IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2007 MTWCC 18

WCC No. 2006-1778

BONITA FOSTER

Petitioner

vs.

MONTANA SCHOOLS GROUP INSURANCE AUTHORITY

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Petitioner sustained a left knee injury on September 6, 2005, while employed by Respondent's insured, Evergreen School District. On October 27, 2005, Petitioner underwent a left knee arthroscopy with a partial medial meniscectomy. On November 22, 2005, Petitioner was released to full duty by her treating physician. On December 20, 2005, Petitioner returned to her treating physician noting severe pain and catching in her left knee. Ultimately, an MRI conducted on May 19, 2006, showed evidence of an avascular necrosis of the subchondral area of the lateral femoral condyle. Petitioner contends that the avascular necrosis is causally related to either her injury of September 6, 2005, or the medial meniscectomy of October 27, 2005. Alternatively, Petitioner contends that an additional arthroscopy should be authorized to determine whether she has sustained a repeat meniscal tear. Respondent has denied liability, contending that Petitioner has failed to establish a causal relationship between the avascular necrosis and her industrial injury. Respondent also contends that Petitioner has failed to establish on a more-probable-than-not basis that she has sustained a repeat meniscal tear.

Held: Petitioner has failed to establish on a more-probable-than-not basis that the avascular necrosis is causally related to either her injury of September 6, 2005, or her arthroscopy of October 27, 2005. With respect to the possibility of a repeat meniscal tear, Petitioner has likewise failed to establish on a more-probable-than-not basis that such an injury exists. The MRI conducted on May 19, 2006, showed no evidence of a tear, and her treating physician's testimony that there may be a 5-10% chance that the MRI may have missed it does not satisfy Petitioner's burden of proof.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: 39-71-407. Where Petitioner established that she sustained avascular necrosis of the subchondral area of the lateral femoral condyle, but failed to show how the AVN condition was causally related to her initial injury or subsequent arthroscopy with objective medical findings, Petitioner failed to meet her burden of proof pursuant to the 1995 amendments to § 39-71-407, MCA.

Causation: Medical Condition. Where Petitioner established that she sustained avascular necrosis of the subchondral area of the lateral femoral condyle, but failed to show how the AVN condition was causally related to her initial injury or subsequent arthroscopy with objective medical findings, Petitioner failed to meet her burden of proof pursuant to the 1995 amendments to § 39-71-407, MCA.

Injury and Accident: Objective Medical Evidence of. Where Petitioner established that she sustained avascular necrosis of the subchondral area of the lateral femoral condyle, but failed to show how the AVN condition was causally related to her initial injury or subsequent arthroscopy with objective medical findings, Petitioner failed to meet her burden of proof pursuant to the 1995 amendments to § 39-71-407, MCA.

Medical Evidence: Objective Medical Findings. Where Petitioner established that she sustained avascular necrosis of the subchondral area of the lateral femoral condyle, but failed to show how the AVN condition was causally related to her initial injury or subsequent arthroscopy with objective medical findings, Petitioner failed to meet her burden of proof pursuant to the 1995 amendments to § 39-71-407, MCA.

Proof: Causation. Where the literature and testimony presented established that avascular necrosis secondary to a meniscectomy is a rare event, Petitioner's treating physician characterized the development of AVN post-arthroscopy as a "very low risk," and her AVN occurred in the lateral compartment of her knee, while the meniscectomy was of the medial meniscus, the Court concluded that Petitioner failed to prove on a more probable than not basis that the AVN was caused by her arthroscopy.

Causation: Medical Condition. Where an MRI was negative for a repeat medial meniscus tear and a physician testified that there is a 5-10% chance

that the MRI missed a repeat tear, the Court concluded that Petitioner had failed to sustain her burden of proof establishing that Respondent is liable for a repeat arthroscopy.

¶ 1 The hearing in this matter was held on April 3, 2007, in Missoula, Montana. Petitioner Bonita Foster was absent but was represented by David W. Lauridsen. Respondent Montana Schools Group Insurance Authority was represented by Oliver H. Goe. Katy Howell, claims examiner for Respondent, was also present.

¶ 2 Exhibits: Exhibits 1 through 5 were admitted without objection. At the time of hearing, Petitioner also wished to introduce a June 20, 2007, letter from Ms. Howell to Petitioner as an additional exhibit. Respondent objected on the grounds of timeliness, relevance since there was no issue as to penalty or attorney fees, and that counsel had agreed that this hearing was merely an opportunity for counsel to present argument. The Court sustained the objection and the letter was not admitted into evidence.[1]

¶ 3 Witnesses and Depositions: The depositions of Petitioner, Kenneth V. Carpenter, M.D., and Robert J. Seim, M.D., were taken and submitted to the Court.

¶ 4 Issues Presented: The Pretrial Order states the following contested issues:

¶ 4a Whether Petitioner's current medical condition and disability resulted from the industrial accident on September 6, 2005, while acting within the course and scope of her employment with Evergreen School District in Kalispell, Flathead County, Montana.

¶ 4b Whether Petitioner is entitled to additional medical benefits.

¶ 4c Whether Petitioner is entitled to temporary partial and/or temporary total disability benefits retroactive to July 4, 2006, and continuing until she reaches maximum medical improvement.

¶ 4d Whether Petitioner is entitled to costs pursuant to § 39-71-611, MCA.[2]

[1] The letter was docketed into the Court's file for appeal purposes.

[2] Pretrial Order at 6.

FINDINGS OF FACT

¶ 5 Petitioner resides in Kalispell, Montana.[3]

¶ 6 On September 6, 2005, Petitioner was working as a kitchen helper for the Evergreen School District when she sustained an industrial injury to her left knee.[4] The Respondent accepted liability for Petitioner's left knee injury and has paid temporary total disability, permanent partial disability, and medical benefits.[5] She first sought treatment for this injury at the Evergreen Community Clinic on September 15, 2005. Her primary complaint at that time was pain on the inside and back parts of her left knee and pain up the side of her leg and into her hip.[6]

¶ 7 Petitioner was then referred for treatment to orthopedic surgeon Matthew K. Bailey, M.D. She first treated with Dr. Bailey on September 20, 2005. At this initial treatment with Dr. Bailey, Petitioner related a history of immediate pain on the medial aspect of her left knee at the time of her injury with persistent medial pain. Dr. Baily assessed Petitioner as having sustained "an MCL strain, left knee." He also noted the possibility of a meniscus tear. He recommended Petitioner wear a hinged knee brace for the following three weeks and work on her range of motion and, if she continued to have difficulty, she undergo an MRI.[7]

¶ 8 Petitioner followed up with Dr. Bailey on October 5 and 18, 2005. Due to Petitioner's continuing difficulties, Dr. Bailey ordered an MRI which was performed on October 20, 2005.[8]

¶ 9 The MRI report reflects three conclusions:

¶9a Abnormal marrow signal intensity in the medial femoral condyle that is compatible with a subcortical, nondisplaced fracture and adjacent edema/contusion.

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[3] Petitioner Dep. 84:17-18.

[4] Pretrial Order at 1; Petitioner Dep. 9:6-9.

[5] Pretrial Order at 2.

[6] Ex. 1 at 29.

[7] Ex. 1 at 49-50.

[8] Ex. 1 at 53-54, 81-82.

¶9b Tear of the posterior horn of the medial meniscus probably extending to the mid body.

¶9c Slightly increased signal intensity in the medial collateral ligament on the T1 images, compatible with minor sprain of uncertain age.[9]

¶ 10 Following the MRI, Petitioner returned to Dr. Bailey for follow-up treatment on October 25, 2005. After reviewing the MRI findings, Dr. Bailey assessed Petitioner with a left knee medial meniscus tear and recommended arthroscopic evaluation and treatment likely consisting of a partial meniscectomy.[10]

¶ 11 On October 27, 2005, Petitioner underwent a left knee arthroscopy with a partial medial meniscectomy. Dr. Bailey's operative report reflects that the arthroscopy confirmed the medial meniscus tear and 30% to 40% of the medial meniscal tissue was removed. Some fraying of the medial edge of the lateral meniscus was noted and shaved back to stable margins. Dr. Bailey's report also notes, "No chondral injuries were seen."[11]

¶ 12 Petitioner followed up with Dr. Bailey post-surgery on November 22, 2005. At that time, she reported no complaints other than a "little difficulty kneeling." She exhibited full extension and nearly full flexion. Dr. Bailey authorized Petitioner to return to full duties and normal activities and indicated that Petitioner would only be seen back on an as-needed basis.[12]

¶ 13 On December 14, 2005, in response to a letter from Respondent's claims adjuster, Dr. Bailey indicated that Petitioner was at maximum medical improvement (MMI) and assigned her a 1% impairment.[13]

¶ 14 Petitioner returned to Dr. Bailey on December 20, 2005, with complaints of pain in the medial side of her left knee. After examining Petitioner, Dr. Bailey assessed "either a

[9] Ex. 1 at 81-82.

[10] Ex. 1 at 55.

[11] Ex. 1 at 85-86.

[12] Ex. 1 at 59-60.

[13] Ex. 1 at 61.

possible recurrent meniscal tear versus inflammation of the knee versus pes bursitis." A cortisone injection was administered and Petitioner was directed to return in three weeks.[14]

¶ 15 Petitioner next treated with Dr. Bailey on March 14, 2006. At this time, she reported no pain, locking, or swelling but she was experiencing sudden buckling and giving way about two times per week. Dr. Bailey directed Petitioner to return for follow-up in four weeks, at which time if Petitioner was having unremitting problems, he would consider ordering an MRI. If Petitioner had continued to improve, he would consider her to be at MMI.[15]

¶ 16 Petitioner returned to Dr. Bailey on April 11, 2006. Petitioner reported feeling better until just over a week prior to her appointment, at which time she experienced a significant increase in pain following a drive to and from Great Falls. Petitioner also reported a persistent locking sensation every other day and a great deal of difficulty with kneeling. Dr. Bailey administered another cortisone injection and ordered "therapy to work on functional rehab of her knee and strengthening." He concluded that, if none of this helped, he would consider a repeat MRI to look for a recurrent meniscal tear.[16]

¶ 17 Petitioner returned to Dr. Bailey on May 10, 2006. Because of her persistent pain in the left knee medial joint line, Dr. Bailey ordered a repeat MRI to address concerns of a possible recurrent meniscus tear.[17]

¶ 18 After the second MRI, Petitioner returned to Dr. Bailey on May 23, 2006. In his treatment note from that day, Dr. Bailey notes that the MRI showed evidence of the previous partial meniscectomy. It also showed "a large area of marrow abnormality, lateral femoral condyle, compatible with a bone infarct."[18]

¶ 19 Petitioner next treated with Dr. Bailey on June 13, 2006. She reported worsening pain in her knee, fluctuating between medial and lateral. After examination and a review of x-rays, Dr. Bailey concluded that Petitioner was suffering from avascular necrosis (AVN) of the lateral femoral condyle. Dr. Bailey's recommendation was to proceed with an

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[14] Ex. 1 at 62.

[15] Ex. 1 at 63.

[16] Ex. 1 at 64.

[17] Ex. 1 at 65.

[18] Ex. 1 at 68.

arthroscopic evaluation to look for loose chondral fragments and sloughing and to "consider drilling any defects."[19]

¶ 20 In response to Dr. Bailey's request for authorization of the left knee arthroscopy, Ms. Howell wrote to Dr. Bailey inquiring whether the AVN was causally related to Petitioner's industrial injury of September 6, 2005.[20] In Dr. Bailey's response, he noted, "The majority of cases of avascular necrosis are [of] unknown cause or idiopathic." He noted further that Petitioner had been doing well prior to being put on a course of steroids for an unrelated condition. He concluded that, "more probably than not medically it is likely the steroids that caused AVN." Dr. Bailey was also concerned, however, that Petitioner may have developed a recurrent meniscal tear. Notwithstanding the absence of any indication of a meniscal tear on the most recent MRI, Dr. Bailey noted that an MRI "can miss recurrent tearing 5-10% of the time."[21]

¶ 21 In a follow-up letter to Ms. Howell on July 26, 2006, Dr. Bailey amended his previous opinion that, more probably than not, it was likely that Petitioner's steroid use caused the AVN. Dr. Bailey stated that since offering that initial opinion, it had come to his attention that Petitioner had only taken two 20 mg prednisone tablets. After conferring with an internist, he determined it was unlikely such a dose would be a source or contributing factor of AVN. Dr. Bailey modified his assessment, stating, "I think it is most likely that this is either an idiopathic AVN versus certainly is possible that it is related to the arthroscopy." Dr. Bailey noted that a causal link had not been established between arthroscopy and AVN. However, he stated: "There have been some associations made in the literature between arthroscopy and a very low risk of developing AVN postop." Dr. Bailey further noted that the "confounding factor" was that Petitioner had developed symptoms initially on the medial side where her meniscus tear had been but the MRI reflected the AVN in the lateral condyle. He repeated his concern that her symptoms may be coming from a repeat meniscus tear though he acknowledged, "there is certainly the possibility she may be sloughing some cartilage laterally and causing similar symptoms."[22]

¶ 22 Petitioner also sought the opinion of Dr. Robert J. Seim. Dr. Seim is formerly an orthopedic surgeon who specialized in arthroscopy and joint replacement surgery. His current practice is primarily the performance of independent medical examinations. After

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[19] Ex. 1 at 71.

[20] Ex. 1 at 73.

[21] Ex. 1 at 75.

[22] Ex. 1 at 79-80.

conducting a records review, Dr. Seim authored a report dated November 17, 2006.[23] In this report, Dr. Seim concluded: "I believe [Petitioner] has had a spontaneous osteonecrosis[24] of the knee. The cause of this can be trauma or idiopathic. The literature, however, does show that these have been noted post meniscectomy."[25] Dr. Seim further opined that it was unlikely that the small amount of steroids taken by Petitioner had any effect on the osteonecrosis. Ultimately, Dr. Seim concluded, "In essence, the spontaneous osteonecrosis appears to be most likely secondary to the trauma of the fall or secondary to the arthroscopy."[26]

¶ 23 At Respondent's request, Dr. Kenneth V. Carpenter, an orthopedic surgeon, conducted a medical records review and submitted a report dated December 6, 2006.[27] In this report, Dr. Carpenter opined that, "the osteonecrosis that has developed in the lateral femoral condyle is not related to the arthroscopic partial medial meniscectomy."[28] Regarding both Dr. Bailey's and Dr. Seim's observations that there have been reports of AVN developing after arthroscopic surgery, Dr. Carpenter commented:

> In reviewing the literature, it is noted that these areas of avascular necrosis developed in the compartment where the meniscectomy was performed, i.e., if a medial meniscectomy was performed, the avascular necrosis developed in the medial femoral condyle. In this case, the avascular necrosis developed in the lateral compartment.[29]

¶ 24 Dr. Carpenter opined that two factors may have played a part in Petitioner's development of AVN – Petitioner's use of steroids and her history of Raynaud's phenomenon. Dr. Carpenter noted that, although Petitioner stated that she only took two 20 mg prednisone tablets, "no minimum dose [of corticosteroids] that would cause

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[23] Ex. 1 at 100-107.

[24] At various times in the medical records and testimony, the terms "avascular necrosis" (AVN) and "osteonecrosis" are used in discussing the condition of Petitioner's lateral femoral condyle. As they pertain to this case, these terms are synonymous and are used interchangeably. (*See*, Seim Dep. 15:25 - 16:1-8.)

[25] Ex. 1 at 107.

[26] *Id*.

[27] Ex. 1 at 109-110.

[28] Ex. 1 at 110.

[29] Ex. 1 at 109.

avascular necrosis has been established."[30] Regarding the Raynaud's phenomenon, Dr. Carpenter noted, "There is a correlation between avascular necrosis and diseases that effect the immune system. Raynaud's Phenomenon [is] known to be associated with a number of autoimmune diseases."[31] Finally, Dr. Carpenter opined that Petitioner's AVN may simply be a spontaneous osteonecrosis "for which there is no known specific cause."[32]

¶ 25 Dr. Carpenter supplemented his report by way of a letter dated January 16, 2007. In this letter, Dr. Carpenter further opined that the AVN was not related to Petitioner's initial knee injury.[33]

¶ 26 Dr. Seim reviewed Dr. Carpenter's report and responded to it by way of letter dated January 28, 2007.[34] Dr. Seim agreed with Dr. Carpenter that the AVN "should most likely be within the medial compartment where the meniscus was removed."[35] Dr. Seim went on to note, however, that although the excision was of the medial meniscus, there was some trimming of the lateral meniscus. However, Dr. Seim stated, "I am not sure in my experience that I can tell you how that does or does not affect this." Ultimately, Dr. Seim explained:

> I think Dr. Carpenter has covered the subject very well, and I would only have one slight disagreement. This being the fact that there was some mild trimming of the lateral meniscus, as well as excision of the medial meniscus. I am not sure how this would come in to in the development of avascular necrosis[36]

¶ 27 In Dr. Carpenter's deposition, he expounded upon his report. Specifically, he agreed that, had Petitioner sustained an injury to the lateral femoral condyle in her September 6, 2005, industrial injury, it should have appeared on the MRI taken on October 25, 2005.[37] Dr. Carpenter testified that the medical literature on the subject indicates that such an injury

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[30] Ex. 1 at 109-110.

[31] Ex. 1 at 110.

[32] *Id.*

[33] Ex. 1 at 111.

[34] Ex. 1 at 108.

[35] *Id*.

[36] *Id*.

[37] Carpenter Dep. 9:14-18.

would be expected to appear on an MRI within four to six weeks post-incident.[38] Moreover, Dr. Carpenter testified that, in all the case studies which have addressed the issue of a potential association between arthroscopy and osteonecrosis, the osteonecrosis has developed in the same compartment of the knee in which the arthroscopy was performed.[39] This is unlike the present case, in which Petitioner underwent an arthroscopic meniscectomy in the medial compartment and later developed osteonecrosis in the lateral compartment. Regarding the shaving of the medial edge of the lateral meniscus, Dr. Carpenter could find no support in the medical literature upon which to conclude that this bore any relationship to the subsequent onset of osteonecrosis of the lateral femoral condyle.[40] In his personal experience, Dr. Carpenter testified that he had performed between 1,500 and 2,000 arthroscopic surgeries and had never seen the development of osteonecrosis following such a surgery.[41] Based on his review of the May 19, 2006, MRI, Dr. Carpenter agreed, to a reasonable degree of medical probability, that Petitioner did not suffer a repeat tear of the medial meniscus.[42]

¶ 28 In Dr. Seim's deposition, he agreed that no evidence indicated that Petitioner suffered an injury to the lateral condyle at the time of her September 6, 2005, injury.[43] Dr. Seim also testified that, although the AVN could be related to either the trauma or the meniscectomy, it may not be related to either.[44] Dr. Seim agreed that he could not state to a reasonable degree of medical probability that the AVN was specifically related to either the trauma or the subsequent surgery.[45] Dr. Seim agreed that the occurrence of AVN secondary to a meniscectomy is a rare event.[46] Finally, Dr. Seim agreed that there was no objective evidence of a repeat meniscus tear.[47]

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[38] Carpenter Dep. 9:19-25.

[39] Carpenter Dep. 12:14-23.

[40] Carpenter Dep. 15:9-12.

[41] Carpenter Dep. 13:8-13.

[42] Carpenter Dep. 11:19-25.

[43] Seim Dep. 16:17-25 - 17:1-9; 27:12-15.

[44] Seim Dep. 54:20-25.

[45] Seim Dep. 55:13-17.

[46] Seim Dep. 41:17-22.

[47] Seim Dep. 33:12-14.

CONCLUSIONS OF LAW

¶ 29 The claims at issue in this case are governed by the 2005 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Petitioner's industrial accident.[48]

¶ 30 Petitioner bears the burden of proving by a preponderance of the evidence that she is entitled to the benefits she seeks.[49]

¶ 31 Petitioner's claim presents issues concerning the nature and amount of evidence necessary to support claims for compensation under the Workers' Compensation Act. In this regard, Petitioner's burden of proof is set forth in § 39-71-407(2), MCA, which provides as follows:

> (2) (a) An insurer is liable for an injury, as defined in 39-71-119, if the injury is established by objective medical findings and if the claimant establishes that it is more probable than not that:
> (i) a claimed injury has occurred; or
> (ii) a claimed injury aggravated a preexisting condition.
> (b) Proof that it was medically possible that a claimed injury occurred or that the claimed injury aggravated a preexisting condition is not sufficient to establish liability.[50]

¶ 32 Objective medical findings means medical evidence, including "diagnostic evidence, substantiated by clinical findings."[51]

¶ 33 Section 39-71-407(7), MCA, provides:

> (7) An employee is not eligible for benefits payable under this chapter unless the entitlement to benefits is established by objective medical findings that contain sufficient factual and historical information concerning the relationship of the worker's condition to the original injury.

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

[49] *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).

[50] § 39-71-407(2), MCA.

[51] § 39-71-116(19), MCA.

¶ 34 The Montana Supreme Court has held: "Causation is an essential element to benefit entitlement. The claimant has the burden to prove a causal connection by a preponderance of the evidence."[52]

¶ 35 In interpreting the pertinent provisions of § 39-71-407, MCA, Petitioner argues that this case presents an "almost identical issue" as the one addressed in this Court's decision in *Gallup v. State Compensation Insurance Fund*.[53] In *Gallup*, this Court found that the claimant's condition was causally related to her industrial injury despite the absence of conclusive medical evidence establishing a causal relationship. In so finding, this Court detailed the line of Montana Supreme Court cases addressing the compensability of conditions for which the causes are unknown to medical science beginning with *Moffett v. Bozeman Canning Co.*[54] through *Prillaman v. Community Medical Center*.[55] However, *Gallup* was decided under the 1991 version of the Workers' Compensation Act.[56] In light of the amendments to this statute in 1995, Petitioner's reliance on *Gallup* is largely misplaced. Indeed, this Court indicated as much when it stated: "It should be noted that this [statutory] scheme no longer applies due to revision of section 39-71-407, MCA, by the 1995 Montana legislature. . . . [T]he *Moffett* rationale may not apply to cases arising after July 1, 1995."[57]

¶ 36 Since *Gallup*, and the cases discussed therein, were all decided prior to the 1995 amendments to § 39-71-407, MCA, their analysis and interpretation of this statute is of limited utility to this Court's determination, which must apply the post-1995 version of § 39-71-407, MCA. The Montana Supreme Court recognized as much in *Matthews v. State Compensation Insurance Fund*,[58] when it rejected an injured worker's reliance on *Plainbull v. Transamerica Insurance Company*[59] as it pertained to a post-1995 injury.[60]

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[52] *Hash v. Montana Silvermith*, 256 Mont. 252, 257, 846 P.2d 981, 983 (1993), *citing Grenz v. Fire and Casualty of Conn.*, 250 Mont. 373, 380, 820 P.2d 742, 746 (1991).

[53] *Gallup v. State Compensation Ins. Fund*, 1996 MTWCC 14.

[54] *Moffett v. Bozeman Canning Co.*, 95 Mont. 347, 26 P.2d 973 (1933).

[55] *Prillaman v. Community Medical Cent.*, 264 Mont. 134, 870 P.2d 82 (1994).

[56] *Gallup*, Conclusions of Law No. 1.

[57] *Gallup*, Conclusions of Law No. 7.

[58] *Matthews v. State Compensation Ins. Fund*, 296 Mont. 76, 985 P.2d 741 (1999).

[59] *Plainbull v. Transamerica Ins. Co.*, 264 Mont. 120, 870 P.2d 76 (1994). *Plainbull* was among the line of cases applying the "*Moffett* rationale" as discussed by this Court in *Gallup*.

[60] *Matthews*, 296 Mont. at 81, 985 P.2d at 744, ¶ 16.

¶ 37 In rejecting the claimant's reliance on *Plainbull*, the Court in *Matthews* specifically noted:

> [I]n 1995, the legislature amended § 39-71-407, MCA, to provide in pertinent part that "[a]n insurer is liable for an injury, as defined in 39-71-119, *if the injury is established by objective medical findings* and if the claimant establishes that it is more probable than not...." Section 39-71-407(2)(a), MCA (1995) (emphasis added). In addition, the legislature inserted the requirement that "[a]n employee is not eligible for benefits payable under this chapter unless the entitlement to benefits is established by objective medical findings that contain sufficient factual and historical information concerning the relationship of the workers' condition to the original injury." Section 39-71-407(6), MCA (1995).[61]

¶ 38 The Court summarized the new statutory scheme as follows: "Thus, unlike the claimant in *Plainbull*, Matthews had to establish with objective medical findings that an injury occurred."[62]

¶ 39 In the present case, it is not disputed that Petitioner has established that she has sustained an AVN of her lateral femoral condyle with objective medical findings. The issue for this Court's determination is whether she has met her burden of establishing, by a preponderance of the evidence, the existence of a causal connection between the AVN and either her injury of September 6, 2005, or the subsequent meniscectomy of October 27, 2005. As noted above, causation is an essential element to benefit entitlement and the claimant has the burden to prove a causal connection by a preponderance of the evidence.[63] I conclude Petitioner has not met this burden.

¶ 40 Addressing first the initial trauma, there simply is no evidence that Petitioner sustained any trauma to the lateral femoral condyle of her left knee when she sustained her industrial injury on September 6, 2005. In fact, all the evidence presented appears to the contrary. Notably, the October 20, 2005, MRI conducted over six weeks after the initial injury showed no evidence of damage to the lateral femoral condyle.[64] Moreover, when Dr. Bailey performed the October 27, 2005, arthroscopy, he specifically noted in his operative

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[61] *Id.* (Emphasis in original.)

[62] *Id.*

[63] *Hash v. Montana Silvermith*, *supra*.

[64] Ex. 1 at 81-82.

report, "No chondral injuries were seen."[65] In her November 22, 2005, follow-up with Dr. Bailey, Petitioner reported no complaints other than a "little difficulty kneeling" and exhibited full extension and nearly full flexion, which prompted Dr. Bailey to authorize Petitioner to return to full duties and normal activities.[66] Finally, Dr. Bailey placed Petitioner at MMI and assigned her a 1% impairment on December 14, 2005.[67] All of this occurred before Petitioner began exhibiting any symptoms that could even arguably be attributed to the AVN of her lateral femoral condyle.

¶ 41 With respect to the medical opinions concerning any causal relationship between the initial injury and the AVN, the only unqualified opinion is that of Dr. Carpenter – which is that the two are not related.[68] Although Dr. Seim initially opined that the AVN was "most likely secondary to the trauma of the fall or secondary to the arthroscopy,"[69] he later agreed that there was no evidence that Petitioner suffered an injury to the lateral condyle at the time of her September 6, 2005, injury[70] and that, although the AVN could be related to either the trauma or the meniscectomy, it may not be related to either.[71]

¶ 42 Petitioner may also prevail if the Court finds that the AVN was causally related to the arthroscopy of October 27, 2005. Again, however, the Court concludes that the evidence fails to establish such a relationship.

¶ 43 At the outset, it bears noting that the literature and the testimony presented to this Court establishes that an AVN secondary to a meniscectomy is a rare event. Both Dr. Carpenter and Dr. Seim agreed on this fact.[72] Dr. Bailey, Petitioner's treating physician, characterized the development of AVN post-arthroscopy as a "very low risk."[73] The rarity of this occurrence was further illustrated by Dr. Seim's testimony that, when providing

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[65] Ex. 1 at 85-86.

[66] Ex. 1 at 59-60.

[67] Ex. 1 at 61.

[68] Ex. 1 at 111.

[69] Ex. 1 at 107.

[70] Seim Dep. 16:17-25 - 17:1-9; 27:12-15.

[71] Seim Dep. 54:20-25.

[72] Carpenter Dep. 13:3-5; Seim Dep. 41:17-22.

[73] Ex. 1 at 79.

meniscectomy patients with informed consent, he never advised them that AVN was a possible development post-meniscectomy.[74]

¶ 44 Even to the extent that AVN has occurred secondary to a meniscectomy, it would generally be expected to occur in the same compartment in which the meniscectomy had been performed.[75] In the present case, Petitioner underwent a meniscectomy of the medial meniscus yet developed AVN in the lateral compartment. Although Dr. Seim noted that Dr. Bailey shaved the medial edge of the lateral meniscus in the course of performing the medial meniscectomy, he also conceded, "I am not sure in my experience that I can tell you how that does or does not affect this."[76] Dr. Carpenter was unable to find any literature that would support the argument that trimming of the medial edge of the lateral meniscus would cause AVN to develop.[77]

¶ 45 In summation, Petitioner has failed to meet her burden of proof that the AVN is causally related to either her initial injury or the medial meniscectomy. That being the case, the Court need not address the viability of the other potential causes advanced by Respondent (i.e., steroid use, Raynaud's phenomenon).

¶ 46 Petitioner also argues that the Court should find Respondent liable for a repeat arthroscopy, irrespective of whether the AVN is causally related to Petitioner's initial injury or medial meniscectomy. The basis for Petitioner's argument is that Dr. Bailey expressed concern of a recurrent meniscal tear and recommended a repeat arthroscopy to evaluate. Notwithstanding the absence of any evidence of a repeat tear on the May 19, 2006, MRI, Petitioner emphasizes that Dr. Bailey noted that the MRI "can miss recurrent tearing 5-10% of the time."[78] The Court cannot endorse this argument.

¶ 47 For an insurer to be liable for an injury, § 39-71-407(2)(a), MCA, requires the injury to be established by objective medical findings. The Montana Supreme Court has reiterated this point in *Matthews,* holding that a claimant must "establish with objective medical findings that an injury occurred."[79] Unlike the issue of causation as it pertains to Petitioner's AVN, whether Petitioner has sustained a repeat tear of the medial meniscus

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[74] Seim Dep. 44:4-7.

[75] Ex. 1 at 109; Seim Dep. 42:15-19.

[76] Ex. 1 at 108.

[77] Carpenter Dep. 15:9-12; 19:21-25.

[78] Ex. 1 at 75.

[79] *Matthews,* 296 Mont. at 81, 985 P.2d at 744, ¶ 16.

goes to the very existence of this alleged injury. In this case, the only objective medical finding – the May 19, 2006, MRI – shows no repeat tear has occurred.

¶ 48 It is also worth noting that Dr. Bailey's initial notation regarding the need for a repeat arthroscopy made no mention of concerns about a repeat tear of the medial meniscus. Rather, this note indicated that an additional arthroscopy was needed exclusively to address and treat the AVN.[80] Moreover, although Dr. Bailey repeated his recommendation for the repeat arthroscopy in his July 26, 2006, letter to Respondent by noting that it is "possible [Petitioner's] symptoms are coming from a repeat meniscus tear," he went on to acknowledge, "though there is certainly the possibility she may be sloughing some cartilage laterally and causing similar symptoms."[81] Also of note on this matter is Dr. Seim's testimony that there was no objective evidence of a repeat meniscus tear.[82]

¶ 49 Dr. Bailey specifically ordered the May 19, 2006, MRI in order to determine whether Petitioner had sustained a repeat tear of her medial meniscus.[83] The MRI was negative for such a tear. The Court would be hard-pressed to find that a 5-10% chance that the MRI missed the tear is sufficient to sustain Petitioner's burden of proof, especially when there is an equally, if not more, plausible explanation for Petitioner's symptoms.

JUDGMENT

¶ 50 Petitioner has not met her burden of proof that her current medical condition and disability is causally related to either the industrial accident of September 6, 2005, or the arthroscopic surgery of October 27, 2005.

¶ 51 Respondent is not liable for the additional medical and indemnity benefits Petitioner seeks in her Petition for Hearing.

¶ 52 Petitioner's Petition for Hearing is therefore DISMISSED WITH PREJUDICE.

¶ 53 This JUDGMENT is certified as final for purposes of appeal.

¶ 54 Any party to this dispute may have twenty days in which to request reconsideration from these FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT.

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[80] Ex. 1 at 71.

[81] Ex. 1 at 79.

[82] Seim Dep. 33:12-14.

[83] Ex. 1 at 65.

DATED in Helena, Montana, this 11th day of June, 2007.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: David W. Lauridsen
Oliver H. Goe
Submitted: April 24, 2007