

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2012 MTWCC 38

WCC No. 2011-2758

TRAVIS GARY

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Petitioner suffers from low-back pain due to an L4-5 herniated disk. Petitioner claims his current condition is a result of his 2005 industrial injury and wants Respondent to pay for surgery and related, unpaid medical expenses. Respondent denies liability for Petitioner's current condition, maintaining Petitioner's herniated disk is a result of naturally-occurring degeneration unrelated to his industrial injury.

Held: Petitioner has the burden of proving a causal connection between his current herniated disk and his industrial accident. Without proof of medical causation on a more-probable-than-not basis that his current condition is causally related to his industrial injury, Petitioner has failed to meet his burden of proof.

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-407. A conclusory statement from a treating physician that a cause and effect relationship exists between an industrial accident and a condition occurring five years later, without explaining the mechanism of causation, is insufficient to establish a causal connection between the condition and the injury under § 39-71-407(2)(a), MCA.

Causation: Medical Condition. A conclusory statement from a treating physician that a cause and effect relationship exists between an industrial accident and a condition occurring five years later, without explaining the

mechanism of causation, is insufficient to establish a causal connection between the condition and the injury under § 39-71-407(2)(a), MCA.

¶ 1 This matter was submitted on briefs in accordance with the parties' Stipulation for Submission of Case upon Briefs and Medical Records dated December 20, 2011.¹ A Stipulated Briefing Schedule² was agreed to by the parties, subsequently extended by agreement.³

¶ 2 Exhibits: Exhibits 1 through 23 consisting of medical records, diagnostic imaging/radiology reports, lab reports, physical therapy records and occupational therapy records were submitted to the Court without objection.

¶ 3 Witnesses and Depositions: There was no trial and no depositions were taken.

¶ 4 Issues Presented: The parties did not set forth the issues to be determined by the Court. Based on the arguments presented in the briefs, the Court sets forth the issues as follows:

Issue No. 1: Whether Petitioner's current L4-5 herniated disk is causally related to his July 22, 2005, industrial injury.

Issue No. 2: Whether Petitioner is entitled to the payment of unpaid medical bills related to his L4-5 herniated disk.⁴

FINDINGS OF FACT

¶ 5 Petitioner Travis Gary was injured on July 22, 2005, in the course and scope of his employment with Montana Tunnels Mining in Jefferson City, Montana. Gary injured his back while driving a truck and the seat "bottomed out numerous times."⁵

¶ 6 Montana State Fund (State Fund) was the workers' compensation insurer for Gary's employer at the time of his injury. State Fund accepted liability for the claim and paid indemnity and medical benefits.⁶

¹ Docket Item No. 8.

² Docket Item No. 10.

³ Unopposed Motion to Extend the Briefing Schedule, Docket Item No. 11.

⁴ Petitioner also prayed for attorney fees and costs in his Petition for Hearing (Petition), Docket Item No. 1. Since neither party raised nor argued the issue of attorney fees and costs in their respective briefs, the issue is deemed abandoned.

⁵ Petition at 1, ¶ 1; Respondent's Trial Brief (Respondent's Brief) at 1, Docket Item No. 13.

¶ 7 On July 27, 2005, Gary went to Diane Eodice, D.O., complaining of back pain. Dr. D. Eodice referred Gary to Paul Eodice, D.O. (Dr. Eodice) for further treatment.⁷

¶ 8 Dr. Eodice had an MRI taken of Gary's back on August 8, 2005, which showed minimal degenerative bulging of the intervertebral disks at levels T5-T7, a "very mild T-11 anterior wedge compression deformity of chronic age . . . with 5% loss of height and some slight degenerative dehydration of the T11-12 disc," a "minimal physiologic bulge at 4-5," and a disk herniation at L5-S1 with nerve root compression.⁸

¶ 9 Gary had a history of cervical and back pain dating back 15 years following a motor vehicle accident, but Gary told Dr. Eodice that he had been asymptomatic until his injury of July 22, 2005.⁹

¶ 10 An x-ray taken of Gary's lumbar spine on October 3, 2005, showed mild to moderate degenerative disease at L4-5 and L5-S1, with bilateral facet disease at L5-S1.¹⁰ A CT scan of the same date showed spina bifida occulta at S1 and posterior bulging of the L5-S1 disk.¹¹

¶ 11 On November 9, 2005, Ron Hull, M.D., performed a discography with CT scan of Gary's lumbar spine at L3 through S1. Dr. Hull's findings included: "completely normal discography at the L3-4, L4-5 intervertebral disc levels. He has abnormal discography at L5-S1 with evidence of a posterior disc herniation . . ." ¹² As noted by Keith Edwards, M.D., there was also early degenerative changes in the facets at the L3-L5 levels.¹³

¶ 12 On March 22, 2006, an MRI of Gary's spine showed a "tiny central disc herniation" at L4-5, and a small central disk herniation at L5-S1.¹⁴ Gus G. Varnavas, M.D., who ordered the MRI, read it as "no HNP or other structural problems causing nerve root compression."¹⁵

⁶ Response to Petition for Hearing (Response) at 1-2, ¶¶ 1(b), 1(c), Docket Item No. 4.

⁷ Ex. 1 at 1.

⁸ Ex. 18 at 2; [Petitioner's] Initial Brief (Petitioner's Brief), Ex. C at 1, Docket Item No. 12.

⁹ Ex. 1 at 2.

¹⁰ Ex. 18 at 8.

¹¹ Ex. 18 at 6.

¹² Ex. 3 at 5.

¹³ Ex. 18 at 10.

¹⁴ Ex. 18 at 16.

¹⁵ Ex. 2 at 21.

¶ 13 On March 22, 2006, bone mineral analysis of Gary's lumbar spine and hip showed lumbar spine osteopenia and "significantly diminished" bone mineral density.¹⁶

¶ 14 On April 18, 2006, Dr. Varnavas performed an arthroplasty on Gary's lumbar spine, replacing the intervertebral disk at L5-S1 with an artificial Charité disk. The pre- and post-operative diagnosis was degenerative disk disease at L5-S1.¹⁷

¶ 15 Following his back surgery, Gary continued to be seen by Drs. Eodice and Varnavas. On August 25, 2006, Gary told Dr. Eodice that his back pain was improved,¹⁸ and on August 31, 2006, Dr. Varnavas noted that Gary "looks very good" and "[h]is films look great."¹⁹

¶ 16 On February 1, 2007, Dr. Varnavas noted that Gary had recent imaging studies that looked good, and believed Gary was suffering from facet-generated pain. The doctor noted, "I would like to order a spect scan of his lumbar spine to see if one of his facets is lighting up."²⁰ On Gary's next visit, Dr. Varnavas noted, "His bone scan is hot in the lower lumbar facet joints, which could mean that that is the facet that is painful."²¹ Dr. Varnavas then wrote out a request to have Gary undergo facet injections by Dr. Eodice.²²

¶ 17 On April 10, 2007, Dr. Eodice performed right-sided zygapophyseal joint injections at L3-4, L4-5, and L5-S1.²³ Gary received no improvement from the injections.²⁴

¶ 18 On November 12, 2007, Dr. Eodice determined Gary had reached maximum medical improvement and assigned him a 28% impairment rating.²⁵

¶ 19 Gary was seen by John VanGilder, M.D., on January 30, 2008, upon the referral of Dr. Eodice.²⁶ Dr. VanGilder ordered an MRI that revealed annular disk bulges at L3-4

¹⁶ Ex. 18 at 12.

¹⁷ Ex. 2 at 29-30.

¹⁸ Ex. 1 at 34.

¹⁹ Ex. 2 at 149.

²⁰ Ex. 2 at 159.

²¹ Ex. 2 at 161.

²² Ex. 2 at 162.

²³ Ex. 1 at 41-42.

²⁴ Ex. 1 at 43.

²⁵ Ex. 1 at 67-68.

²⁶ Ex. 1 at 72; Ex. 11 at 1.

and L4-5 with facet arthropathy but no nerve impingement. The radiologist noted that the narrowing of the neural foramina at L4-5 was “slightly progressed compared with the prior study” of August 2005.²⁷

¶ 20 Gary continued to treat with Dr. Eodice every 30 to 90 days for his chronic low-back pain and for what Dr. Eodice termed “failed arthroplasty.”²⁸

¶ 21 On September 2, 2010, Dr. Eodice reported that Gary’s August 17, 2010, MRI²⁹ showed a new disk herniation at L4-5 with nerve root compression, causing Gary significant right leg pain.³⁰

¶ 22 Gary was again seen by Dr. VanGilder on September 7, 2010. Dr. VanGilder noted that Gary complained that his right leg pain became noticeably worse about four months ago, with no inciting event. Dr. VanGilder reviewed the recent MRI that showed a new disk herniation at L4-5.³¹ Dr. VanGilder requested authorization from the State Fund for Gary to undergo an L4-5 discectomy.³²

¶ 23 On September 9, 2010, Ken Carpenter, M.D., performed a review of Gary’s case for the State Fund, noting that:

This is a new herniation above the previously treated level. In the case of a disc replacement, the spine isn’t fused and the adjacent level degeneration associated with fusion isn’t a factor. Because of this, the new herniation wouldn’t be related to this injury. The surgery is appropriate but not related.³³

¶ 24 Dr. Eodice wrote in his office note of October 4, 2010, that:

[Gary] has had a long-standing history of back injury, right-sided in nature. This appears to be most likely an aggravation to a chronic underlying

²⁷ Ex. 18 at 47.

²⁸ Ex. 1 at 72-112.

²⁹ Ex. 18 at 62-63.

³⁰ Ex. 1 at 112.

³¹ Ex. 11 at 5-7.

³² Ex. 11 at 8.

³³ Ex. 4 at 7.

condition. He could also have an independent medical evaluation in this situation as well to piece this out for another opinion.³⁴

¶ 25 Dr. Eodice wrote to the State Fund on October 14, 2010, recommending that it consider Gary's current back condition "as an aggravation of his prior injury, and I strongly recommend you recognizing neurosurgical's (sic) recommendations by Dr. John Van[G]ilder."³⁵

¶ 26 The State Fund claims examiner, Tammy Gibson, wrote to Dr. Eodice on October 15, 2010, denying liability for Gary's new herniated disk at the L4-5 level, claiming that it was unrelated to Gary's 2005 accident. The letter also stated State Fund was denying liability for the referral to Dr. VanGilder, as no prior authorization was requested for the referral and Dr. VanGilder was not a panel physician with MHS.³⁶

¶ 27 In his office note of February 14, 2011, Dr. Eodice wrote that Gary was still waiting for the State Fund to recognize that his current disk herniation was "related to an aggravation of a prior injury."³⁷ On May 20, 2011, Dr. Eodice wrote to the State Fund again recommending that Gary be cleared for surgery with Dr. VanGilder.³⁸

¶ 28 On December 26, 2011, Dr. VanGilder wrote to Gary's attorney, stating:

In regards to your questions, as far as the L4-5 level, in reviewing old MRI's, the patient did have degenerative changes at the L4-5 level. This had an annular bulge. As far as the disc herniation that occurred, I suspect that's a progression of a pre-existing problem as he did have degenerative changes at the L4-5 level.³⁹

¶ 29 On July 19, 2011, John C. Schumpert, M.D., performed an independent medical evaluation⁴⁰ of Gary at Tammy Gibson's request.⁴¹ Dr. Schumpert found that, on a more-likely-than-not basis, Gary's herniated disk at L4-5 was unrelated to the July 22, 2005, injury and unrelated to Gary's L5-S1 arthroplasty.⁴² Dr. Schumpert's report

³⁴ Ex. 1 at 114.

³⁵ Ex. 1 at 115.

³⁶ Respondent's Brief, Ex. 1.

³⁷ Ex. 1 at 117.

³⁸ Ex. 1 at 120.

³⁹ Petitioner's Brief, Ex. A.

⁴⁰ Ex. 17.

⁴¹ Respondent's Brief, Ex. 2.

⁴² Ex. 17 at 12.

rationalized that the L4-5 disk was deemed to be normal on the November 9, 2005, discogram, with early degenerative changes of the facet joints, but with no impingement of the nerves or dura. Dr. Schumpert went on to explain that, by the time of the February 8, 2008, MRI, the L4-5 disk had changed, with “broad-based anular (sic) bulge with facet arthropathy,” and finally found to be herniated two and a half years later.⁴³

¶ 30 Dr. Schumpert also explained that an arthroplasty is intended to decrease the likelihood of junctional syndrome that often occurs with spinal fusions, by maintaining normal range of motion of the spine. With no shifting of the artificial disk ever identified, Dr. Schumpert concluded that because Gary was not working and with the maintenance of normal range of motion in his lumbar spine, Gary “is suffering from the natural progression of lumbar degeneration that is unrelated to the 22 July 2005 injury.”⁴⁴ Dr. Schumpert’s report provides a citation to three medical articles that support his opinion regarding the effectiveness of arthroplastic surgery.⁴⁵

CONCLUSIONS OF LAW

¶ 31 This case is governed by the 2003 version of the Montana Workers’ Compensation Act since that was the law in effect at the time of Gary’s industrial accident.⁴⁶

ISSUE ONE: Whether Petitioner’s current L4-5 herniated disk is causally related to his July 22, 2005, industrial injury.

¶ 32 The injured worker bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.⁴⁷ This includes establishing a “causal connection” between his injury and the right to benefits.⁴⁸ Gary must prove by a preponderance of the evidence that the herniated disk at L4-5, occurring some five years after his occupational injury, is causally related to the injury.⁴⁹ Gary has not met this burden.

⁴³ Ex. 17 at 12-13.

⁴⁴ Ex. 17 at 13.

⁴⁵ Ex. 17 at 14.

⁴⁶ *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986); § 1-2-201, MCA.

⁴⁷ *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).

⁴⁸ *Fellenberg v. Transp. Ins. Co.*, 2005 MT 90, ¶ 16, 326 Mont. 467, 110 P.3d 464.

⁴⁹ *McCauley v. Liberty Northwest*, 2004 MTWCC 43, ¶ 47 (citing *Hash v. Montana Silversmith*, 256 Mont. 252, 257, 846 P.2d 981, 983 (1993)).

¶ 33 State Fund accepted liability for Gary's July 22, 2005, back injury and paid indemnity and medical benefits, including surgery to repair a herniated disk at L5-S1, discovered on diagnostic tests shortly after the accident. The present issue is whether State Fund is liable for medical care and treatment for a new herniated disk at level L4-5, discovered over five years after Gary's industrial accident.

¶ 34 After discovering the L4-5 disk herniation, Gary's treating physician Dr. Eodice opined that it represented "an aggravation of [Gary's] prior injury"⁵⁰ . . . most likely an aggravation to a chronic underlying condition."⁵¹ However, Dr. Eodice never explained how the L4-5 disk herniation, diagnosed in 2010, may constitute an "aggravation" of the 2005 injury to the L5-S1 disk. In the absence of any explanation or even minimal elaboration on Dr. Eodice's opinion, I am left to guess as to why he believed the L4-5 disk herniation constituted an "aggravation" of the injury to the L5-S1 disk.

¶ 35 Dr. VanGilder responded to the inquiry from Gary's attorney by noting that Gary's herniated L4-5 disk represented a progression of pre-existing degenerative changes. Notably absent from that opinion, however, is whether Dr. VanGilder believed the progression of those pre-existing degenerative changes at L4-5 is in any way related to Gary's disk herniation at L5-S1. In fact, Dr. VanGilder's opinion could just as easily be viewed as a restatement of Dr. Schumpert's conclusion that Gary "is suffering from the natural progression of lumbar degeneration."⁵²

¶ 36 To sum up the pertinent medical evidence in this case, Dr. Schumpert opined that the L4-5 disk herniation is more likely than not related to the natural progression of Gary's lumbar degeneration and unrelated to Gary's July 22, 2005, accident. Dr. VanGilder opined that the herniated L4-5 disk represented a progression of pre-existing degenerative changes but was silent as to any causal relationship between the L4-5 disk herniation and Gary's industrial accident. Although Dr. Eodice wrote that the L4-5 disk herniation represented "an aggravation of [Gary's] prior injury," he offered no explanation or elaboration as to how that may be the case.

¶ 37 In *Ford v. Sentry Cas. Co.*,⁵³ the Montana Supreme Court held: [A] causal connection between the claimant's physical condition and a work-related accident is an integral part of establishing a compensable "injury" under § 39-71-407(2)(a), MCA." A conclusory statement from a treating physician that there is a cause and effect relationship between an industrial accident and a condition occurring some five years

⁵⁰ Ex. 1 at 115.

⁵¹ Ex. 1 at 114.

⁵² Ex. 17 at 12-13.

⁵³ 2012 MT 156, ¶ 48, 365 Mont. 405, 282 P.3d 687, *affirming Ford v. Sentry Cas. Co.*, 2011 MTWCC 19.

later, without explaining the mechanism for that causation, is insufficient for this Court to conclude the two are related. As I noted in *Stewart v. Liberty Northwest Ins. Corp.*,⁵⁴ “When all of the medical evidence fails in any way to demonstrate a causal relationship between Petitioner’s symptoms and [injury, the treating physician’s] opinion that the two are related is insufficient to meet Petitioner’s burden of proof.” Likewise, I conclude here that Gary has failed to meet his burden of proof.

ISSUE TWO: Whether Petitioner is entitled to the payment of unpaid medical bills related to his L4-5 herniated disk.

¶ 38 Gary has not met his burden in showing that the L4-5 herniated disk is causally related to his 2005 industrial accident. Consequently, Gary is not entitled to payment of the unpaid medical bills related to his L4-5 herniated disk.

JUDGMENT

¶ 39 Petitioner’s current L4-5 herniated disk is not causally related to his July 22, 2005, industrial injury.

¶ 40 Petitioner is not entitled to the payment of unpaid medical bills related to his L4-5 herniated disk.

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

DATED in Helena, Montana, this 26th day of October, 2012.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: John C. Doubek
Thomas E. Martello
Submitted: March 20, 2012

⁵⁴ 2007 MTWCC 41, ¶ 30.