterated his desire to see Floyd get into the pain management program, but explained that there was “a chance he still may need surgery.” Dr. Henry filled out another Texas Workers’ Compensation Work Status Report stating, “medical condition resulting from the workers’ compensation injury . . . has prevented and still prevents [him] from returning to work”

¶ 34 Dr. Henry testified that Floyd’s compression fracture of L4 was an acute injury, and not a chronic process. And, when asked if Floyd’s compression fracture could have been caused by everyday movements, given that Floyd has osteoporosis, Dr. Henry testified:

I mean it does take some force to still fracture the bone. You know, in his case, his lumbar spine, he has osteopenia too. He wasn't -- he was in kind of the middle range. So it's still going to take some force to, you know, cause him to have a fracture there.

¶ 35 Dr. Henry testified that the history Floyd conveyed to him made sense and was consistent with the objective medical evidence. Dr. Henry also explained that Floyd's symptoms and pain complaints were what one would expect with a compression fracture in the lumbar spine:

Well, I mean he would have low back pain, you know, muscle spasm. Could have some leg pain, depending on the fracture, you know. And basically what happens is the patient will change their posture, their gait pattern; and it can, you know, propagate pain further up into the thoracic spine and will start, you know bending forward and things like that.

When asked about the IME physician's opinion that Floyd's pain should have resolved, Dr. Henry explained that the IME physician was wrong because:

[T]he fractures sometimes don't heal. Or when you have [loss] of height or wedging of the vertebral body, it changes the, basically the shape of the spine, what we call the sagittal alignment.

And basically it shifts the body's center of gravity forward, and then the muscles are basically fighting that forward center of gravity, and it continues to cause pain even though the fracture can be completely healed.

And I believe that's what's going on in his case. He's got, you know, anterior wedging of that vertebral body that's changing his posture, center of gravity; and his muscles are overworked now causing pain.

¶ 36 Dr. Henry testified he wanted Floyd to try the pain management program. If such a program were unsuccessful, Dr. Henry stated he would need to perform surgery to "stabilize the fracture, restore normal spinal alignment[,] . . . reduce his pain[,] and increase his function as a person.

The IME

¶ 37 On December 1, 2015, Floyd underwent an IME² with Dr. McCaskill, about a third of whose practice includes doing such examinations. Dr. McCaskill's report indicates that he reviewed only 11 of approximately 30 of Floyd's medical records.

¶ 38 Dr. McCaskill's report contains several mistakes. While some of Dr. McCaskill's mistakes are inconsequential and can be attributed to sloppiness and inattention to detail, two are significant. Dr. McCaskill incorrectly noted that the emergency room report from the day of the incident included "no description of objective abnormal physical findings." He also incorrectly noted that "available medical records document no significant thoracic complaints until six months following the date of injury."

¶ 39 Relying in large part upon these mistakes, and on his belief that Floyd lied when he said he had not had thoracic spine pain before the accident, Dr. McCaskill concluded that Floyd's presentation "makes no clinical sense and no common sense." Because Dr. McCaskill did not think Floyd gave him a valid history, Dr. McCaskill questioned whether Floyd's L4 compression fracture was "truly work related." Dr. McCaskill stated that he could not provide a "definitive diagnosis" nor state which diagnosis was related to Floyd's injury because the "relationship of the L4 compression fracture to activity at work is speculative." Dr. McCaskill wrote, the "findings of the lumbar MRI scan of 1-9-15 are consistent with a compression fracture that occurred sometime over the previous 6-12 weeks." However, Dr. McCaskill concluded that Floyd's L4 compression fracture was of "undetermined age and etiology" because it was "possible that the compression fracture noted at the L4 level was also spontaneous and occurred some time prior to the work related event of 12-18-14."

¶ 40 Dr. McCaskill opined that Floyd had reached MMI for his L4 compression fracture because he did "not believe that [the] persistence and severity of the patient's current complaints [are] readily explained by his L for [sic] compression fracture." Dr. McCaskill also stated that Floyd had "undergone all reasonable and appropriate treatment" and Dr. McCaskill did not believe that any "additional supervised medical treatment would be of predictable benefit." Dr. McCaskill also stated he could not opine that Floyd had any physical restrictions because of "the obvious discrepancy between his subjective complaints, lack of objective abnormal physical findings and multiple non-physiologic findings." Dr. McCaskill also opined that, "by this date he should be able to return to his preinjury work despite such injury."

² Dr. McCaskill testified at his deposition that the term "required medical evaluation" best describes his examination of Floyd because a third party, interested in his medical opinion, required Floyd to undergo the evaluation. This Court uses the term "IME" in order to maintain consistency in the decisions of the Workers' Compensation Court.

¶ 41 In response to a question asking whether Floyd has a permanent impairment, Dr. McCaskill answered that, were he to assume the L4 compression fracture was the result of an industrial injury, he would assign Floyd a 14% whole person impairment rating under the 6th edition to the *Guides to the Evaluation of Permanent Impairment*, which is a Class 2 impairment.

¶ 42 Notwithstanding, at his deposition, Dr. McCaskill retreated from many of the opinions in his IME report. Most importantly, Dr. McCaskill testified that it was his opinion that it is more likely than not that Floyd sustained an L4 compression fracture as a result of the event on December 18, 2014.³ Dr. McCaskill also agreed that bending over and pulling on a tire iron was a mechanism of injury for an L4 compression fracture. Although Dr. McCaskill opined that Floyd's complaints of pain in his extremities did not make sense, Dr. McCaskill conceded on cross-examination that, "It's not unusual to see some leg symptoms." Dr. McCaskill thought that it was odd that Floyd did not have previous back pain, but agreed that compression fractures can be a gradual process, primarily in older individuals who have severe osteoporosis.

¶ 43 Dr. McCaskill also acknowledged the significant mistakes in his report. He admitted that, contrary to the statement in his IME report, the emergency room report from the day of the incident included objective abnormal physical findings, i.e., muscle spasms, and that both the emergency room report and Dr. Dacre's January 7, 2015, report documented thoracic complaints earlier than six months after the accident. Although Dr. McCaskill based his opinions in large part upon these mistakes, Dr. McCaskill continued to assert that Floyd had non-physiological findings and was exaggerating his symptoms.

¶ 44 Dr. McCaskill also stuck to his opinion that Floyd had reached MMI and had no physical restrictions as a result of his L4 compression fracture. He based his opinion that Floyd's symptoms should have resolved and that he has no permanent disability on the Medical Disability Advisor, a meta-analysis used in Texas workers' compensation claims to determine the average period of disability for specific injuries. He agreed that he took the "average, and project[ed] it on to Danial Floyd specifically." Dr. McCaskill also stuck with his opinion that Floyd does not require any additional medical treatment. He based this opinion on the Official Disability Guidelines, a meta-analysis used in Texas workers' compensation claims to determine what types of treatments should be provided for injuries.

³ Hart has yet to pay the impairment award, despite learning that Dr. McCaskill subsequently connected the L4 compression fracture to the incident at work.

Zurich's Termination of Benefits

¶ 45 Upon receiving Dr. McCaskill's IME report, Zurich terminated Floyd's TTD and medical benefits. Moreover, Zurich refused to pay Floyd an impairment award for his 14% whole person impairment rating.

¶ 46 In effect, Zurich retracted its acceptance of liability for Floyd's claim. Even though Dr. McCaskill had only stated it was "possible" that Floyd's L4 compression fracture predated the incident at work, Hart explained that she relied upon Dr. McCaskill's IME report and concluded that Floyd's L4 compression fracture was of "unknown etiology, preexisting condition, not related to an injury at work." When asked whether she had ever rejected an IME physician's opinion on the grounds that the IME physician did not give his opinions on a more-probable-than-not basis, Hart volunteered:

[I]n all the years I've managed Work Comp claims I haven't rejected an independent medical evaluation opinion. I've reviewed them, and I've followed the advice.

Resolution

¶ 47 The parties' disputes as to whether Floyd is at MMI, is able to return to work, and requires additional medical treatment boil down to whether this Court accepts Dr. Henry's opinions or Dr. McCaskill's. Though not conclusive, the opinion of a treating physician is generally accorded greater weight than the opinions of non-treating experts.⁴ In determining whether conflicting medical opinions outweigh the opinion of a treating physician, this Court has considered such factors as the relative credentials of the physicians and the quality of evidence upon which the physicians based their respective opinions.⁵

⁴ *EBI/Orion Grp. v. Blythe*, 1998 MT 90, ¶¶ 12-13, 288 Mont. 356, 957 P.2d 1134 (citations omitted).

⁵ See, e.g., *Barnhart v. Liberty Northwest Ins. Corp.*, 2016 MTWCC 12, ¶ 45 (citation omitted). See also *Warburton v. Liberty Northwest Ins. Corp.*, 2016 MTWCC 1, ¶¶ 47, 52, 58, 59, 61 (accepting IME physician's opinions over treating physicians' in case where claimant provided inaccurate history to her treating physicians); *Rushford v. Montana Contractor Comp. Fund*, 2014 MTWCC 16, ¶ 205 (ruling that IME physician's opinion had more weight over treating physician's because IME physician had higher quality of evidence on which to base his opinions); *Wright v. ACE Am. Ins. Co.*, 2010 MTWCC 11, ¶ 75 (giving more weight to orthopedic surgeon's opinion over treating physician's because treating physician was chronic pain specialist and issue in case was whether orthopedic surgery was indicated); *Frisbie v. Champion Int'l Corp.*, 1995 MTWCC 13, ¶ 31 (resolving conflict in medical opinions in favor of IME physicians who specialized in treatment of low-back conditions over opinion of claimant's treating physician, who was family practitioner).

¶ 48 Based on these factors, Dr. Henry's opinions are more persuasive than Dr. McCaskill's. First, Dr. Henry is well-credentialed, and at least as qualified as Dr. McCaskill, who no longer performs surgery. Dr. Henry is board-certified in orthopedic surgery by the National Board of Osteopathic Medical Examiners and has been an orthopedic spine surgeon for 14 years, during which time he has treated approximately 8,000 low-back patients. While Zurich maintains that Dr. McCaskill is more qualified because he is board-certified by the American Board of Orthopedic Surgeons, Zurich introduced no evidence that Dr. McCaskill's board certification is more prestigious than Dr. Henry's, and this Court is not persuaded that comparing board certifications from reputable organizations is an accurate measure of a physician's qualifications.

¶ 49 Second, Dr. Henry had more evidence than Dr. McCaskill upon which to base his opinions. Dr. Henry reviewed Floyd's imaging studies and compared them to the radiologists' reports. Dr. Henry saw Floyd on six occasions between April and December 2015, spending 30 to 40 minutes with Floyd at each appointment. Dr. Henry's records demonstrate that he took a thorough history and conducted complete examinations. Dr. Henry's records and testimony show that he understood Floyd's medical history, and offered reasoned opinions based on Floyd's condition, including Floyd's underlying osteoporosis and osteopenia. In contrast, Dr. McCaskill reviewed only 11 of approximately 30 of Floyd's medical records, and the mistakes he made, and his brief descriptions of the records in his report, demonstrate that he did not carefully review them. Although this Court suspects that Dr. McCaskill spent a little more than "approximately 5 minutes" with Floyd, as Floyd testified, Dr. McCaskill spent far less time with Floyd than Dr. Henry.

¶ 50 Moreover, Dr. McCaskill's opinions are not supported by the evidence. Dr. McCaskill's opinion that Floyd's presentation did not make sense was based largely on Dr. McCaskill's failure to accurately read Floyd's medical records. While Dr. McCaskill concluded that Floyd did not give him a valid history and had "multiple non-physiologic findings," Dr. McCaskill acknowledged he was the only physician who found positive Waddell's tests and noted non-physiological findings. None of Floyd's treating physicians doubted Floyd's veracity, and this Court is persuaded that Dr. McCaskill's opinion that Floyd was exaggerating his symptoms is based upon Dr. McCaskill's bias. Dr. McCaskill did not offer any explanation, other than that an average person would not need additional treatment, as to why he does not think Floyd is a candidate for the pain management program or, if that fails, surgery. Nor did Dr. McCaskill refute Dr. Henry's explanation that compression fractures sometimes do not heal and that because Floyd has wedging of his L4, the L4 compression fracture has altered his alignment and changed his posture, thereby causing Floyd pain.

¶ 51 Furthermore, neither the Medical Disability Advisor nor the Official Disability Guidelines is applicable in Montana, and neither provides any basis to conclude that

Floyd's symptoms have resolved, that he is at MMI, and that he does not need additional treatment. While the Medical Disability Advisor provides average return-to-work time frames, the "[d]isability duration values in the [Medical Disability Advisor] are not absolute values and do not represent specific lengths or periods of time at which an injured employee must return to work; the values represent points in time at which additional evaluation may take place if full medical recovery and return to work have not occurred. . . ."6 In addition, "The health care provider, insurance carrier, employer, and Division may consider co-morbid conditions, medical complications, or other factors that may influence medical recoveries and disability durations as mitigating circumstances when setting return to work goals or revising expected return to work durations and goals."7 Likewise, physicians may perform treatment beyond that recommended in the Official Disability Guidelines when warranted.8 Dr. McCaskill did not consider factors unique to Floyd, which Dr. McCaskill acknowledged would affect his healing time, e.g., his age, the length of time he has smoked, and the fact that he continued to smoke after his injury.

¶ 52 Zurich makes several arguments in support of its claim that Dr. McCaskill's opinions should carry more weight than Dr. Henry's. However, none have merit.

¶ 53 Zurich maintains that Dr. Henry doubts that Floyd was injured at work, and argues that Dr. Henry's records and testimony support its position that Floyd did not suffer an L4 compression fracture in his industrial accident. Zurich points to the records in which Dr. Henry diagnosed Floyd's L4 compression fracture as being pathologic, i.e., a fracture that is not caused by trauma but by another condition, such as osteoporosis. However, use of the term "pathologic" does not indicate that Floyd suffered no trauma to his lumbar spine. Rather, as Dr. Henry explained, although Floyd's abnormally low bone density made him more susceptible to an injury, it would still "take some force to . . . cause him to have a fracture there." Zurich also points out that Dr. Henry agreed at his deposition that Floyd's compression fracture "could have" occurred at a time other than at work on December 18, 2014. However, it is clear from Dr. Henry's records and testimony that he is of the opinion that Floyd suffered an L4 compression fracture while attempting to change a tire at work. Moreover, Zurich has not presented any evidence suggesting that Floyd suffered his injury at another time. Zurich also points out that Dr. Henry agreed that the MRI did not show any compression on his nerve, and argues that Dr. Henry doubted Floyd's complaints of pain. However, Dr. Henry went on to explain, "But radiculopathy can come from other things, such as inflammation" There is nothing in Dr. Henry's records or testimony that indicates he thought Floyd was exaggerating his pain. At trial, Hart insisted that Dr. Henry had stated in his records that Floyd's L4

⁶ 28 Texas Admin. Code § 137.10(e).

⁷ 28 Texas Admin. Code § 137.10(d).

⁸ See Texas Admin. Code § 137.100.

compression fracture was of “unknown etiology.” However, Hart’s testimony is false. Dr. McCaskill used the phrase “undetermined . . . etiology”; Dr. Henry did not. Again, Dr. Henry’s records are clear that he believes Floyd suffered an L4 compression fracture at work.

¶ 54 Zurich also argues that this Court should accept Dr. McCaskill’s opinions over Dr. Henry’s because Dr. Henry did not identify where Dr. McCaskill may have been wrong. However, Zurich’s argument is backwards. Zurich proffered Dr. McCaskill’s opinions to rebut Dr. Henry’s opinions. Thus, Zurich should have had Dr. McCaskill explain why Dr. Henry was wrong.

¶ 55 Zurich also argues that it was justified in terminating Floyd’s benefits because his presentation was unusual. While the physicians agree that it is unusual for a man of Floyd’s age to develop osteoporosis, osteopenia, and compression fractures, the “employer takes its workers as it finds them with all of their preexisting conditions.”⁹

¶ 56 This Court gives Dr. McCaskill’s opinions no weight. Accordingly, this Court finds that Floyd has not reached MMI, that he has not been able to return to work, and that the additional medical treatment recommended by Dr. Henry is likely to improve Floyd’s physical condition.

¶ 57 This Court also finds that Zurich’s actions were unreasonable for three reasons.

¶ 58 First, Zurich terminated Floyd’s benefits upon receipt of Dr. McCaskill’s report, taking the position that Floyd did not suffer an L4 compression fracture at work, without applying the standard to rely upon a medical opinion. In *Ford v. Sentry Casualty Co.*, the Montana Supreme Court explained that the standard to rely upon a medical opinion in a workers’ compensation claim is more probable than not.¹⁰ The court explained that a possibility is insufficient, and that the more-probable-than-not standard “assures that the expert testimony or opinion ‘does not represent mere conjecture, but rather is sufficiently probative to be reliable.’”¹¹

¶ 59 Hart knew that this is the standard, and testified that she expects a physician conducting an IME to express his opinion on a more-probable-than-not basis. Notwithstanding, she took Dr. McCaskill’s statement that it was “possible” that Floyd’s L4 compression fracture predated his industrial accident, and terminated his benefits on the grounds that his L4 compression fracture was of “unknown etiology, preexisting condition,

⁹ *Greene v. Uninsured Employers’ Fund*, 2003 MTWCC 27, ¶ 88.

¹⁰ 2012 MT 156, ¶¶ 41, 42, 365 Mont. 405, 282 P.3d 687.

¹¹ *Ford*, ¶ 41 (citations omitted).

not related to the injury at work.” It is unreasonable for an insurer to disregard established Montana law.¹²

¶ 60 Second, Zurich terminated Floyd’s benefits in reliance on Dr. McCaskill, without having a sound reason to accept his opinions over Dr. Henry’s. As set forth above, Zurich has not established that Dr. McCaskill has greater credentials than Dr. Henry, nor that Dr. McCaskill had better evidence on which to base his opinions. When asked at trial if she should have accepted Dr. Henry’s opinions over Dr. McCaskill’s, Hart did not give any reason for accepting Dr. McCaskill’s. Rather, she was evasive; she just testified that she did not accept Dr. Henry’s opinions. When asked about Dr. McCaskill’s mistakes, Hart absurdly testified that they raised no concerns for her and did not change her views of the opinions Dr. McCaskill rendered in his IME report. Zurich did not set forth any other reason for accepting Dr. McCaskill’s opinions over Dr. Henry’s that is supported by the evidence.

¶ 61 This Court has explained, “while conflicting medical opinions ordinarily raise issues of fact which are appropriately submitted to the Workers’ Compensation Court for resolution, the fact that the insurer has obtained an IME opinion supporting its denial does not preclude a finding that its denial was unreasonable. An insurer must fairly and reasonably evaluate all facts and opinions with respect to medical issues.”¹³ It is apparent that Hart did not fairly and reasonably evaluate the facts when she received Dr. McCaskill’s report. Rather, she blindly accepted Dr. McCaskill’s opinions simply because, by her own admission, she accepts the IME physician’s opinion in every claim, a practice that is unreasonable since “unless there are cogent reasons for preferring the opinions of non-treating physicians, the treating physician’s opinions will prevail.”¹⁴ This Court is convinced that Hart was more focused upon finding a basis to deny benefits than on evaluating the merits of Floyd’s claim.

¶ 62 Third, Zurich failed to reinstate Floyd’s benefits after Dr. McCaskill’s deposition. Dr. McCaskill unequivocally testified, on a more-probable-than-not basis, that Floyd suffered his L4 compression fracture at work on December 18, 2014, thereby completely undermining the reason Zurich terminated Floyd’s benefits. However, it is still Zurich’s

¹² See, e.g., *Marcott v. Louisiana Pacific Corp.*, 275 Mont. 197, 205, 911 P.2d 1129, 1134 (1996) (“[A]s a general rule, where a court of competent jurisdiction has clearly decided an issue regarding compensability in advance of an insurer’s decision to contest compensability, the clear applicability of the earlier decision constitutes substantial evidence supporting a finding by the Workers’ Compensation Court that the contest over compensability is unreasonable.”).

¹³ *Doubek v. CNA Ins. Co.*, 2004 MTWCC 76, ¶ 59.

¹⁴ *Doubek*, ¶ 52 (citation omitted). See *Wall v. Nat’l Union Fire Ins. Co.*, 1998 MTWCC 11, ¶¶ 56, 67-69 (penalty and attorney fees warranted where, *inter alia*, insurer failed to ascertain IME physician’s qualifications, continued to rely on IME physician’s opinions despite information suggesting treating physician was more qualified, and disregarded opinions of treating physician).

position that Floyd did not suffer an L4 compression fracture at work, as evidenced by the fact that it has not paid Floyd an impairment award, which Hart also conceded would be payable if Floyd's L4 compression fracture was a compensable injury. Zurich wants to have its proverbial cake and eat it too: it wants this Court to reject Dr. McCaskill's reconsidered opinion that Floyd suffered an L4 compression fracture at work, thereby avoiding liability for Floyd's 14% impairment rating, but at the same time accept Dr. McCaskill's opinion that Floyd is at MMI and needs no further treatment for, in Zurich's words, "whatever may have occurred at the time of Mr. Floyd's December 2014 incident with the lug wrench." It is unreasonable for an insurer to disregard uncontroverted medical evidence and take an inconsistent position.¹⁵

¶ 63 In short, Zurich disregarded Dr. Henry's opinions and seized upon Dr. McCaskill's opinions despite their obvious faults. Zurich then held onto its position that Floyd did not suffer an L4 compression fracture during his employment even after Dr. McCaskill testified that it was his opinion, on a more-probable-than-not basis, that Floyd suffered an L4 compression fracture at work. This Court therefore finds that Zurich's termination of benefits and its refusal to reinstate benefits were unreasonable.

CONCLUSIONS OF LAW

¶ 64 This case is governed by the 2013 version of the Workers' Compensation Act since that was the law in effect at the time of Floyd's industrial accident.¹⁶

¶ 65 Floyd bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.¹⁷

Issue One: Is Floyd at MMI for his injury and if so, when did he reach such status?

¶ 66 "Maximum medical improvement" means "a point in the healing process when further material functional improvement would not be reasonably expected from primary medical services."¹⁸ "Primary medical services" means "treatment prescribed by the

¹⁵ *Galetti v. Montana Power Co.*, 1999 MTWCC 11, ¶¶ 34, 41-43 (self-insured employer's denial of a claim for medical benefits was unreasonable where, among other reasons, the adjuster persisted in maintaining claimant's flare-up was not compensable despite medical information and legal precedent to the contrary). See *Caekaert v. State Comp. Ins. Fund*, 1995 MTWCC 78 (attorney fees warranted where insurer proceeded to trial with no independent medical support for its position, but only a medical opinion that was equivocal as to whether post-injury work aggravated claimant's condition).

¹⁶ *Ford*, ¶ 32 (citation omitted); § 1-2-201, MCA.

¹⁷ *Dumont v. Wickens Bros. Constr. Co.*, 183 Mont. 190, 201, 598 P.2d 1099, 1105-06 (1979) (citations omitted).

¹⁸ § 39-71-116(21), MCA.

treating physician, for conditions resulting from the injury . . . necessary for achieving medical stability.”¹⁹

¶ 67 According to Dr. Henry, Floyd is experiencing pain because his muscles are overworked as a result of his L4 compression fracture. Dr. Henry opined that Floyd is not at MMI because he would benefit from continuous passive motion to improve his physical functioning and control his pain, or, failing that, an operation to stabilize the fracture, restore normal spinal alignment, and reduce pain. Having found that Dr. Henry’s opinion is entitled to more weight than Dr. McCaskill’s, this Court concludes that Floyd is not at MMI.

Issue Two: If Floyd is not at MMI, for what period is he entitled to TTD benefits?

¶ 68 Pursuant to § 39-71-701(1), MCA, “A worker is eligible for temporary total disability benefits: (a) when the worker suffers a total loss of wages as a result of an injury and until the worker reaches maximum healing.”

¶ 69 The evidence establishes that Floyd has suffered a total loss of wages as a result of his injury. He has yet to return to work and Dr. Henry, upon whose opinion this Court relies, has opined that Floyd’s workers’ compensation injury prevents him from returning to work. Thus, Floyd is entitled to TTD benefits from the point at which Zurich terminated those benefits until it may lawfully terminate those benefits.

Issue Three: Is Floyd entitled to further medical benefits from the time Zurich terminated those benefits?

¶ 70 Section 39-71-704(1)(a), MCA, provides, in relevant part: “[T]he insurer shall furnish reasonable primary medical services, including prescription drugs for conditions that are a direct result of the compensable injury”

¶ 71 Here, even Dr. McCaskill agrees that it is more likely than not that Floyd’s L4 compression fracture was a result of the incident at work. Further, Dr. Henry has opined, and Dr. McCaskill has not rebutted, that Floyd continues to experience pain because anterior wedging of the L4 vertebral body has changed his posture and center of gravity, causing his muscles to be overworked. Because his condition is the direct result of a compensable injury, Floyd is entitled to further medical benefits from the time Zurich terminated those benefits.

¹⁹ § 39-71-116(29), MCA.

Issue Four: Is Floyd entitled to costs, attorney fees, and a penalty?

¶ 72 This Court has the authority to award a claimant reasonable costs and attorney fees if: (a) the insurer terminates compensation benefits, (b) this Court later adjudges the claim compensable, and (c) in the case of attorney fees, this Court determines that the insurer's actions in terminating benefits were unreasonable.²⁰ This Court also has the authority to award a 20% penalty on unreasonably refused payments of benefits.²¹

¶ 73 This Court has found that Zurich's termination of benefits and refusal to reinstate benefits were unreasonable. Thus, Floyd is entitled to attorney fees and a penalty. Since Floyd has prevailed, he is also entitled to his costs.

JUDGMENT

¶ 74 Floyd is not at MMI for his injury.

¶ 75 Floyd is entitled to TTD benefits from the point at which Zurich terminated those benefits until it may lawfully terminate those benefits.

¶ 76 Floyd is entitled to further medical benefits from the time Zurich terminated those benefits.

¶ 77 Floyd is entitled to costs and attorney fees, as well as a 20% penalty on the amount of benefits due Floyd during the period of Zurich's refusal to pay.

¶ 78 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 12th day of April, 2017.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: Paul E. Toennis
Charles G. Adams

Submitted: July 12, 2016

²⁰ § 39-71-611(1), MCA.

²¹ § 39-71-2907(1)(b), MCA.