

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2007 MTWCC 13

WCC No. 2006-1734

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CHARLES HUNTER

Petitioner

vs.

HARTFORD INSURANCE COMPANY OF THE MIDWEST

Respondent/Insurer.

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FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

**Summary:** Petitioner suffered an industrial injury in the course and scope of his employment on May 5, 1998. Petitioner contended that his right knee conditions were causally related to the May 5<sup>th</sup> accident. Respondent responded that Petitioner's right knee conditions were a natural progression of Petitioner's 1983 industrial injury.

**Held:** The preponderance of the medical evidence demonstrates that Petitioner's right knee conditions are causally related to the May 5, 1998, accident. Petitioner is entitled to receive medical benefits and all other benefits provided under the Workers' Compensation Act.

**Topics:**

**Injury and Accident: Aggravation: Generally.** Where a subsequent knee injury arguably aggravated Petitioner's preexisting knee condition, Respondent is liable for Petitioner's knee injury because it failed to meet its burden of proving (1) Petitioner had not reached maximum medical healing with respect to his 1983 accident or (2) Petitioner's 1998 accident did not permanently aggravate the underlying condition.

**Maximum Medical Improvement: General.** Where a subsequent knee injury arguably aggravated Petitioner's preexisting knee condition, Respondent is liable for Petitioner's knee injury because it failed to meet its burden of proving (1) Petitioner had not reached maximum medical healing

with respect to his 1983 accident or (2) Petitioner's 1998 accident did not permanently aggravate the underlying condition.

**Injury and Accident: Subsequent Injury.** Where a subsequent knee injury arguably aggravated Petitioner's preexisting knee condition, Respondent is liable for Petitioner's knee injury because it failed to meet its burden of proving (1) Petitioner had not reached maximum medical healing with respect to his 1983 accident or (2) Petitioner's 1998 accident did not permanently aggravate the underlying condition.

¶ 1 The trial in this matter was held on January 17, 2007, in Missoula, Montana. Petitioner Charles Hunter was present and represented by Matthew B. Thiel. Respondent was represented by William O. Bronson.

¶ 2 Exhibits: Exhibits 1 through 13 were admitted without objection.

¶ 3 Witnesses and Depositions: The depositions of Petitioner, John Schumpert, M.D., and Michael J. Schutte, M.D. were taken and submitted to the Court. Petitioner and Linda Slavik were sworn and testified at trial.

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

¶ 4a Petitioner's entitlement to medical benefits and all other benefits provided under the Act for an alleged right knee injury, and disability.

¶ 4b Petitioner's entitlement to costs.<sup>1</sup>

#### FINDINGS OF FACT

¶ 5 Petitioner was a credible witness and the Court finds his testimony at trial credible.

¶ 6 Linda Slavik was a credible witness and the Court finds her testimony at trial credible.

¶ 7 Petitioner is 49 years old and lives in Missoula, Montana.<sup>2</sup>

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<sup>1</sup> Pretrial Order at 2.

<sup>2</sup> Trial Test.

¶ 8 In 1983, Petitioner suffered an injury to his right knee while working for Mountain Water Company in Missoula, Montana. Petitioner's injury was sustained when he jumped over a fence while being chased by a dog.<sup>3</sup>

¶ 9 Petitioner was treated for his 1983 industrial injury by Dr. Michael J. Schutte beginning on June 12, 1986. At this time, Dr. Schutte's examination revealed that there was no deconditioning of the quadriceps muscles when comparing both left and right, that Petitioner was able to hop and squat, had no medial joint line pain, and had full range of motion in the knee. The McMurray test for pain was also negative. An ACL exam did indicate chronic ACL injury and probable medial meniscal lesion.<sup>4</sup>

¶ 10 Petitioner was next treated for his right knee injury by Dr. Schutte on August 28, 1986.<sup>5</sup>

¶ 11 Dr. Schutte followed Petitioner for his right knee complaints on June 24, 1987, July 2, 1987, and July 8, 1987. Dr. Schutte's final impression was chronic ACL with functional giving away episodes. Petitioner was fitted for a brace and no further treatment was rendered.<sup>6</sup>

¶ 12 During the next twelve years, the medical records indicate that Petitioner had no complaints nor received any treatment with regard to his right knee. Petitioner was able to function relatively well with his right knee limitations.<sup>7</sup>

¶ 13 Petitioner was involved in a snowmobile accident on February 14, 1993, and injured his ribs, left clavicle, and spleen.<sup>8</sup> No medical records were produced that indicate the right knee was involved in this accident. Dr. John Schumpert performed an Independent Medical Examination (IME) and was unable to determine whether the right knee was involved in any way in the snowmobile accident.<sup>9</sup> Dr. Schumpert testified by deposition that

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<sup>3</sup> *Id.*

<sup>4</sup> Schutte Dep. Ex. 2.

<sup>5</sup> *Id.*

<sup>6</sup> Schutte Dep. Ex. 3.

<sup>7</sup> Trial Test.

<sup>8</sup> *Id.*

<sup>9</sup> Ex. 7 at 13.

any connection between the snowmobile accident and injury or aggravation to the knee in any way would require speculation.<sup>10</sup>

¶ 14 Petitioner worked for Mountain Water Company between 1982 and 1985. He was self-employed as an auto repairman and automobile parts wholesale dealer from 1986 to 1996. Petitioner began work for Brody Chemical as a sales representative in 1997 and worked at that job until his date of injury on May 5, 1998, after which he continued to work sporadically for Brody Chemical until May 2000.<sup>11</sup>

¶ 15 On May 5, 1998, Petitioner began working for Alpine Construction as a laborer. Alpine Construction is a construction company engaged in traffic control for road contractors. On his first day of employment, toward the end of the shift, Petitioner was involved in a serious electrical accident when a crane hoisting a concrete barrier came into contact with the Montana Power Company transmission lines that crossed the construction site. Petitioner received a 100,000 voltage electrical shock to his body which entered through his hands and exited through his right knee and right foot. Numerous medical records confirm the serious nature of this work-related accident and the resulting injuries suffered by Petitioner.<sup>12</sup>

¶ 16 Petitioner was evaluated the same day of his accident at the emergency room by Drs. Peterson-Hale and Swannack. These doctors confirmed abrasions and exit wounds on Petitioner's right knee and small burns on the right knee.<sup>13</sup>

¶ 17 Drs. Peterson-Hale and Swannack indicate in the history portion of their records that Petitioner was involved in a fall from a truck of approximately three to four feet, in addition to an electrical shock, at the time of his accident.<sup>14</sup> Based on the photographs from the scene of the accident<sup>15</sup> and Petitioner's testimony at trial, the Court finds Petitioner's fall may have been up to five feet from the truck bed to the ground.

¶ 18 Dr. Rebecca S. Anderson, Petitioner's treating physician, examined Petitioner on May 6, 1998, and found an exit wound on the right knee, burns, and an abrasion on the

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<sup>10</sup> Schumpert Dep. 65:21 - 66:1.

<sup>11</sup> Trial Test.; Petitioner's Dep. 9:7 - 10:16.

<sup>12</sup> See Exs. 1, 2, 3, and Ex. 5 at 1-2.; Trial Test.

<sup>13</sup> Ex. 2.

<sup>14</sup> *Id.* at 1, 3.

<sup>15</sup> Exs. 11 and 12; Trial Test.

right knee and confirmed in the history portion of her records that Petitioner states he fell on his right knee when he was thrown from the truck bed.<sup>16</sup>

¶ 19 At the request of Respondent, Petitioner underwent an IME conducted by Dr. Dana Headapohl on July 28, 1998. Dr. Headapohl's report included findings that the right knee was swollen and tender. Dr. Headapohl also made a finding of effusion of the right knee.<sup>17</sup> Dr. Headapohl was specifically requested to make findings to determine whether Petitioner's injuries were related to the electrical injury of May 5, 1998. Dr. Headapohl found that the right knee swelling, pain, and instability were causally related to the injury on May 5, 1998.<sup>18</sup>

¶ 20 Petitioner continued to see his treating physician, Dr. Anderson, from the time of his May 5, 1998, industrial injury for the next several years with various complaints related to the electrical injury. On January 23, 2002, Dr. Anderson found right knee pain, buckling, and locking of the right knee. Dr. Anderson recommended an orthopedic evaluation by Dr. Colin Sherrill or Dr. Michael J. Schutte.<sup>19</sup> On May 28, 2002, Dr. Anderson examined Petitioner, at which time Petitioner continued to complain of pain and problems with his right knee. Dr. Anderson again referred Petitioner to an orthopedic evaluation.<sup>20</sup> Petitioner failed to follow up with an orthopedic evaluation and testified that his failure to follow up with an orthopedic evaluation with regard to his right knee was because of his inability to pay.<sup>21</sup>

¶ 21 The medical records reflect that after May 5, 1998, Petitioner informed numerous doctors of his pain and difficulties with his right knee. During an IME conducted on May 20, 2003, Dr. Schumpert confirmed that Petitioner continued to suffer from pain and mild laxity in his right knee.<sup>22</sup>

¶ 22 The May 20, 2003, IME conducted by Dr. Schumpert was the second IME conducted at Respondent's request. With respect to Petitioner's right knee, Dr. Schumpert confirmed degenerative joint disease, medial meniscus tear, and anterior cruciate ligament

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<sup>16</sup> Ex. 5 at 1.

<sup>17</sup> Ex. 6 at 3.

<sup>18</sup> *Id.* at 10.

<sup>19</sup> Ex. 5 at 6-8.

<sup>20</sup> Ex. 5 at 10-11.

<sup>21</sup> Trial Test.

<sup>22</sup> Ex. 7 at 11.

rupture. However, Dr. Schumpert opined all were not work related.<sup>23</sup> Dr. Schumpert noted that Petitioner's right knee complaints were not related to the May 5, 1998, incident because "Electric shock victims do not typically experience cartilaginous disruption or necrosis."<sup>24</sup> Dr. Schumpert further opined that "The right knee injury of 1983 and/or the snowmobile accident of 1993, which were not well-defined by the patient or medical records, seems most likely to be responsible for the current significant right knee degenerative arthritis."<sup>25</sup>

¶ 23 Dr. Schumpert testified by deposition and acknowledged that he discounted the fact that Petitioner experienced a fall of approximately three to five feet in connection with his electrical shock.<sup>26</sup> Dr. Schumpert acknowledged that Petitioner suffered a significant life-threatening accident.<sup>27</sup> Dr. Schumpert acknowledged the existence of objective medical evidence that Petitioner had suffered an injury and trauma to his right knee as a result of the May 5, 1998, industrial accident.<sup>28</sup> While Dr. Schumpert acknowledged that this is objective medical evidence because it was collected near the time of the accident in this case,<sup>29</sup> he nevertheless disregards the significance of this information in reaching his final conclusions.

¶ 24 Dr. Schumpert testified that he was unable to give any medical opinion with regard to whether Petitioner's 1983 injury was stable prior to the 1998 injury.<sup>30</sup> Dr. Schumpert acknowledged, as is evident from his report, that he did not evaluate or consider in any way Dr. Schutte's medical records from the 1983 right knee injury.<sup>31</sup> Dr. Schumpert could not state an opinion with regard to how long it took for Petitioner's right knee arthritis to develop.<sup>32</sup> Dr. Schumpert examined Petitioner on one occasion, did not treat or follow

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<sup>23</sup> *Id.* at 12.

<sup>24</sup> *Id.* at 13

<sup>25</sup> *Id.*

<sup>26</sup> Schumpert Dep. at 20:20 - 22:6, 26:1 - 27:1, 58:1-13.

<sup>27</sup> *Id.* at 26:14-16.

<sup>28</sup> *Id.* at 44:1 - 48:16.

<sup>29</sup> *Id.* at 27:16 - 28:1.

<sup>30</sup> *Id.* at 36:12 - 37:2.

<sup>31</sup> *Id.* at 34:23 - 35:3; Ex. 7.

<sup>32</sup> Schumpert Dep. at 31:12 - 32:25.

Petitioner's condition and his evaluation occurred some five years after the injury and Dr. Headapohl's original examination.<sup>33</sup>

¶ 25 Dr. Schutte also testified by deposition. Dr. Schutte began treating Petitioner in 1986, specifically with regard to his right knee complaints, followed Petitioner's treatment for his right knee to a point of medical stability in 1987, and once again treated Petitioner for his knee complaints after the May 5, 1998, injury.<sup>34</sup> Dr. Schutte offered his medical opinion based upon a reasonable degree of medical probability that Petitioner's knee injury from 1983 was medically stable for a period of time prior to the 1998 injury.<sup>35</sup> Dr. Schutte further opined that the May 5, 1998, electrical injury and related fall resulted in a significant aggravation of his preexisting right knee condition.<sup>36</sup>

¶ 26 Finally, Dr. Schutte was asked by Respondent's counsel how he disagreed with Dr. Schumpert's opinion that Petitioner's current right knee complaints were not related to the May 5, 1998, injury. Dr. Schutte stated that he has a difference of opinion with Dr. Schumpert's position because Dr. Schumpert discounts the fact that Petitioner fell at the same time he received a severe electrical shock.<sup>37</sup>

¶ 27 Dr. Schutte's medical opinion is clearly set forth in his correspondence dated November 3, 2004, which states:

I saw Mr. Hunter initially on 06/12/86 in regard to injuries sustained to his right knee in the 1982 injury.

He subsequently sustained an electrocution in 1998 with charred exit wounds on the anterior aspect of his right knee. . . . There is medical documentation that there was further injury to his right knee secondary to the electrocution event that occurred in 1998.

There is an unrelated snowmobile accident which occurred in 1994, which did not cause injury to his right knee, to the best that I can determine from the historical information.

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<sup>33</sup> *Id.* at 33:4-11.

<sup>34</sup> Schutte Dep. Ex. 2 and 3; Ex. 4 at 1-2.

<sup>35</sup> Schutte Dep. at 24:8-21.

<sup>36</sup> *Id.* at 25:10 - 26:11.

<sup>37</sup> *Id.* at 35:19 - 37:20.

It is my opinion that Mr. Charles Hunter's current right knee condition is directly related to traumatic events which occurred in 1982 and 1998.

It is important to note that his asymptomatic left knee, which has not sustained trauma over the years, is completely free of arthritic disease and angular deformity.<sup>38</sup>

¶ 28 In response to specific questions posed to him by Respondent, Dr. Schutte again wrote his opinion in a letter dated January 5, 2005, as follows:

It is my opinion that the 1998 electrocution should not be considered a non-event in regards to Mr. Hunter's current knee condition. It is my opinion that it is an aggravating factor – another insult to his knee which has contributed in a negative way to his current knee performance.<sup>39</sup>

¶ 29 Dr. Schutte wrote the following Telecom medical note further clarifying his opinion:

[C]onsidering the length of time from the electrocution up to the present, there is some significant historical performance information that leads to the description of this aggravating factor to be significant. At the time of the 1998 electrocution, Mr. Hunter fell at least 5 to 6 feet, and, although there is no specific record of this, there was a fall associated with this electrocution. According to Dr. Headapohl, there was definitely some swelling in his knee and there were exit wounds from the current from the electrocution. It is important that from the time of this electrocution onward into the future, beyond 1998, Mr. Hunter's knee never returned to the level of functional performance that it was prior to the electrocution. It is known that he had a 1982 injury, with a significant ligament injury to his knee. As I have stated in the correspondence on 1/5/05, the osteoarthritis and the anterior cruciate ligament injury was present prior to electrocution and a lot of what is seen in his knee today is directly related to that 1982 injury. There is also a factor that after the electrocution and the fall, his knee never returned to the level of performance that it was prior to 1998. Because of this failure to improve and the presence of an injury to his knee, it is my opinion that the aggravating factor caused by the electrocution was very significant to Mr.

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<sup>38</sup> Ex. 4 at 7.

<sup>39</sup> *Id.* at 12.

Hunter in terms of his knee performance ever since the electrocution occurred. It is important that his knee performance never return[ed] to the pre-1998 abilities, and this, in my opinion, makes the electrocution an aggravating factor of significance.<sup>40</sup>

### CONCLUSIONS OF LAW

¶ 30 This case is governed by the 1997 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Petitioner's industrial accident.<sup>41</sup>

¶ 31 Petitioner bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.<sup>42</sup>

¶ 32 Petitioner suffers from advanced medial compartment osteoarthritis and chronic ACL deficient right knee, which was aggravated and triggered by his May 5, 1998, injury while working for Alpine Construction. An employer "takes an employee as he finds him."<sup>43</sup> Although a preexisting condition may be substantially responsible for a claimant's medical condition, the insurer is liable for the condition where the preexisting disease or condition is "lit up, aggravated or accelerated by an industrial injury."<sup>44</sup> Significant medical evidence demonstrates that several doctors found that Petitioner suffered abrasions, burns and exit wounds to his right knee after being shocked by a 100,000 volt transmission line and, more significantly for the Court's determination, his fall of approximately five feet from the back of a flatbed truck. Respondent's first IME physician, Dr. Headapohl, found pain, swelling, instability, and abrasion causally connected to the May 5, 1998, industrial accident. Dr. Schutte, Petitioner's treating physician with regard to his knee, further opined that his current complaints result from an aggravation to existing conditions and are directly related to the 1998 industrial injury.

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<sup>40</sup> *Id.* at 13.

<sup>41</sup> *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

<sup>42</sup> *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).

<sup>43</sup> *Houts v. Kare-Mor, Inc.*, 257 Mont. 65, 68, 847 P.2d 701, 704 (1993).

<sup>44</sup> *Birnie v. U.S. Gypsum Co.*, 134 Mont. 39, 45, 328 P.2d 133, 136 (1958).

¶ 33 For an injury to be compensable, the claimant is not required to prove that a separate and distinct injury occurred.<sup>45</sup> “It has long been the law that an accident is compensable if the traumatic event or unusual strain aggravates a pre-existing injury.”<sup>46</sup> Accordingly, if a previous injury covered by another insurer has reached maximum healing or a medically stable condition, the insurer on risk at the time of the injury forming the basis for the claim is responsible to pay benefits.<sup>47</sup> A preponderance of credible medical evidence demonstrates that Petitioner suffered a severe electrical injury on May 5, 1998, in the course of which he experienced a fall of approximately five feet and injured his right knee. While Petitioner had experienced a 1983 industrial injury involving the right knee, Dr. Schutte opined that Petitioner’s 1983 industrial knee injury was medically stable for a period of time prior to Petitioner’s 1998 injury. The medical records demonstrate that Petitioner sought no medical treatment for his right knee condition for a period of approximately twelve years prior to his May 5, 1998, injury, after which he began seeking treatment for right knee complaints. Dr. Schutte further opined that the May 5, 1998, industrial injury represented an aggravating factor of significance with regard to Petitioner’s right knee injury and resulted in his inability to return to pre-1998 right-knee performance.

¶ 34 “[T]he burden of proof is properly placed on the insurance company which is on risk at the time of the accident in which a compensable injury is claimed. This holding assures that claimant will always know which insurer he can rely on to pay the benefits. It is the duty of the insurance company on risk to pay the benefits until it proves, or until another insurance company agrees, that it should pay the benefits.”<sup>48</sup>

¶ 35 “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 maximum medical healing with respect to his prior workers’ compensation injury or that the second injury did not in fact permanently aggravate the underlying condition for which the prior insurer was liable.”<sup>49</sup> Respondent had the burden of proving Petitioner had not reached maximum medical healing with respect to his 1983 industrial accident or that the May 5, 1998, industrial accident did not permanently aggravate the underlying condition. Respondent failed to produce sufficient credible evidence in both regards. Dr. Schumpert testified that he would not be able to give an opinion with regard to whether Petitioner’s 1983 injury was medically stable prior to reinjury in 1998. Dr. Schumpert’s

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<sup>45</sup> *Belton v. Carlson Transport*, 202 Mont. 384, 387-88, 658 P.2d 405, 407 (1983).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 392, 658 P.2d at 409-10.

<sup>48</sup> *Id.*

<sup>49</sup> *Stacks v. Travelers Property Casualty*, 2001 MTWCC 9, ¶ 108. (Emphasis omitted.)

finding that the May 5, 1998, industrial accident did not causally relate to Petitioner's present knee condition is unpersuasive. First, Dr. Schumpert disregarded the fact that Petitioner experienced a fall from approximately five feet at the same time he suffered a severe electrical injury. Second, Dr. Schumpert's theory that the 1983 knee injury and the 1992 snowmobile injury were likely the causes of his current complaints are unpersuasive because he admitted this opinion would be based upon speculation with regard to the snowmobile accident and that he had no history of treating Petitioner with regard to his 1983 injury, nor had he reviewed any of the treating physician's records in this regard prior to rendering his opinion. Finally, Dr. Schumpert's report does not persuasively explain or support why he completely disregards Dr. Headapohl's IME findings, only three months after the industrial accident in this case, which made a direct causal link between Petitioner's right knee injury and the accident in question.

¶ 36 As the prevailing party, Petitioner is entitled to his costs.<sup>50</sup>

#### JUDGMENT

¶ 37 This Court determines that Petitioner's right knee conditions are causally related to his May 5, 1998, industrial accident.

¶ 38 Petitioner is entitled to his costs.

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

¶ 40 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 11th day of March, 2007.

(SEAL)

/s/ James Jeremiah Shea  
JUDGE

c: Matthew B. Thiel  
William O. Bronson  
Submitted: January 17, 2007

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<sup>50</sup> ARM 24.5.342.