

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2008 MTWCC 7

WCC No. 2006-1707

LIBERTY NORTHWEST INSURANCE CORPORATION

Petitioner

vs.

VALOR INSURANCE COMPANY

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: The claimant suffered knee and neck injuries as a result of an industrial accident on March 5, 2002. His neck injuries were diagnosed as a strain with an underlying degenerative condition. A cervical MRI taken March 23, 2005, revealed a herniated disk. In the interim, the claimant's employer switched workers' compensation insurers. Respondent, who was the insurer at the time of the claimant's industrial accident, denied liability on the grounds that the herniated disk was the result of an occupational disease which developed after July 1, 2002, when it ceased to be the insurer of claimant's employer. Petitioner, who became the employer's workers' compensation insurer on July 1, 2002, denied liability on the grounds that the herniated disk was caused by the March 5, 2002, industrial accident. Petitioner now seeks reimbursement from Respondent of certain medical and wage-loss benefits it has paid the claimant under a reservation of rights.

Held: The claimant did not reach maximum medical improvement (MMI) for his cervical condition until after he was declared to be at MMI following his neck surgery. Accordingly, Respondent is liable for the claimant's neck condition and Petitioner is entitled to indemnification for the benefits it paid pursuant to *Belton v. Carlson Transport*.¹

¹ *Belton*, 202 Mont. 384, 658 P.2d 405 (1983).

Topics:

Maximum Medical Improvement (MMI): When Reached. Where, at the time the claimant was discharged from the care of his treating physician, the doctor opined that the claimant was “very probably” at MMI, and where the claimant continued to treat with another doctor who opined that the claimant was not at MMI a short time later, the Court finds that the treating physician chose his words carefully in not actually finding the claimant to be at MMI on the date of his last appointment. Therefore, the Court concluded the claimant was not at MMI on the date of his last appointment with his treating physician.

Maximum Medical Improvement (MMI): Failure to Follow Physician’s Recommendations. Where the claimant did not choose to cease treating with his doctor, but was discharged from the doctor’s care, the Court does not conclude that the claimant ceased to treat on his own initiative and should therefore be deemed at MMI.

Maximum Medical Improvement (MMI): Failure to Follow Physician’s Recommendations. Where the claimant did not choose to cease treating with his doctor, but was rather seen by the doctor with no follow-up appointment scheduled, the Court does not conclude that the claimant ceased to treat on his own initiative. Therefore, the claimant was not at MMI. While the claimant did not receive treatment for his cervical condition for several months, the record does not demonstrate that he deliberately failed to follow treatment recommendations.

Injury and Accident: Subsequent Injury. Where the Court concluded that the claimant had not reached MMI from a previous industrial injury at the time he alleged his subsequent work activities aggravated his cervical condition, the insurer at risk at the time of the initial industrial accident is not relieved of liability.

Injury and Accident: Aggravation: Generally. Where the Court concluded that the claimant had not reached MMI from a previous industrial injury at the time he alleged his subsequent work activities aggravated his cervical condition, the insurer at risk at the time of the initial industrial accident is not relieved of liability.

Medical Conditions (By Specific Condition): Herniated Disk. Where the claimant suffered a neck injury in a March 5, 2002, industrial accident and did not obtain a cervical MRI until March 23, 2005, it is impossible to know when

the herniation revealed on the MRI occurred. It either did not exist or was asymptomatic until some time after the industrial accident, and either occurred or became symptomatic at that point.

Injury and Accident: Aggravation: Generally. Where a disk herniation was revealed on a 2005 MRI and the claimant had not been found to be at MMI from a March 2002 industrial accident, any occupational disease which was alleged to have occurred subsequent to March 2002 but prior to the claimant's reaching MMI on August 1, 2006, is not compensable as a separate event. Therefore, the insurer at risk in March 2002 remains liable for the medical treatment and other benefits due the claimant.

¶ 1 The trial in this matter was held on January 19, 2007, in Great Falls, Montana. Petitioner Liberty Northwest Insurance Corporation was represented by Larry W. Jones. Respondent Valor Insurance Company was represented by James R. Hintz.

¶ 2 Exhibits: Exhibits 1 through 6 were admitted without objection.

¶ 3 Witnesses and Depositions: The depositions of Mark T. Stoebe, D.C., William Handel (Handel), and Dean Sukin, M.D., were submitted to the Court and can be considered part of the record. Handel was sworn and testified at trial.

¶ 4 Issues Presented: The Court restates the following contested issues found in the Pretrial Order:²

¶ 4a The nature and extent of Handel's cervical injury of March 5, 2002.

¶ 4b Whether Handel attained maximum medical improvement (MMI) from the cervical injury of March 5, 2002.

¶ 4c Whether subsequent diagnosis of a cervical disk herniation and disk osteophyte complex at C6-7 was caused by the injury of March 5, 2002, or Handel's repetitive work activities in subsequent employment.

¶ 4d Whether cervical treatment and surgery by Dr. VanGilder was the direct and natural result of the injury of March 5, 2002, versus an occupational disease that arose after Respondent's coverage of the employer ended.

² See Pretrial Order at 2-3.

¶ 4e Which insurer is liable for Handel's cervical condition after July 1, 2002.

¶ 4f Whether Petitioner is entitled to indemnification from Respondent for medical, temporary total disability (TTD), and permanent partial disability (PPD) benefits that it has paid in regard to Handel's cervical condition.

¶ 4g Whether Respondent is entitled to indemnification from Petitioner for medical benefits that it has paid in regard to Handel's cervical condition since Petitioner was covering the employer.

FINDINGS OF FACT

¶ 5 The parties stipulated to the following facts:³

¶ 5a On March 5, 2002, Handel suffered an industrial accident arising out of and in the course of his employment with Big Sky Tire Rama in Cascade County, Montana.

¶ 5b Big Sky Tire Rama was then insured under Plan II of the Workers' Compensation Act with Respondent.

¶ 5c Respondent accepted liability and has paid certain wage-loss and medical benefits.

¶ 5d Respondent stopped insuring Big Sky Tire Rama on July 1, 2002, when Petitioner began providing workers' compensation coverage for Big Sky Tire Rama.

¶ 5e On July 27, 2005, Handel filed a second claim as a protective filing describing the basis for his claim as follows:

William Handel suffered a cervical injury on 3/5/02. William believes that his current neck problem is causally related to the 3/5/02 injury. Dr. Dean Sukin, a defense medical examiner, states in his report dated 7/6/05 that William's disc herniation at C6-7 is the result of a subsequent occupational disease. See attached medical reports dated 6/13/05 and 7/6/05 of Dr. Sukin. Therefore, William files this claim to protect his

³ See, Pretrial Order at 1-2.

interest, and uses the date 6/13/05 because that is the date of Dr. Sukin's report.

¶ 5f Petitioner has denied the protective filing occupational disease claim.

¶ 5g Petitioner has paid certain wage-loss and medical benefits based on the protective filing claim under a reservation of rights pursuant to *Belton v. Carlson Transport*.⁴

¶ 6 Handel works as an auto technician for Big Sky Tire Rama. His job duties include fixing shocks, brakes, fuel injection systems, and performing tune-ups.⁵ On March 5, 2002, Handel reported to work and went to a repair bay where a coworker was removing a truck from a hoist.⁶ When Handel's coworker put the truck in gear, he drove off the front of the lift instead of backing down the ramp. Handel testified that the lift was about 26 inches high, and when the truck came off the front of the lift, it smashed him into the wall.⁷

¶ 7 Handel believes the front bumper hit him in the knees and he was hit in the face by the bug deflector on the hood of the vehicle.⁸ He was hit on the right side of the face, and felt an extreme jar to his neck.⁹ In the immediate aftermath of the accident, Handel's hip and leg were the most painful, but he also had some pain in the middle of his lower neck.¹⁰

¶ 8 Handel agrees that the initial emergency room examination report accurately describes his physical condition after the accident.¹¹ The report of March 5, 2002, notes:

⁴ *Belton*, 202 Mont. 384, 658 P.2d 405 (1983).

⁵ Handel Dep. 4:3-14.

⁶ Handel Dep. 5:7-25.

⁷ Handel Dep. 6:1-5.

⁸ Handel Dep. 10:6-10.

⁹ Handel Dep. 10:11 - 11: 9.

¹⁰ Handel Dep. 12:10-16.

¹¹ Trial Test.

NECK: Supple with no cervical lymphadenopathy. He did have some mild tenderness in the right lower cervical, upper thoracic paraspinal musculature. There was no midline tenderness, no restrictions with range of motion.¹²

¶ 9 Handel recalls that for a few days after the accident, his entire body was sore.¹³ He was seen by Keith D. Bortnem, D.O., on March 6, 2002. Dr. Bortnem's treatment notes for that date only discuss the condition of Handel's right knee.¹⁴

¶ 10 Handel saw Dr. Bortnem a few more times; on March 28, 2002, Dr. Bortnem noted that Handel complained of back and neck pain.¹⁵ Dr. Bortnem's treatment note of that date states, "[H]e is also having pain in his left knee and up into his right hip, up his back and into his neck. He has never described for me any back or neck pain before but he tells me that he told the emergency room doctor about it when he went in."¹⁶ Dr. Bortnem noted that he wanted to see Handel in three weeks, "and if he is doing well at that time I am going to put him at MMI."¹⁷

¶ 11 Handel recalls that a month after the accident, his neck felt stiff and hurt when he turned or was jarred. He also had headaches.¹⁸ Six months later, his neck felt about the same, and a year later, it felt worse and Handel no longer had medication for it.¹⁹ Handel believes he was unable to get treatment for his neck because Dr. Bortnem would not allow it.²⁰

¹² Ex. 3b at 100.

¹³ Trial Test.

¹⁴ Ex. 3b at 87; Ex. 3c at 6.

¹⁵ Ex. 3b at 88; Ex. 3c at 7.

¹⁶ *Id.*

¹⁷ Ex. 3b at 89; Ex. 3c at 8.

¹⁸ Handel Dep. 13:1-7.

¹⁹ Handel Dep. 14:16-24.

²⁰ Handel Dep. 15:4-12.

¶ 12 Mark T. Stoebe, D.C., is a board certified chiropractic orthopedist and is also board certified in, and a member of, the North American Academy of Impairment Evaluators.²¹ Dr. Stoebe saw Handel as a referral from Dr. Bortnem.²²

¶ 13 Dr. Stoebe initially evaluated Handel on March 28, 2002.²³ The history which Dr. Stoebe recorded at that time was related to him by Handel.²⁴ Dr. Stoebe's understanding of the March 5, 2002, industrial accident was that Handel was standing in front of an alignment rack while a three-quarter-ton pickup was on it. Handel's coworker drove the vehicle off the ramp and it struck Handel in the knee.²⁵ Dr. Stoebe does not know how high the vehicle was off the ground.²⁶ However, he knew from Handel's report that the vehicle also struck him in the cheek,²⁷ chest, and knees, knocking him onto his right hip and elbow.²⁸ Dr. Stoebe believes this impact caused Handel's neck to flex forward.²⁹

¶ 14 At the March 28, 2002, exam, Dr. Stoebe performed several tests and concluded that Handel did not have any radicular symptoms. Dr. Stoebe then took x-rays, including AP and lateral views of Handel's cervical spine. From the films, Dr. Stoebe concluded that Handel had mild degenerative disk disease (DDD) at C6-7 with anterior spondylophytes.³⁰

¶ 15 Over the course of six treatments, Handel's cervical range of motion improved to within normal limits. Dr. Stoebe considered this to be a significant improvement since Handel had exhibited a 40% restriction of bilateral, lateral flexion on March 28, 2002. This further bolstered Dr. Stoebe's belief in his diagnosis that Handel had suffered a strain rather than a disk injury with significant compression of a nerve root.³¹

²¹ Stoebe Dep. 3:17-21.

²² Stoebe Dep. 4:5-6.

²³ Ex. 1 to Stoebe Dep. at 1.

²⁴ Stoebe Dep. 10:12-16.

²⁵ Stoebe Dep. 10:21-25.

²⁶ Stoebe Dep. 11:5-8.

²⁷ Stoebe Dep. 12:18-24.

²⁸ Stoebe Dep. 13:1-3.

²⁹ Stoebe Dep. 11:2-3.

³⁰ Stoebe Dep. 17:1-16.

³¹ Stoebe Dep. 25:4-18.

¶ 16 The films and reports of subsequent x-rays from approximately November 2003 and a March 2005 MRI were available for Dr. Stoebe's review prior to his deposition. Dr. Stoebe also reexamined his March 28, 2002, x-ray films and determined that a very small uncovertebral osteophyte was present at that time on the right-hand side at C6-7.³² Dr. Stoebe stated that a small progression of that osteophyte is present on the November 2003 x-ray.³³ Dr. Stoebe explained that once he learned that disk herniation and a bone spur were found in that area, he retrospectively reviewed and analyzed his March 2002 films, and that upon review, he concluded that while in March 2002 he had opined that no uncovertebral arthrosis was present, in fact some existed at C6-7.³⁴

¶ 17 Dr. Stoebe opined that the DDD at C6-7, the spondylophytes, and the osteophyte were not caused by Handel's industrial accident of March 5, 2002.³⁵ Dr. Stoebe continues to believe his initial diagnosis of mild DDD and a mild strain of the right cervical paraspinal muscles is correct.³⁶

¶ 18 Handel returned to work on April 15, 2002.³⁷ Because of his neck pain, he tried to avoid turning sharply to the side.³⁸ Handel testified that Dr. Bortnem prescribed him Darvocet, and that it relieved his neck pain. However, Dr. Bortnem stopped prescribing him medications and suggested that he take an over-the-counter pain reliever instead.³⁹

¶ 19 Handel said that he called Dr. Bortnem's office on several occasions and stated that he needed a prescription because the over-the-counter medication was not working. According to Handel, Dr. Bortnem's staff told him that Dr. Bortnem was golfing and they laughed at him. Shortly thereafter, Handel had an appointment with Dr. Bortnem and he told Dr. Bortnem that he was experiencing leg and neck pain. Handel testified that Dr. Bortnem accused him of drug-seeking and threw him out of the office. From then on, Handel was unable to get treatment for his conditions because Dr. Bortnem would not allow

³² Stoebe Dep. 17:17-23.

³³ Stoebe Dep. 17:23 - 18:1.

³⁴ Stoebe Dep. 18:2-7.

³⁵ Stoebe Dep. 18:16-20.

³⁶ Stoebe Dep. 18:21 - 19:7.

³⁷ Handel Dep. 16:22 - 17:4.

³⁸ Handel Dep. 17:18-24.

³⁹ Trial Test.

it. Handel further testified that Dr. Bortnem told him to “quit being a pussy.”⁴⁰ Handel stated that Dr. Bortnem used that exact phrase during his first appointment and during an appointment about two months later.⁴¹

¶ 20 Handel believes his neck problems were present from the date of the industrial accident forward. Although he told the doctors about his neck, they concentrated their attention on his knees, which were more painful at that time. Handel’s neck would feel better or worse depending on how strenuous his job was. It also felt better when he was using prescription medication. Sometimes it seemed to feel better or worse for no particular reason.⁴² After he returned to work on April 15, 2002, Handel noted that he would have numbness in his legs and arms when he turned his head at a hard angle while backing up vehicles.⁴³ It was approximately three months after the industrial accident that the neck pain really started to bother him.⁴⁴

¶ 21 Dr. Bortnem saw Handel again on April 18, 2002, and at that time he discharged Handel from his care, noting that Handel was “very probably” at MMI with no permanent impairment.⁴⁵

¶ 22 Handel continued to see Dr. Stoebe. Dr. Stoebe’s treatment note of April 29, 2002, states:

Bill Handel was seen in our clinic this morning for continued chief complaints of bilateral infrapatellar, lower cervical, as well as low back pain. He indicates that his discomforts are improved approximately 50% after six treatments in our clinic. Chief complaint continues to be bilateral knee pain along the medial aspect, more so right than left. . . . Secondary complaint is intermittent lower neck pain without radicular symptoms.⁴⁶

⁴⁰ Trial Test.

⁴¹ Handel Dep. 32:5-16.

⁴² Trial Test.

⁴³ Handel Dep. 33:17 - 34:1.

⁴⁴ Trial Test.

⁴⁵ Ex. 3b at 97; Ex. 3c at 8.

⁴⁶ Stoebe Dep. Ex. 2 at 1.

¶ 23 Dr. Stoebe treated Handel on May 3, 2002, and then did not see him again until April 7, 2003.⁴⁷ Dr. Stoebe testified that as of May 1, 2002, Handel's insurer had authorized additional visits.⁴⁸ Dr. Stoebe does not know why Handel did not return for another treatment in May 2002. Dr. Stoebe's chart notes indicate that on June 11, 2002, a representative from Respondent called his office to ask if Handel was still treating there. The next chart note, dated December 13, 2002, states that Handel came to the office for an appointment and the office called his claims adjuster for authorization. Dr. Stoebe's office reached a representative who did not have the authority to authorize treatment, and no representative with the authority was available that day. Handel was informed that he could receive treatment but that he would be liable for payment, and he refused.⁴⁹ Dr. Stoebe stated that Dr. Bortnem never interfered with his treatment of Handel.⁵⁰

¶ 24 Handel testified that most of the time, when he went to Dr. Stoebe's office for treatment, Dr. Stoebe's staff would ask him to wait while they checked to make sure the visit was authorized by Respondent. Handel testified that one time, he was told his authorization had been cancelled, and another time he did not receive any treatment.⁵¹ When Handel needed something from Respondent, he contacted Jim Miller (Miller), its representative. Handel would usually contact Miller by phone, and usually he would not reach Miller directly but would leave a message. Handel stated that Miller normally did not promptly return his calls, or Miller would call after Handel had left for work.⁵²

¶ 25 Handel explained that he had ongoing problems with Respondent closing his case file. Handel would attempt to fill prescriptions only to be told that his case was closed. Handel also would show up for doctor appointments and be told that he could not be seen because his case was closed. Handel would then contact Miller to get his case reopened. Handel does not know why this happened repeatedly.⁵³

¶ 26 Dr. Stoebe testified that it is his practice to have a member of his office staff contact any workers' compensation patients who fail to show for appointments to have those patients come in for a final examination so that he can determine whether or not there is

⁴⁷ Stoebe Dep. 28:23-25.

⁴⁸ Stoebe Dep. 26:2-5.

⁴⁹ Stoebe Dep. 29:1-14.

⁵⁰ Stoebe Dep. 30:2-8.

⁵¹ Trial Test.

⁵² Trial Test.

⁵³ Trial Test.

medical impairment and to close the case. Dr. Stoebe says he does this specifically to prevent situations like the present one, where issues concerning the status of a patient's condition arise at a future date.⁵⁴

¶ 27 Dr. Stoebe stated that based on Handel's progress up to that point, on a more-probable-than-not basis, Handel would have been at MMI within three to five additional treatments of May 3, 2002.⁵⁵ Dr. Stoebe stated that he was unable to make a formal determination of MMI in Handel's case because Handel ceased to return for treatment.⁵⁶

¶ 28 Dr. Bortnem did not see Handel again until October 17, 2002. After that appointment, Dr. Bortnem reported:

[Handel] comes in today very upset with me. He claims that he has called here many times for medications and has been told no. I reviewed his record and back in June I told him he could not have any more narcotics. He tells me he has been having trouble all along with a burning pain on the inner aspect of his knees and pain down into his Achilles tendons. He tells me that if he works too long he cannot sleep at night. As I inspect his legs, there is absolutely no redness or swelling. He has no atrophy that I can visualize. As I began to examine him some more, he confronted me again about not giving him any more medication and told me that I told him in the past on two occasions that he needs to "quit being a pussy." I in no way, shape or form would ever say anything like that to a patient so I do not know where he gets that from. He again became belligerent with me and I told Mr. Handel that he needs to get another opinion and then I walked out of the room and I do not want to see this man back.⁵⁷

¶ 29 I have reservations as to Handel's credibility. In his medical records, several of his providers noted instances when he was unclear, vague, or a difficult historian regarding his industrial injury. While his testimony at trial seemed straightforward and forthright, I simply have great difficulty believing his assertions that instead of taking his complaints of pain seriously, both Dr. Stoebe and Dr. Bortnem told him to "quit being a pussy." Since Dr. Bortnem did not testify in this matter and Dr. Stoebe testified via deposition, I did not have the same opportunity to assess their credibility. However, in his treatment notes

⁵⁴ Stoebe Dep. 32:4-16.

⁵⁵ Stoebe Dep. 30:15-18.

⁵⁶ Stoebe Dep. 31:4-10.

⁵⁷ Ex. 3b at 97; 3c at 8.

Dr. Bortnem strenuously denied Handel's accusation when Handel confronted him in October 2002. Ultimately, I have given less weight to Handel's testimony than might otherwise have been the case and I have relied heavily on the medical records in making my determinations in this case.

¶ 30 Handel never treated with Dr. Bortnem again after October 17, 2002. On October 30, 2002, he treated with PA-C Deborah F. Sybrant at the Monarc Clinic. PA-C Sybrant noted that Handel had improvement of his neck, knee, and heel pain, with intermittent discomfort in his knees.⁵⁸

¶ 31 In the fall of 2002, Handel sought physical therapy for his knee condition. On November 18, 2002, he reported to his physical therapist that he was having "minimal problems" with his neck from the March 5, 2002, industrial injury.⁵⁹

¶ 32 Handel was released to return to work with no restrictions by PA-C Clifford W. Davis on December 11, 2002, with a follow-up appointment scheduled at Monarc Injury Center for December 27, 2002.⁶⁰ At the follow-up appointment, his work release was reconfirmed, but it was further noted on the Work Ability Report that an MRI of his cervical spine was recommended. It was also recommended that Handel either see a "physiatrist (pain management specialist) or spine doctor or anesthesiologist."⁶¹

¶ 33 Dr. James D. Hinde evaluated Handel on December 20, 2004.⁶² Dr. Hinde found neck pain in the bilateral cervical and parascapular region with cervical paraspinous, upper trapezius and levator scapulae area tightness. Handel reported numbness into his right arm and leg when rotating his head to the right, and occasionally waking up with numbness in his right arm and leg. Handel further reported reduced strength in these limbs.⁶³ Dr. Hinde reviewed cervical spine films which showed foraminal encroachment at C6-7 on the right. Dr. Hinde assessed Handel's condition as including chronic neck pain with periodic right arm and leg numbness, "status post 03/06/2002 accident with head torqued to left." Dr. Hinde noted that while Handel had preexisting spondylosis, it was

⁵⁸ Ex. 3h at 10.

⁵⁹ Ex. 3i at 6.

⁶⁰ Ex. 3g at 1.

⁶¹ Ex. 3g at 3. (Emphasis in original.)

⁶² Ex. 3g at 195.

⁶³ Ex. 3g at 196.

asymptomatic: “He now gets a Lhermitte’s like phenomenon with rotation as above noted.” Dr. Hinde recommended a cervical MRI.⁶⁴

¶ 34 Although both PA-C Davis and Dr. Hinde recommended that Handel get a cervical MRI, none was performed at that time.

¶ 35 Dr. Stoebe saw Handel on April 7, 2003. At that time, he noted that Handel’s pain reports had markedly changed since May 2002, and that he now complained of sharp pain in his right lower neck and numbness extending down the posterior aspect of his right arm into his hand. Dr. Stoebe’s exam revealed symmetrical reflexes and intact sensation, but he further noted that foraminal compression caused lower cervical pain on both sides, more notably on the right. Dr. Stoebe also found moderate tension throughout the levator scapulae and upper trapezius bilaterally, and a tender point in the right rhomboid. Dr. Stoebe diagnosed Handel’s condition as a chronic strain of the cervical and scapular muscles.⁶⁵ He further noted mild DDD in the cervical spine.⁶⁶

¶ 36 On April 11, 2003, Dr. Stoebe wrote a response to an inquiry from Respondent’s counsel. In addition to lower extremity problems which are not at issue in the present case, Dr. Stoebe diagnosed Handel with a chronic strain of the right levator scapulae, upper trapezius, and rhomboid muscles relating to his March 5, 2002, industrial injury. Dr. Stoebe further stated that Handel “describes right upper extremity numbness in a posterolateral distribution, most likely referred versus radicular pain.”⁶⁷ Dr. Stoebe stated that the cervical issues were superimposed upon mild DDD at C6-7. Dr. Stoebe further opined that Handel was not at MMI.⁶⁸

¶ 37 Dr. Stoebe’s status report of April 25, 2003, notes that Handel’s chief complaints involve his legs, but that a secondary complaint of intermittent right-sided neck pain accompanied by a headache is also present. Dr. Stoebe further noted that Handel reported numbness in his right upper arm after prolonged sitting. Upon examination, Dr. Stoebe found Handel’s cervical range of motion to be within normal limits and his reflexes symmetrical; however, he noted mild tension and tenderness in Handel’s right levator

⁶⁴ Ex. 3g at 198-99.

⁶⁵ Ex. 3a at 31.

⁶⁶ Ex. 3a at 32.

⁶⁷ Ex. 3a at 28.

⁶⁸ *Id.*

scapulae and rhomboid muscles.⁶⁹ Dr. Stoebe diagnosed Handel with mild strain of the right levator scapulae and rhomboid muscles and mild DDD in his cervical spine.⁷⁰

¶ 38 Handel testified that he resumed treatment with Dr. Stoebe after Respondent reopened his case. Handel testified that Dr. Stoebe's adjustments were so painful that he would leave the office unable to walk. According to Handel, he asked Dr. Stoebe to be more gentle in his treatment and Dr. Stoebe also told him to "quit being a pussy." Handel testified that during this time, his condition continued to worsen because no doctor would write him a prescription. Handel stated that he is positive that Dr. Bortnem used this exact phrase, but he is not sure if Dr. Stoebe said that or something similar.⁷¹

¶ 39 On June 30, 2003, Dr. Dean C. Sukin wrote an independent medical examination (IME) report following his review of Handel's medical records and a physical examination on that date.⁷² Dr. Sukin practices general orthopedics, adult reconstruction, and trauma.⁷³ Dr. Sukin opined that Handel had suffered a cervical sprain/strain, but he noted an absence of radiographic studies hampered his ability to diagnose Handel's condition.⁷⁴ While he thought Handel was at MMI, he noted that further radiographic studies were warranted to support this conclusion.⁷⁵ Dr. Sukin stated that while he believed it "very likely" that the radiographic studies would confirm that Handel was at MMI, he would not declare Handel to be at MMI until the studies were completed. He stated that while he believed Handel had no permanent physical impairment, the radiographic studies were needed to support that conclusion.⁷⁶

¶ 40 On June 30, 2003, Dr. Sukin issued an addendum to his IME report.⁷⁷ Dr. Sukin reviewed additional medical records and noted that he continued to find Handel's "[c]ervical sprain/strain with underlying degenerative disc disease/spondylolysis" to be related to his

⁶⁹ Ex. 3a at 26.

⁷⁰ Ex. 3a at 27.

⁷¹ Trial Test.

⁷² Ex. 3bb at 24.

⁷³ Sukin Dep. 6:15-19.

⁷⁴ Ex. 3bb at 30.

⁷⁵ Ex. 3bb at 31.

⁷⁶ Ex. 3bb at 32.

⁷⁷ Ex. 3bb at 20.

March 5, 2002, industrial accident.⁷⁸ Dr. Sukin again noted that without additional radiographic studies, he could not determine if Handel was at MMI.⁷⁹

¶ 41 A radiology report of November 11, 2003, found degenerative spondylosis mid and lower cervical spine with degenerative changes at the uncovertebral joints at C6-7 resulting in right C6-7 neural foraminal encroachment.⁸⁰ At that time, films and an MRI of Handel's lumbar spine were performed, but for unclear reasons, an MRI was not done on his cervical spine.⁸¹

¶ 42 Dr. James D. Hinde performed a physiatric examination of Handel on December 20, 2004.⁸² Dr. Hinde reported that Handel continued to experience neck pain in the bilateral cervical and parascapular region with cervical paraspinous, upper trapezius and levator scapulae area tightness. Handel reported to Dr. Hinde that he gets numbness into his right arm and leg when he rotates his head to the right, and that he sometimes wakes up with his right arm and leg numb.⁸³ Upon examination, Dr. Hinde noted that Handel exhibited mildly decreased sensation in the C6 and possibly C7 dermatomes on the right.⁸⁴ Dr. Hinde reviewed Handel's cervical films and noted that a foraminal encroachment of C6-7 on the right was present. Dr. Hinde's assessment included:

Chronic neck pain with periodic right upper and lower extremity numbness, status post 03/06/2002 accident with head torqued to left. The patient does have pre-existing spondylosis but was asymptomatic. He now gets a Lhermitte's like phenomenon with rotation as above noted. MRI of the cervical spine is advised. His neurologic assessment is grossly normal except for mild diminution of sensation in right C6 and C7 dermatomes.⁸⁵

¶ 43 On March 9, 2005, Dr. Sukin issued a report detailing his findings and opinions after an IME he conducted on Handel on February 23, 2005, at the request of Respondent's

⁷⁸ Ex. 3bb at 21.

⁷⁹ Ex. 3bb at 22.

⁸⁰ Ex. 3e at 134.

⁸¹ Ex. 3e at 134-40.

⁸² Ex. 3a at 57.

⁸³ Ex. 3a at 58.

⁸⁴ Ex. 3a at 59.

⁸⁵ Ex. 3a at 60.

counsel. Dr. Sukin reviewed additional medical records which had become available since his previous examination of Handel in June 2003. Dr. Sukin reported that Handel's symptoms at the time of his examination included achiness and stabbing pain in the right side of his neck, numbness in his arm and elbow, and numbness in the deltoid region anteriorly on his left side.⁸⁶ Handel also reported that his neck felt worse if he slept "funny."⁸⁷ Dr. Sukin's examination of Handel's neck revealed that it had mild tenderness globally, trapezius left and right, with negative Spurling's. Dr. Sukin also noted no sensory deficit to light touch in Handel's arms and "cervical flexion of 60/0, extension 45/0, lateral left of 45/0, lateral right of 50/0, and rotation of 70 degrees bilaterally."⁸⁸ Dr. Sukin recommended that Handel have a cervical MRI.⁸⁹

¶ 44 Dr. Sukin opined that Handel sustained a cervical sprain/strain as a result of his March 5, 2002, industrial accident which caused exacerbation of preexisting cervical spondylolysis.⁹⁰ Dr. Sukin declined to opine whether Handel was at MMI until an MRI was performed to determine if his neck condition was normal or degenerative in nature. Dr. Sukin further explained:

I do feel the patient needs a cervical MRI in order to assess whether or not there is very subtle radiculitis or radiculopathy coming from the neck region. This patient does report, and always has, that he had to rotate the neck to the left quite severely as a result of the force of the vehicle impacting him. Therefore, there is a possibility the patient had an annular tear or subtle herniation, in addition to underlying spondylolysis.⁹¹

¶ 45 An MRI of Handel's cervical spine was taken on March 23, 2005. The radiology report's impression states:

Degenerative disc disease at C6-C7 with a moderate sized right posterior parasagittal and foraminal focal disc protrusion. There is a mild to moderate effacement of the right anterior aspect of the thecal sac and spinal cord and

⁸⁶ Ex. 3bb at 10-11.

⁸⁷ Ex. 3bb at 12.

⁸⁸ *Id.*

⁸⁹ Ex. 3bb at 14.

⁹⁰ Ex. 3bb at 14.

⁹¹ Ex. 3bb at 15.

definite right-sided narrow foraminal narrowing is a result of this. Irritation of the right C7 nerve is a strong consideration.⁹²

The findings state:

Cervical vertebral bodies are normal in height. There is a mild amount of narrowing at the disc at C6-C7 associated with a fairly large right posterior parasagittal and foraminal focal disc protrusion. This does cause a mild degree of effacement of the right anterior aspect of thecal sac and spinal cord as well as neural foraminal narrowing.⁹³

¶ 46 On June 13, 2005, Dr. Sukin issued an addendum to his March 9, 2005, IME report. Dr. Sukin explained that the addendum was being issued subsequent to Handel having undergone an MRI of the cervical spine at Dr. Sukin's recommendation. Dr. Sukin noted that the MRI, dated March 23, 2005, indicated a C6-7 spondylolysis, a fairly large right disk bulge impinging on the neural elements at that level, and foraminal narrowing.⁹⁴ Dr. Sukin opined:

It was my opinion that this patient had a cervical sprain/strain. It was also my opinion that the cervical sprain/strain most likely did cause an exacerbation of a pre-existing cervical spondylolysis. The MRI of the neck, however, does indicate that this patient does have a fairly large disk herniation at the C6-7 level. This is consistent with a two-view of the cervical neck film, dated March 28, 2002. The patient's original injury was March 5, 2002. These original cervical films did indicate anterior disk space narrowing at C5-6 and C6-7, i.e., spondylolysis. In addition, the patient had the other studies, outlined on page two of the independent medical exam dated March 5, 2005. Therefore, it is my opinion that this patient did have some early degenerative changes at the level that were present in the time frame around the claim. The patient has had progression of that degenerative process to a disk herniation, which is present on the cervical films provided today. . . . These findings are consistent with the patient's right-sided neck pain, which is described as achiness and stabbing in February of 2005. . . .

. . . .

⁹² Ex. 3e at 132.

⁹³ *Id.*

⁹⁴ Ex. 3bb at 5.

It is my opinion that these diagnoses are all related to the March 2002 claim. However, I do feel that there is some pre-existing pathology. The pre-existing pathology is the fact the patient had two-level degenerative disk disease on the original plain radiographs in the time frame around the claim.⁹⁵

¶ 47 Dr. Sukin responded to the question as to whether Handel was at MMI for conditions related to his industrial accident: “No. It is my opinion that the patient is only at MMI if he decides not to proceed with any treatment of his neck or right knee.”⁹⁶ Dr. Sukin further stated:

It is my opinion that the knee injury is directly and solely caused by the claim of March 2002. It is my opinion, however, that the cervical is a combination of his pre-existing degenerative disk disease at two levels and a radiculopathy that he has developed as a result of the rotation of the neck. This occurred quickly and quite severely as a result of the force of the vehicle’s impacting him.⁹⁷

¶ 48 Dr. Sukin further noted that his opinion had changed from his initial report regarding whether Handel had a physical impairment. He explained:

My opinion [that Handel does not have a permanent physical impairment resulting from the March 5, 2002, claim] has changed, based on these films. I do feel that this patient does have a physical impairment. However, I cannot determine whether this is permanent unless the patient is at MMI. This patient is not at MMI unless he chooses no further treatment. If the patient does choose no further treatment, then I do feel this is permanent.⁹⁸

¶ 49 Dr. Sukin issued another addendum to his IME report on July 6, 2005, after reviewing additional medical records. He further discussed the March 23, 2005, cervical MRI. Dr. Sukin noted that the MRI indicated C6-7 spondylolysis foraminal narrowing, and a fairly large right disk bulge impinging on the neural elements at C6-7.⁹⁹

⁹⁵ Ex. 3bb at 6.

⁹⁶ Ex. 3bb at 7.

⁹⁷ Ex. 3bb at 7.

⁹⁸ Ex. 3bb at 8.

⁹⁹ Ex. 3bb at 1-2.

¶ 50 In response to specific questions posed by Respondent's counsel, Dr. Sukin opined that Handel had preexisting spondylolysis, or DDD, at two levels in his neck and that he suffered a sprain or strain which exacerbated the underlying condition. Dr. Sukin further opined that the disk bulge/herniation which was apparent on the MRI taken three years and three months after the first radiographs was more likely than not the result of work-related events occurring on more than one day or one shift.¹⁰⁰

¶ 51 Counsel for Respondent further asked, "Did Mr. Handel's employment of July 1, 2002 cause acceleration or permanently aggravate the progression of the degenerative process to a disc herniation?" Dr. Sukin responded:

It is my opinion that the patient did have some early degenerative changes in the neck, as previously described. It is my opinion that the patient had progression of that degenerative process to a disc herniation, which is present on the cervical films/MRIs provided today. It is my opinion that all these diagnoses are related to the March 2002 claim; however, I do feel that there is preexisting pathology. I do feel that the 2-level degenerative disc process that was present on the initial film was a major contributing cause of the pathology currently being seen. It is my opinion that it is more likely than not that the patient would have developed the same medical problem without the work-related claim; however, the timing of this could potentially have been different. . . . [I]n my previous report . . . my opinion with regard to the cervical condition was that it was a combination of preexisting degenerative disc disease at two levels and radiculopathy that developed as a result of rotation of the patient's neck. I do feel that this condition of the neck is a combination of the preexisting condition; repetitive rotation that he does in activities of daily living, i.e., events that occurred on more than one day, not a specific day; and also the work claim.¹⁰¹

¶ 52 Counsel for Respondent further asked, "Is it your opinion that the cervical disc herniation at C6-7 was present when Mr. Handel ceased treatment on and after May 3, 2002, or did his cervical condition progress to a disc herniation sometime later, after July 1, 2002?"¹⁰² Dr. Sukin responded, "It is my opinion that most likely and with the highest

¹⁰⁰ Ex. 3bb at 2.

¹⁰¹ Ex. 3bb at 2-3.

¹⁰² Ex. 3bb at 3 (emphasis omitted).

reasonable level of medical certainty, it developed July 1, 2002.”¹⁰³ During his deposition, Dr. Sukin clarified that he meant that Handel’s herniation developed after July 1, 2002.¹⁰⁴

¶ 53 Dr. John G. VanGilder first evaluated Handel on August 31, 2005. Dr. VanGilder reported that Handel’s complaints included pain and popping in the right side of his neck with numbness in his heels, arms, and hands and frontal headaches which all started after his March 5, 2002, industrial accident.¹⁰⁵ Upon examination, Dr. VanGilder found Handel to have a “poking sensation” with palpation in the mid-cervical spine into the interscapular area with some of the same sensation in the paracervical region. Dr. VanGilder observed decreased flexion, but good extension, tilting, and bilateral rotation.¹⁰⁶

¶ 54 Dr. VanGilder noted that although Handel had had a cervical MRI, the films were not available for review, but the report stated that Handel had a C6-7 disk osteophyte off the right-hand side. Dr. VanGilder informed Handel that he would further discuss his case as soon as he had the opportunity to view the MRI, but further explained that because Handel was a smoker, he was not a surgical candidate.¹⁰⁷

¶ 55 Dr. VanGilder received and reviewed the MRI on September 8, 2005. He informed Handel that he had reviewed the MRI and that he believed that Handel would benefit from surgery; however, he would first need to quit smoking.¹⁰⁸

¶ 56 On November 22, 2005, Dr. VanGilder wrote to Respondent’s counsel in response to questions regarding Handel’s conditions. Dr. VanGilder opined:

I suspect that Mr. Handel had a pre-existing condition with some disc osteophyte complex at C6-7 that was exacerbated by the injury he sustained March 5, 2002, and may have also been exacerbated by repetitive activities. He does have x-rays both from Dr. Stoebe’s office and from the Great Falls Clinic which show a degenerative change at the C6-7 level. I suspect that the problem was there and was exacerbated initially by the accident on March 5, 2002 and subsequent repetitive activities could have made things

¹⁰³ *Id.*

¹⁰⁴ Sukin Dep. 37:7-17.

¹⁰⁵ Ex. 3g at 217.

¹⁰⁶ Ex. 3g at 218.

¹⁰⁷ Ex. 3g at 215.

¹⁰⁸ Ex. 3g at 216.

worse. He did complain of mild neck pain on the right side while being seen in the emergency room and also was seen by Dr. Stoebe for his neck pain.

...

I would suspect that the disc osteophyte complex at C6-7 was probably present prior to July 1, 2002, but may have been asymptomatic prior to his accident on March 5, 2002.

...

I would agree with Dr. Sukin's opinion that the patient had a pre-existing condition and multiple factors including the accident he had at work and other repetitive motions of the neck contributed to his neck and arm pain.¹⁰⁹

¶ 57 On November 23, 2005, Handel attended an appointment with Dr. VanGilder. Dr. VanGilder reported that he and Handel reviewed Handel's cervical MRI which showed a C6-7 right-sided disk osteophyte complex causing foraminal stenosis. Handel reported to Dr. VanGilder that he was experiencing significant neck pain and right arm pain. Dr. VanGilder suspected Handel's condition at C6-7 was causing his neck and arm pain as well as his previously reported headaches. Dr. VanGilder further noted that Handel had proceeded with physical therapy with minimal success and was in the process of quitting smoking so that he could proceed with surgery to correct his cervical condition.¹¹⁰

¶ 58 On November 23, 2005, Dr. Stoebe responded by letter to an inquiry by Respondent's counsel concerning Handel's cervical condition. Dr. Stoebe asserted that on March 28, 2002, when Handel first presented for treatment, Handel had reduced cervical range of motion with tension and tenderness in the lower cervical and rhomboid muscles. Mild DDD at C6-7 was revealed on x-rays. Dr. Stoebe stated that Handel did not present with radicular complaints, signs, or symptoms of cervical radiculopathy or other signs of a herniated or protruded disk at C6-7.¹¹¹ Dr. Stoebe opined that it was more probable than not that Handel's herniated disk and protrusion at C6-7 was caused by a degenerative process over time and multiple micro traumas, and not the March 5, 2002,

¹⁰⁹ Ex. 3f at 14.

¹¹⁰ Ex. 3g at 212.

¹¹¹ Stoebe Dep. Ex. 6 at 1.

industrial accident. Dr. Stoebe testified that his opinion remains the same in these matters.¹¹²

¶ 59 Dr. Stoebe stated that in his opinion and based on his findings of DDD and uncovertebral hypertrophy, he believed Handel's disk at C6-7 was probably injured prior to the March 5, 2002, industrial accident.¹¹³ Dr. Stoebe finds it probable that the March 5, 2002, industrial accident accelerated the disk injury at C6-7, and categorized the industrial accident as "an additive factor in a preexisting condition."¹¹⁴ Dr. Stoebe opined that Handel's March 5, 2002, industrial accident aggravated the already existing osteophyte, which continued to grow until it reached a point where it impinged upon Handel's nerve root.¹¹⁵ Dr. Stoebe could not opine whether Handel reached MMI for his osteophyte prior to Dr. VanGilder's surgery.¹¹⁶ Dr. Stoebe testified that had Handel continued in his chiropractic treatment, he likely would have experienced improvement in the short term, but that he may have eventually needed surgery because patients with osteophytes are generally not able to avoid surgery with chiropractic care in the long term.¹¹⁷ Dr. Stoebe agreed that the type of activities which Handel described performing at work are things that could cause an asymptomatic disk bulge to become symptomatic.¹¹⁸

¶ 60 Respondent's counsel further asked, "In your opinion, is it more probably [sic] than not that the herniated disc/protrusion at C6-7 developed after July 1, 2002?" Dr. Stoebe responded:

This is a difficult question to forensically predict when this disc protrusion occurred. More likely than not, this disc was not causing nerve compression on April 29, 2002 because: 1. There is no evidence of radicular symptoms, 2. There are no radicular findings, 3. I am unable to reproduce radicular symptoms with provocative testing, i.e. foraminal compression failed to

¹¹² Stoebe Dep. 41:4 - 42:3.

¹¹³ Stoebe Dep. 63:21-25.

¹¹⁴ Stoebe Dep. 64:16-24.

¹¹⁵ Stoebe Dep. 67:5-10.

¹¹⁶ Stoebe Dep. 67:22 - 68:1.

¹¹⁷ Stoebe Dep. 69:11-25.

¹¹⁸ Stoebe Dep. 78:4-8.

reproduce similar symptoms. As such I suspect this disc became symptomatic some time after April 29, 2002.¹¹⁹

¶ 61 Dr. Stoebe further noted that on a subsequent clinic visit on April 7, 2003, Handel reported numbness in his right arm, but that Dr. Stoebe's testing did not reproduce any radicular symptoms. Dr. Stoebe concluded that he did not have any hard evidence that Handel's disk protrusion was symptomatic at that time. However, he further found that Handel exhibited ulnar nerve symptoms which could be caused by a C6-7 disk protrusion or foraminal stenosis, but there was no corresponding loss of reflex, strength, or sensation. Dr. Stoebe concluded:

Retrospectively I would suggest that his cervical disk problem became symptomatic some time between April 29, 2002 and April 7, 2003. More likely than not, this disc protrusion relates to multiple micro traumas rather than a solitary macro trauma as already explained.¹²⁰

¶ 62 On December 14, 2005, Dr. VanGilder performed a C6-7 anterior cervical discectomy with allograft fusion and plating on Handel's cervical spine.¹²¹ Handel improved substantially following surgery.¹²² However, his condition deteriorated again and, as of the time of trial, it was likely he would need a second surgery.¹²³

¶ 63 On August 1, 2006, Dr. K. Allan Ward found Handel to be at MMI with a 17% impairment rating.¹²⁴ Prior to Dr. Ward's finding Handel to be at MMI, I do not find that Handel ever reached MMI as a matter of fact. As the facts above demonstrate, on March 28, 2002, Dr. Bortnem opined that Handel might reach MMI in approximately three weeks. When he discharged Handel from his care on April 18, 2002, he opined that Handel was "very probably" at MMI; however, Handel was still treating with Dr. Stoebe, who on May 3, 2002, specifically found Handel *not* to be at MMI on that date. Dr. Stoebe opined that Handel would probably be at MMI after three to five additional treatments, but those treatments did not occur.

¹¹⁹ Stoebe Dep. Ex. 6 at 2.

¹²⁰ *Id.*

¹²¹ Ex. 3t at 9.

¹²² Handel Dep. 20:17-22.

¹²³ Trial Test.

¹²⁴ Ex. 3e at 41-48.

¶ 64 When Handel's treatment resumed in the fall of 2002, his medical providers recommended that he have a cervical MRI. Dr. Stoebe saw Handel on April 7, 2003, and on April 11, 2003, he opined that Handel was not at MMI. For the next two years, Handel was seen by various medical providers who recommended a cervical MRI. When Handel finally received a cervical MRI on March 25, 2005, the MRI revealed that he was certainly not at MMI for his neck condition. Therefore, I find that Handel was not at MMI as a matter of fact; however, Respondent argues that I should nonetheless deem Handel to be at MMI because he allegedly refused treatment for his industrial accident. Whether Handel was at MMI as a matter of law due to his alleged refusal to treat will be discussed in the conclusions of law below.

CONCLUSIONS OF LAW

¶ 65 This case is governed by the 2001 version of the Montana Workers' Compensation Act since that was the law in effect at the time of the claimant's injury.¹²⁵

¶ 66 In any case where a claimant arguably aggravates a preexisting injury in a subsequent work-related incident and there is a dispute between insurers as to whether the subsequent injury is permanent or merely temporary, or whether it or the prior injury is the cause of the claimant's current condition and disability, or whether the claimant had reached MMI, the insurer for the subsequent injury is liable for benefits until it proves, or until another insurer agrees, that it [the other insurer] should pay the benefits.¹²⁶

¶ 67 Petitioner argues that under *Belton*, since it was the insurer at risk when Handel filed his protective claim alleging an occupational disease to his neck, Petitioner properly paid Handel's benefits while seeking to prove that Respondent should pay those benefits. Petitioner now seeks this Court's determination as to liability and further seeks indemnification of those benefits which it paid Handel pursuant to *Belton*.

¶ 68 This Court has interpreted *Belton* to mean that when a subsequent injury has arguably aggravated a preexisting condition, the second insurer avoids liability for that condition only upon proving the claimant had not reached MMI with respect to his prior workers' compensation injury or that the second injury did not permanently aggravate the underlying condition for which the previous insurer was liable.¹²⁷

¹²⁵ *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¹²⁶ *Montana Contractor Compen. Fund v. Liberty Northwest Ins. Corp.*, 2003 MTWCC 54, ¶ 32.

¹²⁷ *Stacks v. Travelers Property Casualty*, 2001 MTWCC 9, ¶ 108.

¶ 69 In the present case, Respondent argues that Handel's disk herniation was a separate injury not caused by his March 5, 2002, industrial accident. Respondent further argues that the Court should find that Handel reached MMI from his industrial accident because he ceased treatment with Dr. Stoebe after May 3, 2002. As this Court held in *Montana Contractor Compen. Fund v. Liberty Northwest Ins. Corp.*,¹²⁸ if a claimant has reached MMI with respect to an industrial injury and thereafter suffers a work-related, permanent, and material aggravation of his medical condition, the insurer at risk at the time of the aggravation is liable.

¶ 70 Among other issues, the parties have asked the Court to determine whether Handel reached MMI for the cervical injury caused by his March 5, 2002, industrial accident. It is undisputed that Handel suffered a neck injury as a result of his March 5, 2002, industrial accident, and it is further undisputed that he was eventually found to have cervical problems including a herniated disk at C6-7. Whether he reached MMI prior to his allegedly suffering a subsequent occupational disease to his neck is the underlying issue in this case.

¶ 71 Maximum medical healing, or MMI, means a point in the healing process when further material improvement would not be reasonably expected from primary medical treatment.¹²⁹ This Court has previously held that when a claimant fails to follow through with medical treatment or his or her treating physician's recommendations, and the treatment can be reasonably expected to materially improve the claimant's condition, the claimant can be deemed to be at MMI.¹³⁰ Respondent argues that in the present case, Handel discontinued treatment and therefore the Court should deem him to have reached MMI for his March 5, 2002, industrial injury.

¶ 72 There have been previous cases in which this Court deemed a claimant to be at MMI when treatment was available which the claimant declined to undertake. In *Burtell v. State Compen. Ins. Fund*,¹³¹ the claimant suffered an injury to her low back. She quit physical therapy because she alleged she could not afford transportation to and from her sessions.¹³² The claimant continued to seek care from an orthopedic surgeon, but did not follow through on the surgeon's recommendation to quit smoking, and did not attend

¹²⁸ *Montana Contractor Compen. Fund v. Liberty Northwest Ins. Corp.*, 2003 MTWCC 10, ¶ 35.

¹²⁹ § 39-71-116(18), MCA.

¹³⁰ See *Burtell v. State Compen. Ins. Fund*, 2002 MTWCC 18; *Hams v. Liberty Northwest Ins. Corp.*, 2000 MTWCC 6.

¹³¹ *Burtell*, 2002 MTWCC 18.

¹³² *Burtell*, ¶ 12.

additional physical therapy sessions for which she was referred by the surgeon.¹³³ The surgeon later opined that the claimant was not at MMI because she had not completed a physical therapy program.¹³⁴ Subsequent attempts by other medical providers to refer the claimant for physical therapy met with resistance and she either refused to attend or failed to show up for treatments.¹³⁵ She also ceased taking a prescribed medication, stated that she would not consider surgery, and refused recommended injections.¹³⁶ Ultimately, this Court found that the claimant failed to show that there was reasonable treatment offered or available to her at any time between 1994 and 2000 which would have materially improved her condition or which she was willing to pursue.¹³⁷ Therefore, the Court declined to order retroactive reinstatement of her TTD benefits for that time period.¹³⁸ However, the Court further concluded that by May 3, 2000, the claimant's condition had deteriorated to a point where she needed additional medical treatment. The Court held that the claimant was therefore no longer at MMI and qualified for TTD benefits at that time.¹³⁹

¶ 73 In *Hams v. Liberty Northwest Ins. Corp.*, this Court found that the claimant was not at MMI because, among other reasons, his treating physician had not implemented a treatment plan incorporating the elements which had been identified as likely to improve the claimant's condition.¹⁴⁰ However, the Court further noted that it did not believe the claimant was fully committed to giving up coffee and cigarettes as had been recommended by various medical providers.¹⁴¹ The Court noted that if, after a treatment plan was implemented, the claimant did not follow through on the recommendations, the Court could find that the claimant had reached MMI if it was not reasonable to expect that further medical treatment would be implemented.¹⁴²

¹³³ *Burtell*, ¶¶ 16-19.

¹³⁴ *Burtell*, ¶ 21.

¹³⁵ *Burtell*, ¶¶ 22-30.

¹³⁶ *Burtell*, ¶¶ 34, 45, 47.

¹³⁷ *Burtell*, ¶ 55.

¹³⁸ *Burtell*, ¶ 62.

¹³⁹ *Burtell*, ¶ 64.

¹⁴⁰ *Hams*, ¶¶ 37-38.

¹⁴¹ *Hams*, ¶ 39.

¹⁴² *Hams*, ¶ 45.

¶ 74 In other cases, this Court has declined to find claimants to be at MMI when the Court found that further potentially beneficial treatment had not been offered to those claimants. In *Thompson v. Liberty Northwest Ins. Corp.*,¹⁴³ the claimant was examined by an orthopedic surgeon at the request of the insurer. The surgeon diagnosed the claimant with cubital tunnel syndrome and recommended surgery. The insurer accepted liability and offered to pay retroactive TTD benefits *if* the claimant proceeded with surgery. The claimant refused to undergo surgery and the insurer refused to pay the retroactive TTD benefits.¹⁴⁴ This Court held that the claimant was not at MMI until his condition was diagnosed and he was offered surgery. The Court explained:

A determination of MMI requires, in the first instance, an accurate evaluation and diagnosis of the medical conditions caused by the industrial injury. Without a definitive determination of the claimant's condition, how can proper treatment be prescribed? Lacking evaluation and diagnosis, and at least an opportunity to pursue further treatment, how can it be said that "further material improvement would not be reasonably expected from primary medical treatment?"¹⁴⁵

¶ 75 More recently, and relying in part on the *Thompson* language quoted above, this Court held in *Copeland v. Montana State Fund*¹⁴⁶ that the claimant was not at MMI where medical providers had diagnosed him with depression but did not provide the opportunity for the claimant to pursue further treatment.¹⁴⁷

¶ 76 While Respondent asserts that Handel ceased to treat on his own initiative and therefore should be deemed to have reached MMI from his March 5, 2002, industrial accident, the facts of this case are not so clear cut. First, Handel did not decide to cease treating with Dr. Bortnem. Dr. Bortnem discharged him from his care on April 18, 2002. At the time, Dr. Bortnem opined that Handel was "very probably" at MMI. It may be a fine distinction to find that Dr. Bortnem did not actually find Handel to *be* at MMI on that date. However, I also note that not only did Dr. Bortnem choose his words carefully in not specifically finding Handel to be at MMI, but also Handel continued to treat with Dr. Stoebe, who opined that Handel was *not* at MMI shortly after this appointment with Dr. Bortnem.

¹⁴³ *Thompson*, 2002 MTWCC 34.

¹⁴⁴ *Thompson*, ¶¶ 18-21.

¹⁴⁵ *Thompson*, ¶ 48.

¹⁴⁶ *Copeland*, 2006 MTWCC 45, ¶ 40.

¹⁴⁷ *Id.*

This leads me to conclude that Handel was not at MMI on April 18, 2002, the last time he was seen by Dr. Bortnem prior to July 1, 2002.

¶ 77 As for Handel's apparent departure from Dr. Stoebe's care after May 3, 2002, the parties have not offered any explanation as to why this occurred. From the records I have reviewed, it does not appear that Handel had another appointment set up with Dr. Stoebe after that date. Therefore, he did not have a scheduled treatment for which he failed to show. Dr. Stoebe testified that it is his practice to have his staff follow up and schedule an appointment for workers' compensation-related patients who fail to show for appointments to avoid precisely this type of situation. However, he did not testify that he did so in Handel's case. I can only assume this is because Handel had no additional appointments scheduled after May 3, 2002, and therefore he did not "fail to show" for an appointment because an appointment had not been made. Handel testified to ongoing communications difficulties with Respondent and further testified that he had difficulty getting his treatments authorized. Although I do not find Handel to be entirely credible, I do find that evidence in the record supports his assertions in this regard. Dr. Stoebe's records indicate that Handel did present for treatment in December 2002 and Dr. Stoebe's office was unable to get immediate authorization from Respondent. Furthermore, in December 2002, Handel's medical providers began recommending that he obtain a cervical MRI. Nearly two and a half years would pass with multiple medical providers – including Respondent's IME doctor – recommending a cervical MRI until one was finally obtained.

¶ 78 In the case of the claimant in *Burtell*, as described above, the claimant made a willful and deliberate decision not to follow various treatments recommended by her medical providers. Similarly in *Hams*, the Court expressed concern that the claimant had indicated that he was not fully committed to quitting drinking coffee and smoking as his medical providers had recommended. I find the facts of the present case to be distinguishable. While Handel apparently did not receive treatment for his cervical condition from June through September of 2002, the record does not demonstrate that he willfully and deliberately decided not to follow recommended treatments. I conclude that he did not fail to follow through with medical treatment reasonably expected to materially improve his condition. Nor did Handel fail to follow his treating physician's recommendations. Therefore, I do not deem Handel to have reached MMI as a result of the gap in treatment between June and September of 2002.

¶ 79 The parties have further asked this Court to determine the nature and extent of Handel's March 5, 2002, cervical injury, whether his subsequent diagnoses were caused by his industrial injury or a subsequent occupational disease, whether the treatment he received from Dr. VanGilder was a result of the industrial injury or an occupational disease, and which insurer is liable.

¶ 80 At the outset, I note that Respondent accepted liability for Handel's cervical condition and paid for his medical treatment for his cervical condition at least until July 1, 2002. Both Drs. Stoebe and Sukin opined that Handel suffered a cervical sprain/strain on March 5, 2002, which was superimposed on preexisting DDD, and their opinions have not been refuted. I have determined that Handel did not reach MMI for his cervical condition until August 1, 2006. As set forth in this Court's case law including *Montana Contractor Compen. Fund v. Liberty Northwest Ins. Corp.*, cited above, the insurer at risk at the time of the industrial accident will not be relieved of liability if his subsequent work activities aggravated this condition. Therefore, because Handel had not yet reached MMI at the time of the March 5, 2002 aggravation, Respondent is not relieved of liability.

¶ 81 As the Montana Supreme Court held in *Belton*:

A compensable event does not require that a "separate and distinct injury" be proved. It has long been the law that an accident is compensable if the traumatic event or unusual strain aggravates a pre-existing injury. The employer takes the employee as he finds him. Therefore, no basis exists to conclude that a second accident is compensable as a separate event only if it is proved that the injury resulting from the first accident had "completely healed."¹⁴⁸

It is undisputed that Handel had a herniated disk at C6-7. Since Handel did not obtain a cervical MRI until March 23, 2005, it is impossible to know precisely when this disk herniation occurred. What can be known is that it either did not exist or was asymptomatic until some time after his industrial accident, and that it either occurred or became symptomatic after his industrial accident. Therefore, he was not at MMI at the time that the herniated disk either occurred or became symptomatic. It follows that under *Belton*, Handel's March 5, 2002, industrial accident aggravated the preexisting DDD in his neck, thereby making his cervical condition compensable and the insurer at risk at the time of this incident liable. However, it has not been proven that the injury from the March 5, 2002, industrial accident had "completely healed," or reached MMI, and therefore any alleged occupational disease to Handel's neck which occurred after March 5, 2002, but before he reached MMI on August 1, 2006, is not compensable as a separate event. Therefore, as the insurer at risk at the time of the industrial accident, Respondent remains liable for the medical treatment and other benefits Handel is entitled to receive as a result of his cervical condition.

¹⁴⁸ *Belton*, 202 Mont at 387-88; 658 P2d at 407.

¶ 82 Since I have determined that Respondent is liable for Handel's cervical condition, I hold that Petitioner is entitled to indemnification from Respondent for the medical, TTD, and PPD benefits that it has paid in regards to Handel's cervical condition.

JUDGMENT

¶ 83 Handel suffered a cervical injury on March 5, 2002, which aggravated his underlying degenerative disk disease and ultimately resulted in a disk herniation at C6-7 and related conditions.

¶ 84 Handel did not reach MMI for his neck condition until August 1, 2006.

¶ 85 Handel's cervical condition was caused by, or an underlying condition was substantially aggravated by, his March 5, 2002, industrial accident.

¶ 86 The cervical treatment and surgery performed by Dr. VanGilder was a consequence of Handel's March 5, 2002, industrial accident.

¶ 87 Petitioner is entitled to indemnification from Respondent for the medical, TTD, and PPD benefits that it has paid in regards to Handel's cervical condition.

¶ 88 Respondent is not entitled to indemnification from Petitioner for medical benefits that it has paid in regard to Handel's cervical condition since July 1, 2002.

¶ 89 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.

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

DATED in Helena, Montana, this 30th day of January, 2008.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Larry W. Jones
James R. Hintz
Thomas J. Murphy
Submitted: January 19, 2007