IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2007 MTWCC 29

WCC No. 2005-1251

GERALD HEFFNER

Petitioner

vs.

MONTANA STATE FUND

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Petitioner petitioned the Court for payment of medical expenses associated with Petitioner's 2004 herniation of his L4-L5 or L5-S1 disk.

Held: Petitioner's L4-L5 or L5-S1 disk herniation is not causally related to his May 6, 1980, industrial injury. Accordingly, Respondent is not liable for Petitioner's medical expenses associated with the 2004 herniation.

Topics:

Proof: Conflicting Evidence: Medical. Where the Court is presented with the testimony of two extremely competent and credible neurosurgeons, each of whom, after examining the same patient, arrived at diametrically opposite conclusions and neither of whom is considered a treating physician, the Court looked at the medical evidence in its totality and concluded that Petitioner did not meet his burden of proof.

Proof: Burden of Proof: Generally. Where Petitioner suffered several serious injuries as a result of an industrial accident that occurred approximately eight years prior to the first concrete piece of medical evidence indicating a possible disk herniation at the L4-L5 disk level, and some twenty-four years prior to the detection of a large fragment at the same level, the Court finds that Petitioner failed to satisfy his burden of proof that his herniation and fragment are the result of his industrial accident. The mere

possibility that his disk herniation is related to the accident is not sufficient to satisfy this burden. Viewed in its totality, the evidence relating the herniation and fragment is too scant to meet Petitioner's burden.

Injury and Accident: Causation. Where Petitioner suffered several serious injuries as a result of an industrial accident that occurred approximately eight years prior to the first concrete piece of medical evidence indicating a possible disk herniation at the L4-L5 disk level, and some twenty-four years prior to the detection of a large fragment at the same level, the Court finds that Petitioner failed to satisfy his burden of proof that his herniation and fragment are the result of his industrial accident. The mere possibility that his disk herniation is related to the accident is not sufficient to satisfy this burden. Viewed in its totality, the evidence relating the herniation and fragment is too scant to meet Petitioner's burden.

Medical Conditions (by Specific Condition): Herniated Disk. Where Petitioner suffered several serious injuries as a result of an industrial accident that occurred approximately eight years prior to the first concrete piece of medical evidence indicating a possible disk herniation at the L4-L5 disk level, and some twenty-four years prior to the detection of a large fragment at the same level, the Court finds that Petitioner failed to satisfy his burden of proof that his herniation and fragment are the result of his industrial accident. The mere possibility that his disk herniation is related to the accident is not sufficient to satisfy this burden. Viewed in its totality, the evidence relating the herniation and fragment is too scant to meet Petitioner's burden.

¶ 1 The parties submitted this matter to the Court without a trial.

¶ 2 Exhibits: The Court makes the following determination as to the Exhibits presented by the parties. Exhibits 1, 4, 6, and 15 are not admitted on grounds of hearsay. Exhibits 2, 3, 5, 7-11, 14, 17, and 18 are admitted. Exhibit 16 is not admitted pursuant the Court's ruling of June 24, 2005. Exhibits 12, 13, 19, and 20 are admitted over the objections of Petitioner. Exhibits 21-30 are not admitted because they were not timely filed.

¶ 3 Depositions: The depositions of Jacqui Garcia and Drs. Kenneth V. Carpenter, Chriss A. Mack, and James F. Nabwangu were taken and filed with the Court.[1]

[1] After the initial depositions of Drs. Mack and Nabwangu were taken, issues arose which required the supplemental depositions of both doctors. Further citations to the doctors' testimony will specify the original depositions as Deposition I and the supplemental depositions as Deposition II.

¶ 4 Issue Presented: Whether Petitioner's L4-L5 and S1 herniation is causally related to his May 6, 1980, industrial injury.

FINDINGS OF FACT

¶ 5 On May 6, 1980, Petitioner Gerald Heffner suffered an industrial injury in the course and scope of his employment with Respondent Montana State Fund's insured.[2]

¶ 6 As a result of the industrial injury, Dr. Robert Sterling performed a fusion surgery on Petitioner's L2-L3 vertebrae in 1981.[3]

¶ 7 An x-ray report from March 21, 1980, predating Petitioner's industrial injury, revealed a narrowing of the L5-S1 disk space of moderate degree and mild narrowing of the L4-L5 disk space. This report also noted that osteophytes were developing at the L4-L5 level.[4]

¶ 8 A May 6, 1980, post-injury x-ray reflected: "Vertebral alignment appears normal. There is prominent narrowing of the L5-S1 disc space with small osteophytes on L-5 and the sacral promintory [sic]. The remaining disc spaces and pedicle are preserved."[5]

¶ 9 In an exam report dated October 1, 1981, Dr. Sterling, referring to his examination of Petitioner, stated: "To palpation he is diffusely tender along the entire lumbosacral spine, especially at the L5-S1 and L4-5 level as well as [the] L1-2 and L2-3 level."[6] The examination report also noted "some progressive narrowing at L5-S1 with some mild anterior instability osteophytes."[7]

¶ 10 In a CT lumbar spine scan performed on October 27, 1981, Dr. Root concluded that very minimal bulging existed at L4-L5 and L5-S1, and the findings at these levels were probably not significant. Dr. Root noted the major finding was at the L2-L3 level.[8]

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[2] Ex. 8-2.

[3] Ex. 8-3.

[4] Ex. 19-1.

[5] Ex. 17-1.

[6] Ex. 8-2.

[7] Ex. 8-2; Ex. 8-3.

[8] Ex. 7-1.

¶ 11 A myelogram performed on October 27, 1981, and interpreted by Dr. Layne revealed no evidence of nerve root abnormality at the L4-L5 level. Dr. Layne noted that there may be a slight widening of the nerve root at L5-S1 on the left but characterized the widening as "a subtle finding."[9]

¶ 12 In a letter dated October 30, 1981, Dr. Sterling stated: "The spinal scan showed evidence of injury at the lumbar 2-3 level but showed no compression of the nerves within the spine. There was also some evidence of mild disc narrowing and degeneration at the L5-S1 level, at the lower part of the back, but no evidence of pressure on any nerves in the spine."[10]

¶ 13 Dr. Coriell examined Petitioner on July 17, 1984, and found, "He is markedly tender at the L-4, 5 and L-5, S-1 space, midline." Dr. Coriell injected the L4-L5, L5-S1 area with Lidocaine, Maracaine, and steroids.[11]

¶ 14 An x-ray taken on December 12, 1985, was interpreted by Dr. Sterling. He opined that it "shows again the L5-S1 disc space narrowing and some sclerosis with evidence of progression as evidenced by an instability osteophyte at the antero-inferior aspect of L5."[12]

¶ 15 An MRI lumbar spine scan was performed on January 12, 1988, and was reviewed by Dr. A.E. Noyes. Dr. Noyes' note states:

> Diminished signal from the disc is also observed at L4-5 and 5-S1 areas. Associated bulging of the annulus fibrosis and posterior longitudinal ligament is noted at both of those levels suggesting subacute to acute process. . . .
>
> Transaxial images obtained through the disc L2 through S1 show confirmation of the degenerated disc at the L2-3 level and degenerating disc with bulging annulus and/or protrusion asymmetrical to the right at the L4-5 region. Deterioration at L5-S1 in the transaxial position fails to demonstrate any significant bulge or herniated disc fragment.[13]

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[9] Ex. 7-2.

[10] Ex. 8-1.

[11] Ex 8-5.

[12] Ex. 8-3, Ex. 8-6.

[13] Ex. 9-1.

¶ 16 Dr. Noyes' impression stated: "DEGENERATED DISC L2-3 AND L5-S1 WITHOUT ASSOCIATED HERNIATED DISC FRAGMENT. DEGENERATED L4-5 DISC WITH BULGING ANNULUS ASSOCIATED WITH SOME ASYMMETRICAL . . . PROTRUSION OR FRAGMENT TO THE RIGHT CONSISTENT WITH HERNIATION."[14]

¶ 17 On January 19, 1988, Dr. Sterling reviewed the MRI report and noted that Petitioner has a "degenerative disk at the L-2, 3 level which is traumatic in origin and L-5, S-1 which is noted previously. No associated herniated disk fragments. He has a degenerative L-4, 5 disk with bulging anulus [sic]. Asymetric [sic] protrusion to the right side of his symptoms into the leg."[15]

¶ 18 In a June 11, 1989, note, Dr. Sterling recalled his examination and recommendation to Petitioner and stated:

> Current X-RAYS compared with films of February, 1987 and show absence of disc space at 2-3 and posterior fusion as evidenced on previous films without interval change. There seems to be progression of narrowing of the L5-S1 disc space. Increase of sclerosis at the endplates at L5 and S1. . . .
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> . . . .
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> Discussed the possibility of surgical fusion at the L5-S1 level with a long term prognosis that would be quite guarded, having only three disc spaces left to share stresses in the low back and I think there has been some narrowing at the 4-5 disc space that will probably start giving him problems in the future, if not already.[16]

¶ 19 In an x-ray report dated December 18, 1990, Dr. Noyes stated, "DEGENERATED DISC WITH DISC SPACE NARROWING PRIMARILY AT L5-S1 AND TO A LESSER EXTENT AT L4-5 ASSOCIATED WITH MINIMAL POSTERIOR SPURRING."[17] As part of his impression Dr. Noyes noted, "DEGENERATIVE DISC L4-5 AND [L]5-S1 WITH NARROWING SHOWS NO LIMITATION OF RANGE OF MOTION BUT DOES SHOW SOME ACCENTUATION OF THE DISC SPACE NARROWING AT L4-5 IN FLEXION."[18]

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[14] *Id.*

[15] Ex. 8-10.

[16] Ex. 8-12.

[17] Ex. 9-2.

[18] Ex. 9-3.

¶ 20 In a note dated June 3, 1992, Dr. Sterling reported:

> Current x-rays compared with films of 1989 again shows evidence of loss of disc space at L2-3 and evidence of posterior lateral arthrodesis at L2-3. Degenerative spurring L3-4, L4-5 and L5-S1, same as previously. Perhaps some subtle narrowing of the disc spaces at L3-4 and L4-5 but not dramatic and no interval changes noted otherwise. There is rather significant narrowing that has been present for some time at the L5-S1 level antedating his spinal fusion at the L2-3 level.[19]

Dr. Sterling further found severe degenerative disk disease at L5-S1 and diffuse degenerative disk disease of Petitioner's entire lumbar spine.[20]

¶ 21 On April 10, 1996, Dr. Sterling reviewed an MRI of Petitioner's lumbar spine and found the L5-S1 disk space dehydrated and narrowed. Dr. Sterling noted the presence of some annular bulging and a minimal amount of osteophyte formation along the right posterior lateral disk margin. Dr. Sterling did not identify any definite herniations.[21]

¶ 22 Dr. Sterling's review of the April 10, 1996, MRI found the L4-L5 disk space narrowed and noted a slight annular bulging. He identified no focal herniations at the L4-L5 space. Dr. Sterling found moderate facet hypertrophy at L4-L5.[22]

¶ 23 In a note dated April 10, 1996, Dr. Sterling reviewed Petitioner's x-rays and stated:

> Current X-rays [of the] lumbar spine [show] no dramatic differences from those films taken in 1992, does show degenerative changes with sclerosis in the end plates at L5-S1 and anterior instability osteophytes. Verbal report for an MRI SCAN shows degenerative changes at L5-S1 and facet arthrosis at 4-5 and [S]-1 particularly but no evidence of disc protrusion or compromise of nerve roots.[23]

¶ 24 A radiology report dated September 17, 2004, dictated by Dr. William B. Howard, stated: "There is some focal rather severe narrowing of the intervertebral disc space at the

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[19] Ex. 8-15.

[20] *Id*.

[21] Ex. 7-3.

[22] *Id.*

[23] Ex. 8-17.

L5-S1 level where there is eburnation and marginal osteophyte formation. There also appears to be some posterior facet sclerosis." Dr. Howard further found focal severe degenerative changes involving Petitioner's lumbar spine.[24]

¶ 25 The first page of a radiology report dated September 23, 2004, dictated by an unknown physician,[25] states in part:

> L4-5 shows moderately severe degenerative disc changes with a large disc protrusion that extends asymmetric towards the RIGHT side. It appears to completely obliterate the lateral recess as well as the nerve root on the non-contrast images. On the contrast Gadolinium enhances it tends to clearly define the filling defect with some marginal enhancement which suggests that there may be a small amount of scarring at this level but the appearance would indicate a large recurrent disc with what appears to be a protrusion of the disc inferiorly along the posterior margin of the L5 vertebral body on the RIGHT side. There is some neural foraminal stenosis noted as well.
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> L5-S1 shows moderate degenerative change with a narrowed intervertebral disc space as well as circumferential disc bulging and facet hypertrophy with some mild narrowing of the neural foramen noted bilaterally.
>
> CONCLUSION: THERE APPEARS TO BE A LARGE RECURRENT DISC HERNIATION AT THE L4-5 LEVEL ON THE RIGHT SIDE.[26]

¶ 26 Petitioner's family physician, Dr. Mikale Bedell, referred Petitioner to Dr. Chriss A. Mack, a neurosurgeon in Missoula, for a neurosurgical consultation. Petitioner treated with Dr. Mack on October 22, 2004. Dr. Mack observed a large right-sided disk herniation lodged along the right L5 pedicle. After this initial consultation, Dr. Mack noted:

> Careful review of his history and his subsequent injuries lead me to believe very clearly, as I have told him today, that this is not related to his previous workman's comp injury. This is a routine lumbar disc herniation and while unfortunate, is not likely related to that. If it were an adjacent level disc herniation where his prior fusion was from, it would be most likely that it

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[24] Ex. 11-1.

[25] Presumably the dictating physician's name is on page two of the report. Page two was not provided to the Court. Since neither Petitioner nor Respondent objected to the validity or authenticity of the report, the Court considers the report authentic.

[26] Ex. 11-2.

> would be related to mechanical strain from the fusion at the 2-3 level, but this is not a disc herniation from 3-4, nor is it a disc herniation from L1-2 and, henceforth, has no reasonable credibility if one were to state it is related to workman's comp. He has not worked for years.[27]

¶ 27 Dr. Mack recommended that Petitioner undergo a right-sided hemilaminectomy, retrieval of the free disk fragment, and exploration of the annulus at the L4-L5 and L5-S1 disk space.[28]

¶ 28 On December 22, 2004, Dr. Kenneth V. Carpenter conducted an independent medical examination to determine whether the herniated disk at L4-L5 was related to Petitioner's 1980 industrial injury and opined:

> The question then arises as to whether the trauma of the injury, separate from the fusion caused the recent disc herniation. We know that the disc herniation at L4-5 is new since an MRI as recent as 1996 showed that there was no herniation. It is well known that disc degeneration and herniation are mainly genetically mediated though herniation can occur with traumatic occurrences in susceptible individuals. This is an acute process however and not chronic. This means that an acute herniation like [Mr. Heffner] has would not be associated with an injury that occurred over 20 years ago. It would be due to the normal degenerative process in the spine, possibly associated with a recent but not remote injury.[29]

¶ 29 Dr. James F. Nabwangu performed Petitioner's disk herniation surgery on February 22, 2005. Prior to the operation, Dr. Nabwangu recounted Petitioner's history as follows:

> Mr. Heffner was involved in an accident in 1980 during which he had dropped nearly 55 feet in a bucket into a river and subsequently was rescued, but is left with low back problems which necessitated the fusion of L2-3 in 1981. The patient has complained of low back pain and right lower extremity pain as well ever since that time. In 2000, it became decidedly worse with the subsequent development of numbness of the foot diffusely.

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[27] Ex. 13-1.

[28] Ex. 13-3.

[29] Ex. 12-2.

> In 1981, a CT of the lumbar was reported as showing very minimal bulging of the disks at L4-5 and L5-S1 which at that time were felt not to be significant apparently. A myelogram was done at the same time as well.
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> . . . .
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> In 1988, however, an MRI of the lumbar spine had been reported as showing degenerated L4-5 disk with bulging annulus associated with some asymmetrical disk protrusion of fragment to the right, consistent with herniation.[30]

¶ 30 In his post surgery report describing Petitioner's surgery, Dr. Nabwangu noted:

> [T]his patient had a massive extrusion which was chronic. This was wrapped up in fibrous tissue and had almost even a capsule around it with firm adhesions to the thecal sac, as well as the proximal S1 nerve root and the passing L5 nerve root, and then, furthermore, the exiting L4 nerve root. The disk itself was degenerated in the disk space at the L4-5 nerve root. The operation was performed from the right side where the patient had anatomically most of the quite dramatic changes as a result of the severe disk extrusion which extended almost the entire length of the L5 vertebral body to just above the level of the L5-S1 disk.[31]

¶ 31 Dr. Nabwangu practices medicine in Rapid City, South Dakota. He was deposed on June 13, 2005, and again on December 11, 2006.[32] In response to a question about whether Petitioner's herniation and free fragment abnormality was caused by the 1980 industrial accident, Dr. Nabwangu testified: "I would have to depend rather heavily on the observations, investigations, and conclusions of his treating doctor from 1980 and I believe the same doctor who operated on Mr. Heffner in 1981."[33]

¶ 32 The Court and Dr. Nabwangu then engaged in the following exchange:

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[30] Ex. 14-6.

[31] Ex. 14-9.

[32] Nabwangu Dep. I and Nabwangu Dep. II, respectively.

[33] Nabwangu Dep. I, 4:25 - 5-3.

> THE COURT: By way of clarification, are you indicating that you agree with Dr. Sterling or are you just indicating that you're deferring to Dr. Sterling? I'm not clear on that.
>
> A: No. For the most part, I think that - - I agree. I have no reason to disagree with Dr. Sterling. I do agree with him.[34]

¶ 33 Later in the deposition Dr. Nabwangu, referring to whether the herniation was caused by the 1980 industrial accident, testified: "And I think that probably the initial injury set in motion the train of events that culminated in a massive disk extrusion for which Mr. Heffner was subsequently operated by us."[35]

¶ 34 In his second deposition, Dr. Nabwangu noted that as early as 1988, Petitioner's treating physician, Dr. Sterling, found abnormalities in Petitioner's back that were not related to the L2-L3 level.[36]

¶ 35 Dr. Nabwangu opined that Petitioner's L4-L5 disk herniation was related to his 1980 injury.[37] However, Dr. Nabwangu also testified:

> I cannot give a direct opinion on [the herniation's relationship to the accident] because I only saw the patient many, many years after the accident and I had to depend on the history that I got from previous treating physicians and the patient himself as well as previous investigations that had been carried out. . . .
>
> So I do feel that even not having had the opportunity to examine Mr. Heffner before the accident and immediately after the accident, I do feel that we had something going on that was post traumatic at more than just the L2-3 level for which he was operated.[38]

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[34] Nabwangu Dep. I, 5:9-15.

[35] Nabwangu Dep. I, 7:7-11.

[36] Nabwangu Dep. II, 11:18-25.

[37] Nabwangu Dep. II, 14:15-20.

[38] Nabwangu Dep. II, 13:4-16.

¶ 36 Dr. Mack was deposed on two separate occasions – first, on May 4, 2005, then on January 24, 2006.[39] The latter deposition took place after Dr. Nabwangu's initial deposition to allow Dr. Mack the opportunity to respond to Dr. Nabwangu's opinions. Notwithstanding Dr. Nabwangu's testimony, Dr. Mack was unequivocal that the disk herniation was not related to Petitioner's 1980 injury.[40]

CONCLUSIONS OF LAW

¶ 37 This case is governed by the 1980 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Petitioner's industrial accident.[41]

¶ 38 Petitioner bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.[42] Specifically, Petitioner's burden is to establish his entitlement to payment for the medical expenses associated with his L4-L5 surgery.

¶ 39 In attempting to resolve this issue, I am presented with the testimony of two extremely competent and credible neurosurgeons, each of whom, after examining the same patient, arrived at diametrically opposite conclusions. Additionally, I have Dr. Carpenter's opinion in his IME report to consider. None of the doctors is considered a treating physician under Montana law.

¶ 40 The evidence before me presents a difficult call. Petitioner suffered several serious injuries as a result of his 1980 industrial accident. This case was originally brought before Judge McCarter and the first depositions were taken during that time. Because the medical opinions were vital to the outcome to this case, I took the unusual step of reopening discovery, *sua sponte*, in order to personally inquire of Dr. Nabwangu about whether his opinion of causation had changed because a document upon which he relied to form his initial opinion regarding causation was later excluded from evidence after Dr. Nabwangu's first deposition. In the end, I was afforded the opportunity to personally listen to, and inquire of, both Dr. Mack and Dr. Nabwangu.

¶ 41 In light of the serious nature of Petitioner's 1980 accident, I believe there is a possibility that Petitioner's L4-L5 disk herniation may somehow be related to his industrial injury. However, when viewing the evidence in its totality, the mere possibility that the

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[39] Mack Dep. I and Mack Dep. II, respectively.

[40] Mack Dep. II, 71:14-19.

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

[42] *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).

herniation is related to the accident is not sufficient to satisfy Petitioner's burden of proof in this case. The first concrete piece of medical evidence indicating a possible herniation at the L4-L5 disk level is Dr. Noyes' January 12, 1988, report, describing a bulging annulus associated with some asymmetrical protrusion or fragment to the right consistent with herniation. Dr. Noyes' observation and the subsequent reports from Dr. Sterling were made nearly eight years after Petitioner's accident. The large fragment repaired by Dr. Nabwangu was not detected until some twenty-four years after Petitioner's accident. Viewed in its totality, the evidence relating the L4-L5 herniation/fragment to the 1980 industrial accident is too scant to meet Petitioner's burden. I therefore conclude that Petitioner has not proven that his L4-L5 disk herniation and extrusion are the result of his 1980 industrial accident.

JUDGMENT

¶ 42 The relief requested in Petitioner's February 17, 2005, petition is **DENIED**.

¶ 43 Petitioner's petition is **DISMISSED WITH PREJUDICE.**

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

¶ 45 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 13th day of July, 2007.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Mr. Gerald Heffner
Mr. Bryce R. Floch
Submitted: March 21, 2007.