

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2007 MTWCC 43

WCC No. 2006-1605

ROBERT HEALY

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Topics

Credibility. Where the claimant and an examining doctor disagreed as to how long a medical appointment lasted, they substantially agreed on what occurred during the appointment. Therefore, the discrepancy in duration does not point to a lack of credibility on the part of either party.

Medical Evidence: Objective Medical Findings. The Court is unpersuaded by an IME doctor's opinion that no objective medical findings support the claimant's complaints of back pain when an MRI revealed a bulging disk at L4-5 and a herniation at L3-4 which were disregarded by the doctor for unknown reasons. While the doctor may have had evidence which warranted a skeptical approach to the claimant's subjective pain complaints, objective findings were present and at least warranted further investigation.

Pain. Where a doctor had previously concluded that a claimant's complaints of pain were subjective and did not correlate with any objective medical findings, the Court is unpersuaded by the doctor's further opinion that this "pain" is related to a previous injury and not the injury which is the subject of the present case.

Injury and Accident: Subsequent Injury. Where Petitioner settled a workers' compensation claim in December 2000 and subsequently returned to manual labor jobs and sought no medical treatment for his back for several years, and where he demonstrated an ability to lift and carry 110 pounds in September 2003 and continued to perform heavy-duty manual labor until an industrial accident in June 2005, the evidence weighs towards Petitioner's claim that he reached MMI from his first industrial injury and that the June 2005 accident caused a permanent aggravation of the preexisting injury.

Physicians: Treating Physicians: Weight of Opinions. One physician opined that Petitioner's back condition was permanently aggravated by his industrial injury on June 9, 2005. A second opined that it was not. This Court has previously found the opinion of a doctor more persuasive because of his "longer and later" treatment of a claimant. *Siegler v. Liberty Ins. Corp.*, 2001 MTWCC 23, ¶ 53. Where the second doctor saw Petitioner for a single appointment in 2005 while the first physician treated Petitioner on multiple and more recent occasions, the first physician's opinion was given greater weight.

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Summary: Petitioner injured his low back in a work-related incident in 2005. He had previously settled a workers' compensation claim for a low-back injury in 1998. While Petitioner complained of severe pain in his low back and leg and an MRI revealed a herniated disk, the PA-C who was treating him and the PA-C's supervising physician concluded that no objective medical findings supported Petitioner's subjective complaints of pain. Petitioner was released to work without restriction, but he did not return to work and sought medical treatment elsewhere, eventually having back surgery performed. The physician from whom Petitioner last sought treatment opined that Petitioner's back condition was permanently aggravated by his 2005 industrial injury. Respondent denies liability for benefits from the date Petitioner was released to work without restriction.

Held: Petitioner has demonstrated by a preponderance of the evidence that his back condition was permanently aggravated as a result of his June 9, 2005, industrial injury. Respondent is therefore liable for payment of workers' compensation benefits.

¶ 1 The trial in this matter was held on April 19, 2007, in Billings, Montana. Petitioner Robert Healy was present and represented by R. Russell Plath. Respondent was represented by Larry W. Jones.

¶ 2 Exhibits: Exhibits 1 through 4 were admitted without objection.

¶ 3 Witnesses and Depositions: The depositions of Petitioner and Dr. Yves Meyer were submitted to the Court and can be considered part of the record. Petitioner, Jaspur Kolar, and Dr. Scott Ross were sworn and testified at trial.

¶ 4 Issues Presented: The Proposed Pretrial Order¹ states the following contested issue of law:

¶ 4a Whether the insurer is liable for payment of workers' compensation or occupational disease benefits to Petitioner.²

FINDINGS OF FACT

¶ 5 I find the testimony of Petitioner, Dr. Scott Ross, and PA-C Jaspur Kolar to be credible. Although some discrepancies between their recollections of specific events are evident, I believe these discrepancies are negligible and inconsequential. Most notably in this case is the discrepancy between Petitioner's and Dr. Ross' estimates of how long Petitioner's appointment lasted. However, while the parties disagreed as to how long the appointment lasted, they substantially agreed on what occurred during the appointment and I therefore do not believe that the discrepancy points to a lack of credibility on the part of either party.

¶ 6 This case centers on whether Petitioner is entitled to additional benefits stemming from an industrial injury he sustained in the course and scope of his employment on June 9, 2005. Petitioner had a previous work-related injury on May 27, 1998, while working in South Dakota as a laborer.³ In that incident, Petitioner slipped and fell, suffering low-back and right leg pain in the same areas he felt pain after his 2005 injury. However, Petitioner testified that on a scale of 1 to 10, the pain after the 1998 injury never exceeded a 4 or 5, while after the 2005 incident, his pain was around a 9 or 10.⁴ After the first incident, Petitioner was released to return to work without restrictions on August 25, 1998.⁵ He settled the claim on December 26, 2000.⁶ Petitioner testified that although he had been released to return to work without restrictions, he continued to experience pain in his right leg throughout 2000 and he used a TENS unit for his back.⁷

¹ Although the caption is titled "Proposed" Pretrial Order, this document is signed by the parties and the Court and will be referred to as the "Pretrial Order" in all subsequent references.

² Pretrial Order at 2.

³ Ex. 3 at 220.

⁴ Trial Test.

⁵ Ex. 2 at 181.

⁶ Ex. 3 at 4-13.

⁷ Trial Test.

¶ 7 An MRI report from March 1, 2000, indicated that Petitioner had a normal lumbar spine with early changes of disk degeneration at L4-5 without evidence of frank disk herniation.⁸ After 2000, Petitioner did not receive further medical treatment for his back or right leg. Petitioner continued to work as a construction laborer and moved to Havre, Montana. He was incarcerated from June 2002 through September 2003, during which time he received no medical treatment for his back or right leg. While incarcerated, Petitioner performed manual labor. During that time, he did not experience back problems and he was not bothered by the physical demands of his jobs.⁹

¶ 8 Petitioner was released from prison into a prerelease center in Billings. While at the prerelease center, he worked full time as a dishwasher. Petitioner did not have any difficulties with his back at that time. Petitioner then worked for Billings Concrete putting up concrete forms. As part of that job, he frequently lifted more than 50 pounds and his back gave him no problems. Petitioner worked for Billings Concrete for approximately six months before going to work for H.L. Ostermiller Construction.¹⁰

¶ 9 From the time Petitioner was hired at H.L. Ostermiller Construction in April 2004 until the day of his industrial accident, Petitioner did not have any problems with his back and did not seek any medical treatment for his back. From the record before me, it appears Petitioner sought no medical treatment for his back for over five years – from May 12, 2000, until June 9, 2005. Petitioner testified that during that time period, he did not have back problems.¹¹

¶ 10 On June 9, 2005, Petitioner was moving buckets filled with steel dowels from one vehicle to another when he felt something pop in his back. Petitioner estimates the buckets weighed between 70 and 90 pounds each.¹² When Petitioner felt the pop in his back, he experienced pain in his lower back and dropped to his knees. Petitioner's supervisor and a coworker saw him fall and came to his assistance. Petitioner stood up but could not completely straighten his back. He sat in his pick-up truck and rested for 10 to 15 minutes. He then tried to return to work but was unable to do so.¹³

⁸ Ex. 3 at 130.

⁹ Trial Test.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¶ 11 Petitioner's supervisor told him to call the office manager, Claudia Ostermiller (Ostermiller), and inform her about the accident. Ostermiller advised Petitioner to see chiropractor Kevin Dougherty (Dougherty) and Petitioner then drove himself to Dougherty's office.¹⁴

¶ 12 Dougherty noted that when Petitioner arrived, he could not stand upright, and Dougherty was unable to obtain x-rays of Petitioner's back because Petitioner could not stand in a position that would allow them to obtain readable films. Dougherty further noted that Petitioner was in extreme pain, and he concluded that Petitioner might have either a herniated disk or disk degeneration.¹⁵

¶ 13 Dougherty used warm packs and electrical stimulation to relieve Petitioner's muscle spasm, but he did not perform any adjustments. Petitioner testified that Dougherty informed Ostermiller that he was unable to offer Petitioner further treatment, and Ostermiller directed Petitioner to the Occupational Health and Wellness Department at the Billings Clinic. Petitioner then drove to the Billings Clinic.¹⁶

¶ 14 At the Billings Clinic, Petitioner was seen by Jaspur Kolar (Kolar), a physician's assistant in the Occupational Health and Wellness Department. Kolar took a history, noting that in 1998, Petitioner was diagnosed with a possible herniated disk which was ruled out by an MRI.¹⁷ Kolar's examination revealed significant lumbar spasm, extreme tenderness, an antalgic gait, and obvious pain. Kolar also noted decreased strength in both legs which was more prominent on the right side. An x-ray was taken of Petitioner's lumbar spine. Kolar prescribed physical therapy, medication for pain and spasm, and took Petitioner off work. Kolar also requested preauthorization for an MRI and an orthopedic consultation.¹⁸

¶ 15 Petitioner had an MRI performed on June 11, 2005. The exam report notes an extruded disk at L5-S1 "creating mass effect on the ventral thecal sac," a moderate extruded disk at T11-12, a slight eccentricity to the right at L4-5, and a slight eccentricity to the left with a laterally extruded disk at L3-4.¹⁹

¹⁴ Trial Test.

¹⁵ Ex. 2 at 81.

¹⁶ Trial Test.

¹⁷ Ex. 2 at 48.

¹⁸ Ex. 2 at 49.

¹⁹ Ex. 2 at 55.

¶ 16 At a subsequent appointment, Kolar referred Petitioner to Dr. Michael C. Willis, an orthopedist at the Billings Clinic. Petitioner saw Dr. Willis on June 21, 2005.²⁰ Dr. Willis reviewed Petitioner's MRI and concluded that Petitioner had only a "very minimal" disk bulge at L4-5, which Dr. Willis opined was not responsible for Petitioner's symptoms. Dr. Willis concluded that Petitioner had "[l]ow back pain secondary to work injury" and that Petitioner was not a surgical candidate.²¹

¶ 17 Petitioner continued to treat with Kolar. Kolar released Petitioner to return to work with a lifting restriction of 10-15 pounds on June 29, 2005.²² However, Petitioner's employer had no light-duty work available.²³

¶ 18 Petitioner also began physical therapy, which he attended through September 2005. The sessions ended because they did not seem to improve Petitioner's back condition.²⁴ Petitioner subsequently attended physical therapy at the Billings Clinic.²⁵

¶ 19 At the time Petitioner treated with Kolar, he worked exclusively with Dr. Scott K. Ross as his supervising physician. When Kolar joined the Billings Clinic, Dr. Ross instructed him in Waddell's tests, which consist of various diagnostic tests employed to determine if a patient's subjective complaints match objective findings.²⁶ During Kolar's examination of Petitioner on August 31, 2005, Kolar performed two tests he considers to be Waddell's tests – axial loading and trunk rotation – which elicited complaints of low-back pain from Petitioner.²⁷ However, Kolar testified that there is no anatomical reason why either of those tests should have caused Petitioner to experience increased low-back pain.²⁸ Kolar also noted during the same examination that he did not believe Petitioner was

²⁰ Ex. 2 at 51-52.

²¹ Ex. 2 at 52.

²² Ex. 2 at 41.

²³ Ex. 2 at 39.

²⁴ Trial Test.

²⁵ Ex. 2 at 24.

²⁶ Trial Test.

²⁷ Ex. 2 at 30.

²⁸ Trial Test.