

**IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA**

**2021 MTWCC 17**

**WCC No. 2019-4766**

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**JACOB LORENZEN**

**Petitioner**

**vs.**

**EMPLOYERS PREFERRED INSURANCE COMPANY**

**Respondent/Insurer.**

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**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT**

**Summary:** Petitioner seeks additional benefits, asserting that his industrial accident permanently aggravated his preexisting conditions, including his chronic pain, cervical spine condition; lumbar spine condition; and right foot condition. Petitioner also asserts that his industrial accident caused a brain injury, resulting in headaches and tinnitus.

**Held:** Respondent is not liable for additional benefits. Respondent is liable only for those medical conditions caused or materially aggravated by Petitioner's industrial accident. In his industrial accident, Petitioner suffered a left-wrist sprain, which has completely resolved; a low-back sprain, which has completely resolved; and a herniated disc at C5-6, which has been surgically repaired and which resulted in no additional physical restrictions. Petitioner did not suffer a permanent aggravation to any of his preexisting conditions. Petitioner's current need for medical treatment and his alleged current inability to return to his time-of-injury job or otherwise work is a result of his preexisting conditions and a nonindustrial left-ankle injury, conditions and injuries for which Respondent is not liable.

¶ 1 The trial in this matter was held on January 4, 2021, via Zoom video conference. Petitioner Jacob Lorenzen was present and was represented by R. Russell Plath. Respondent Employers Preferred Insurance Company (Employers Preferred) was represented by Michael P. Heringer.

¶ 2 Exhibits: This Court admitted Exhibits 1 through 77 without objection.

¶ 3 Witnesses and Depositions: This Court admitted the depositions of Jacob Lorenzen; Bella Gentry, MD; Joseph Erpelding, MD; and Daniel Rodriguez, MD, into evidence. Lorenzen was sworn and testified at trial.

¶ 4 Issue Presented: The Pretrial Order sets forth the following issue:

Whether Petitioner is entitled to further benefits under the Montana Workers' Compensation Act (MCA 2017).

### FINDINGS OF FACT<sup>1</sup>

#### Lorenzen's preexisting conditions

¶ 5 In 1989, when Lorenzen was 9 years old, he crashed on his bicycle. He suffered a cervical spine injury, which resulted in a fusion at C6-7. Thereafter, he suffered from chronic pain.

¶ 6 In his early adulthood, Lorenzen worked heavy labor and suffered from worsening chronic pain in his neck, mid and low back, arms, and legs.

¶ 7 In 2015, Lorenzen started working part-time as a casino host at the Silver Fox Casino in Hardin. He worked three, six-hour shifts each week and made \$11.00 per hour. His main job duties were paying out tickets and serving drinks. At times, he rolled beer kegs a few feet and lifted cases of soda weighing 20-50 pounds.

¶ 8 On June 1, 2015, Lorenzen broke his right big toe and presented to Carolyn S. Greimann, MD, in "extreme pain." Dr. Greimann placed Lorenzen in a walking boot, directed him to use crutches with no weightbearing for two weeks, and advised him to keep his foot elevated. Dr. Greimann noted, "This is extremely aggressive care for [a] toe fracture, [but] I am worried that he will develop a nonunion there if he is using it at all."

¶ 9 On June 10, 2016, Lorenzen saw Kirsten L. Morissette, MD, complaining of pain in his right foot, which had been continuous since he broke his toe, and worsening pain in his neck, with pain radiating down his arms. At Lorenzen's request, Dr. Morissette referred him to a pain management clinic.

¶ 10 On August 3, 2016, Lorenzen saw Richard S. Stayner, MD, PhD, who specializes in pain management. Lorenzen complained of constant, severe, and worsening pain in his neck, shoulders, arms, hands, and mid and low back with associated pain, numbness,

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<sup>1</sup> The claimant bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks. *Dumont v. Wickens Bros. Constr. Co.*, 183 Mont. 190, 201, 598 P.2d 1099, 1105-06 (1979) (citations omitted).

and weakness in his right leg. Lorenzen described his pain as “burning, cramping, pins and needles, sharp, numbness, shooting, cutting, dull, achy, electric-like, throbbing, [and] pressure.” On the pain scale, Lorenzen rated his pain as ten out of ten. Lorenzen reported that his pain limited his ability to walk for more than three blocks, to sit for more than one hour, and to stand for more than one hour, and that he was “forced to lie down constantly because of pain.” Lorenzen also reported that his pain made it difficult to sleep, to do yard work and household chores, to exercise, to drive, and to shop. Lorenzen also reported that his pain interfered with caring for his child. Dr. Stayner noted reduced range of motion in Lorenzen’s neck and low back, due to pain. Dr. Stayner diagnosed, *inter alia*, chronic neck pain and cervical radiculopathy, chronic low-back pain and lumbar radiculopathy, and depression. Dr. Stayner continued Lorenzen’s pain medications and prescribed a sleep medication. Dr. Stayner recommended cervical and lumbar MRIs to compare to his previous MRIs.

¶ 11 On August 16, 2016, Lorenzen returned to Dr. Stayner and reported that his cervical and cervical radicular pain and his lumbar pain and lumbar radicular pain were worsening. Dr. Stayner also noted that Lorenzen’s pain “significantly impacts [his] ability to engage in activities of daily living such as working, caring for his 9 month old child, and sleeping at night.” Dr. Stayner noted that the recent lumbar MRI showed degenerative changes and a disc bulge with a foraminal protrusion potentially contacting the exiting left L3 nerve root and that the recent cervical MRI showed a large disc bulge to the right of C3-4, which deformed Lorenzen’s spinal cord. To treat Lorenzen’s cervical pain and cervical radicular pain, Dr. Stayner recommended cervical and thoracic epidural steroid injections (ESIs). To treat Lorenzen’s worsening lumbar pain and worsening lumbar radicular leg pain, Dr. Stayner recommended a medial branch block and an ESI. To treat his worsening insomnia, Dr. Stayner prescribed a sleep medication. Dr. Stayner also thought that Lorenzen should be evaluated by neurosurgery.

¶ 12 Lorenzen returned to Dr. Stayner on September 16, 2016. Lorenzen reported that the ESIs provided some relief for his cervical and lumbar spine pain. However, his pain had returned to its baseline, which Lorenzen described as constant, severe pain, which was at the ten-out-of-ten level on the pain scale. Dr. Stayner recommended additional cervical ESIs, diagnostic lumbar medial branch blocks, and medial branch radio frequency ablation.

¶ 13 Despite Dr. Stayner’s treatments and prescriptions, Lorenzen continued to suffer from severe chronic pain.

¶ 14 On May 3, 2017, Lorenzen saw Anna Hein, NP, because he suffered a flare in his low-back pain while starting a string trimmer. Hein diagnosed a lumbar sprain and treated Lorenzen with a pain medication injection and a prescription for a muscle relaxer.

### Lorenzen's industrial accident

¶ 15 On November 29, 2017, while leaving work, Lorenzen tripped and fell approximately 3½ feet off a deck. He landed first on his left hand and then on his back. He did not hit his head and did not lose consciousness. He called 911 and requested an ambulance.

¶ 16 At the Emergency Room, Lorenzen reported increased pain in his neck and back, with tingling and shooting pains down his arms and legs. He denied loss of consciousness. The ER physician did not note any objective signs of acute injury. The ER physician provided pain and anti-inflammatory medications and instructed Lorenzen to rest and follow up with his primary care physician.

### Post-industrial accident

¶ 17 On December 5, 2017, Lorenzen saw Gary Ostahowski, MD, a primary care physician. Lorenzen reported pain in his neck, in his low back with numbness in his right foot, and in his left wrist. Dr. Ostahowski noted that Lorenzen had limited range of motion and swelling in his left wrist. However, the x-rays of Lorenzen's wrist were normal. Thus, Dr. Ostahowski diagnosed a wrist sprain. Dr. Ostahowski also noted limited range of motion in Lorenzen's neck and low back and diagnosed cervical and lumbar sprains. Dr. Ostahowski prescribed a muscle relaxer and an anti-inflammatory. Dr. Ostahowski released Lorenzen to his time-of-injury job.

¶ 18 On December 9, 2017, Lorenzen returned to work.

¶ 19 On December 26, 2017, Lorenzen returned to Dr. Morissette, who noted, "[Lorenzen] was seen in the ER . . . after a fall of approximately 4 feet. The [fall] occurred while he was working. He had [a] full evaluation that was essentially negative." Lorenzen complained of low-back pain, with numbness and tingling radiating to his right foot. Lorenzen reported that the medications Dr. Ostahowski had prescribed were not working. Thus, he requested a stronger painkiller and a referral to Michael Henry Schabacker, MD, a pain management specialist. Dr. Morissette provided Lorenzen with an opioid pain medication to help him sleep and a referral to Dr. Schabacker. Dr. Morissette filled out a Medical Status Form in which she released Lorenzen to full-duty work.

¶ 20 On December 27, 2017, Employers Preferred accepted liability for Lorenzen's low-back and left-wrist sprains.

¶ 21 On February 28, 2018, Lorenzen saw Dr. Schabacker for "[a]ssumption of chronic pain management care." Lorenzen complained of pain in his neck, shoulders, arms, low back, and right foot. Dr. Schabacker was primarily concerned with Lorenzen's cervical condition and indicated that Lorenzen's industrial accident aggravated his preexisting cervical spine condition. As to Lorenzen's lumbar spine condition, Dr. Schabacker

opined, “[h]istory of low back pain without evidence for radiculopathy or myelopathy, unaffected by the recent fall at work.”

¶ 22 On March 22, 2018, Lorenzen saw Ashely Quanbeck, MD. Lorenzen reported severe cervical pain, with pain radiating into his arms and hands. Lorenzen also complained of tinnitus, i.e., ringing in his ears. Dr. Quanbeck released Lorenzen from work until Dr. Schabacker could review imaging of Lorenzen’s cervical spine and determine the cause of Lorenzen’s pain.

¶ 23 Based on Dr. Quanbeck’s release from work, Employers Preferred began paying Lorenzen temporary total disability (TTD) benefits.

¶ 24 On May 8, 2018, Lorenzen returned to Dr. Morissette. Dr. Morissette reviewed Lorenzen’s CT myelograms and noted that the scan of his lumbar spine was “essentially unremarkable” while the scan of his cervical spine showed “some stenosis and neural foraminal narrowing” and a “large disc herniation centrally and on the right at C5-6.” Dr. Morissette referred Lorenzen for surgical consult. Dr. Morissette restricted Lorenzen to “essentially light duty.”

¶ 25 On May 25, 2018, Lorenzen saw Christopher A. Graham, PA-C, who works in the neurosurgical department. Graham determined that Lorenzen’s workplace fall caused his herniated disc at C5-6. Graham recommended a cervical ESI. Graham took Lorenzen off work.

¶ 26 Employers Preferred accepted liability for Lorenzen’s C5-6 disc herniation.

¶ 27 Lorenzen returned to Graham on August 14, 2018. Because the cervical ESI did not improve Lorenzen’s symptoms, Graham referred Lorenzen for a surgical consultation.

¶ 28 On August 15, 2018, Lorenzen saw Louis Voelkel Ross, MD, a neurosurgeon, who recommended a cervical discectomy at C5-6 and fusion.

¶ 29 On October 12, 2018, Dr. Ross performed the recommended cervical surgery.

¶ 30 On October 26, 2018, Lorenzen returned to Dr. Ross. Lorenzen reported that he had pain at the surgical site but had complete resolution of his radicular symptoms. Dr. Ross told Lorenzen that he could slowly increase his level of activity. Dr. Ross released Lorenzen to modified duty, restricting Lorenzen to lifting no more than 20 pounds and explaining that Lorenzen could not work a full day.

¶ 31 On November 23, 2018, Lorenzen suffered a left-ankle injury while playing basketball with his daughter.

¶ 32 On November 27, 2018, Lorenzen returned to Dr. Ross. Lorenzen reported that he had “almost no neck pain and no arm symptoms.” Dr. Ross told Lorenzen that he could return to work, starting at 4 hours per day during the first week, 6 hours per day during the second week, and “no restrictions after [that].”

¶ 33 Employers Preferred paid TTD benefits through December 9, 2018, because, on December 10, 2018, Lorenzen returned to work.

¶ 34 However, Lorenzen could not work because of the pain in his left ankle and right foot. At trial, Lorenzen testified: “I showed up and couldn’t perform the work. I can’t stand. I can’t work. I couldn’t — between my right foot and my left foot, it was — it was bad. I couldn’t work . . . .” Lorenzen voluntarily resigned his position.

¶ 35 On January 3, 2019, Lorenzen saw Hans E. Bone, PA-C, who works with Dr. Schabacker. Lorenzen complained of pain in his neck and right ankle and foot. Lorenzen reported that he had “almost no neck pain or arm symptoms” after his recent cervical surgery, but he had suffered an increase in neck and arm pain during the previous two weeks. Bone prescribed a painkiller and referred Lorenzen to a podiatrist for his ankle and foot pain.

¶ 36 On January 7, 2019, Lorenzen saw Anna M. Hein, NP, because he continued to suffer from pain, swelling, and reduced mobility in his left ankle.

¶ 37 On January 14, 2019, Lorenzen returned to Dr. Ross, who noted, “[p]atient has had complete alleviation of his preoperative arm pain and numbness. He does continue to report some moderate neck pain below the sight of his [childhood] surgery. My suspicion is that this is facet mediated pain due to adjacent segment disease below his old construct”; i.e., arthritis in the levels below his fusion at C6-7. Dr. Ross released Lorenzen to full duty with no restrictions.

¶ 38 On January 29, 2019, Lorenzen saw Merrell Kauwe, DPM. Lorenzen complained of right-foot pain, which he attributed to his industrial accident, and left ankle pain, which he attributed to his injury while playing basketball with his daughter. Dr. Kauwe did not see any fractures, dislocations, or other abnormalities on x-rays. However, Dr. Kauwe noted problems with the tendons in Lorenzen’s left ankle and foot, and recommended surgery.

¶ 39 Lorenzen returned to Bone on January 30, 2019, complaining of pain in his neck, left ankle, and right ankle and foot. Bone noted that Lorenzen was schedule for left-ankle surgery and increased his pain medication for the week following his surgery.

¶ 40 On January 31, 2019, Dr. Kauwe operated on Lorenzen’s left ankle.

¶ 41 On February 6, 2019, Lorenzen saw Royce Pyette, MD, for an impairment rating evaluation. Dr. Pyette determined that, as a result of Lorenzen's industrial cervical-spine injury, he had a 7% whole person impairment rating, a Class 1 impairment under the 6<sup>th</sup> Edition to the AMA Guides.

¶ 42 On February 12, 2019, Lorenzen saw Hein. Lorenzen reported constant, bilateral tinnitus, which he had had since his workplace fall, and a "popping sensation" in his ears, which he had not. Hein did not observe any ear abnormalities and advised Lorenzen that "tinnitus is very common and there is not a lot we can do about it."

¶ 43 On February 27, 2019, Lorenzen returned to Hein. He complained of right-foot pain. Hein told him to follow up with Dr. Kauwe. Lorenzen also complained of tinnitus and told Hein that he was "convinced that the tinnitus is a result of his previous head injury with loss of consciousness for an unknown amount of time back in 2017." Lorenzen asked Hein to refer him to "somebody who deals with the brain and traumatic brain injuries." Hein referred him to a neurologist. Lorenzen also complained of bilateral low-back pain with right-sided sciatica. Hein did not see any "significant abnormalities" and determined that it was "muscular in nature." She diagnosed piriformis syndrome and referred him to physical therapy.

¶ 44 In April 2019, Dr. Kauwe surgically removed portions of two tendons in Lorenzen's right foot in an attempt to alleviate his right-foot pain.

¶ 45 On April 23, 2019, Lorenzen returned to Bone. Lorenzen complained of right-ankle and foot pain, and neck pain. Lorenzen reported that his left ankle was feeling better. Bone increased Lorenzen's pain medication.

¶ 46 On May 15, 2019, Lorenzen saw Trenay A. Hart, PA-C. Lorenzen complained of frequent headaches and constant tinnitus. He told Hart that when he fell off the deck at work, he hit his head and chin and suffered a whiplash injury. He also told her that he had been suffering with the headaches and tinnitus since his industrial accident but that he did not report them because he was taking care of his other injuries. Hart recommended brain imaging.

¶ 47 On May 21, 2019, Lorenzen began seeing Bella Gentry, MD, as his primary care physician. Lorenzen complained of pain in his neck, with "sharp nerve pain" and numbness and tingling into his hands, low-back pain, and right-foot pain. Lorenzen reported that his pain started with his industrial accident. Dr. Gentry diagnosed Lorenzen with chronic pain.

¶ 48 On July 9, 2019, Lorenzen returned to Hart, complaining of headaches and tinnitus. Hart noted an abnormality on Lorenzen's brain MRI and surmised that his industrial injury was sufficiently severe to cause it and result in "some of the symptoms

he is having may be even the tinnitus.” Hart thought that Lorenzen had post concussive syndrome.

¶ 49 On November 19, 2019, Employers Preferred had orthopedist Joseph M. Erpelding, MD, and neurologist Daniel Rodriguez, MD, examine Lorenzen under § 39-71-605. Dr. Erpelding concluded that Lorenzen’s fall caused a left-wrist sprain, which resolved without sequelae, and a permanent aggravation of Lorenzen’s stenosis at C5-6, which was at maximum healing. Dr. Erpelding opined that Lorenzen did not have any physical restrictions as a result of this injury and that his ongoing neck pain was a result of the arthritis from his childhood fusion at C6-7. Dr. Erpelding opined that Lorenzen’s fall did not cause an injury to his right foot; a permanent aggravation to his lumbar spine condition, nor an increase in the radicular pain in his right leg; his piriformis syndrome; nor an increase in his chronic pain. Dr. Erpelding approved several job analyses, including the job analysis for Lorenzen’s time-of-injury job. However, based on the existing problems with Lorenzen’s neck, lumbar spine, and ankles, Dr. Erpelding opined that Lorenzen should limit his lifting to 35 pounds and that he would benefit from a sedentary job that would allow him to change positions when needed.

¶ 50 Dr. Rodriguez opined that Lorenzen did not suffer a head injury in his industrial accident. Dr. Rodriguez explained that there was nothing “significant” on Lorenzen’s brain MRI and nothing suggesting a shearing injury. Dr. Rodriguez also explained, “that there was no mention of loss of consciousness at the time of injury, there was no evidence that the patient had trauma to the head, and the significant delay of reporting symptoms strongly suggest that it is less likely than not that the patient had head injury as a result of the 11/29/2017 injury.” Based on a lack of objective medical findings and the lack of a temporal relationship between Lorenzen’s industrial accident and his reported symptoms, Dr. Rodriguez also opined that his tinnitus and headaches were not “secondary” to his industrial injury.

¶ 51 Lorenzen returned to Dr. Gentry on November 21, 2019. Lorenzen reported that he aggravated his low back the previous week while shoveling gravel. Dr. Gentry diagnosed Lorenzen with an exacerbation of his chronic low-back pain.

¶ 52 On January 14, 2020, Dr. Gentry wrote a “To Whom it May Concern” letter, stating:

[Lorenzen] continues to have disabling foot, neck and back pain. In spite of his previous injury before this accident he was able to work full shifts at heavy manual labor. Since then he has been unable to tolerate being up and around for more than about four hours and is unable to tolerate any work over his head or lifting. He will most likely need continued medical care for decades and possibly more surgery. He will also need to be trained for a non-manual-labor occupation.



¶ 53 Lorenzen continued seeing Dr. Gentry through the spring of 2020, primarily with complaints of low-back pain with pain radiating into his right leg, and neck pain. After reviewing the report of a lumbar MRI which showed, *inter alia*, a disc herniation at the right of L4-5, Dr. Gentry referred Lorenzen to Alan K. Dacre, MD, a spine surgeon.

¶ 54 On July 8, 2020, Lorenzen saw Dr. Dacre, complaining of worsening right-sided low-back pain. Dr. Dacre reviewed a recent lumbar MRI, which showed a disc herniation on the right at the L4-5 level. However, Dr. Dacre noted that Lorenzen's "pain seems to be relatively broad in its manifestation" and diagnosed, "right-sided low back pain of somewhat unclear origin."

¶ 55 On September 11, 2020, Lorenzen saw Chris Hines, PA-C, who works in Dr. Dacre's office. Lorenzen had undergone a right L4-5 transforaminal ESI, which gave him some relief for a few weeks. Hines thought that the majority of Lorenzen's pain resulted from his right-sided disc herniation at L4-5. Hines thought that Lorenzen may benefit from surgery, but that Lorenzen should first undergo another ESI.

¶ 56 At her deposition on November 18, 2020, Dr. Gentry testified that when she stated in her letter that Lorenzen had "disabling" pain, she meant, "Disabling from the standpoint of heavy manual labor, yes." Dr. Gentry opined that Lorenzen could return to work at the casino. Dr. Gentry also testified that she does not have an opinion on the cause of Lorenzen's L4-5 disc herniation and that she would defer to Dr. Erpelding and Dr. Rodriguez on the issue of causation. Dr. Gentry also testified that she did not have an opinion as to the cause of Lorenzen's right-foot pain, nor to the cause of Lorenzen's chronic neck pain, explaining that each injury he has suffered has contributed to it.

¶ 57 Lorenzen testified that he cannot work because of his headaches; tinnitus; blurred vision, which he attributes to a brain injury; chronic pain in his neck, with bilateral radicular pain and numbness; chronic pain in his shoulders; chronic pain in his mid and low back; chronic pain in his left ankle; and chronic pain in his right foot. With the exception of his left-ankle pain, Lorenzen attributes his current symptoms to his industrial accident.

#### Dispositive Findings

¶ 58 Having considered the totality of the evidence presented, and having resolved the conflicts in the evidence, this Court makes the following dispositive findings of fact.

¶ 59 Lorenzen made several misrepresentations to his medical providers and several misrepresentations during his deposition and trial testimony. Therefore, he was not a credible witness.

¶ 60 In his industrial accident, Lorenzen suffered a left-wrist sprain, which has fully healed with no sequelae.

¶ 61 In his industrial accident, Lorenzen suffered a low-back sprain, which has fully healed with no sequelae.

¶ 62 In his industrial accident, Lorenzen suffered a herniated disc at C5-6. Lorenzen has reached MMI for this injury and, per Dr. Ross, he has no physical restrictions as a result of this injury.

¶ 63 Lorenzen's industrial accident did not cause a permanent aggravation to his preexisting chronic pain, including the chronic pain in his neck. This Court gives weight to the opinion of Dr. Ross, one of Lorenzen's treating physicians and a specialist, that his current neck pain is caused by arthritis from his childhood fusion at C6-7 and not his injury at C5-6. Although Dr. Gentry implied that Lorenzen's industrial accident permanently aggravated his chronic pain, this Court does not give her opinion any weight because it is largely based on the history Lorenzen gave her, which was inaccurate, at best. Lorenzen's medical records show that he suffered from severe and worsening chronic pain before his industrial accident and his testimony did not convince this Court that his industrial accident caused an acceleration or worsening of his chronic pain.

¶ 64 Lorenzen's industrial accident did not cause a permanent aggravation to his preexisting lumbar spine condition, nor his herniated disc at L4-5. This Court gives weight to the opinions of Dr. Schabacker and Dr. Erpelding, who opined that Lorenzen's industrial accident did not permanently aggravate his lumbar spine condition. No physician has opined that Lorenzen's industrial accident caused his herniated disc at L4-5 and Lorenzen did not produce sufficient evidence to prove that his industrial accident caused anything more than a lumbar sprain, which has completely resolved.<sup>2</sup>

¶ 65 Lorenzen's industrial accident did not cause a permanent aggravation to his preexisting right-foot condition. Although Lorenzen attributes his current right-foot pain to his industrial accident, he did not produce sufficient evidence to prove that his industrial accident permanently aggravated his right-foot condition<sup>3</sup> and the totality of the evidence shows that his industrial accident did not aggravate his preexisting right-foot condition.

¶ 66 Lorenzen's industrial accident did not cause a brain injury, his tinnitus, nor his headaches. Lorenzen's testimony did not convince this Court that he fell on his head and was knocked unconscious. This Court gives weight to Dr. Rodriguez's opinions because of his credentials and because he based his opinions on the evidence establishing that Lorenzen did not hit his head in his industrial accident, did not lose consciousness, and did not have tinnitus or headaches for several months thereafter.

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<sup>2</sup> See *Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶ 47-49, 365 Mont. 405, 282 P.3d 687 (holding that under §§ 39-71-119 and -407, MCA (1995-present), a claimant has the burden of proving an injury, which must be established with objective medical findings, and that the industrial accident caused the injury, which includes the aggravation of a preexisting condition, with medical expertise or opinion).

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

¶ 67 Lorenzen did not suffer a wage loss as a result of his industrial injury. Lorenzen's current physical restrictions and alleged inability to work in his time-of-injury job are the result of his preexisting conditions and his nonindustrial left-ankle injury.

### CONCLUSIONS OF LAW

¶ 68 This case is governed by the 2017 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Lorenzen's industrial accident.<sup>4</sup>

¶ 69 The parties broadly ask this Court to determine whether Lorenzen is entitled to any additional benefits. Lorenzen's position that he is entitled to additional workers' compensation benefits is based on his claim that his industrial accident caused a permanent aggravation to his preexisting chronic pain; to his cervical spine condition; to his lumbar spine condition; to his right-foot condition; and on his claim that his industrial accident caused a brain injury, resulting in his tinnitus and headaches. However, this Court has found that the only injuries caused by Lorenzen's industrial accident were his left-wrist sprain, his low-back sprain, and his C5-6 disc herniation. These are the only injuries for which Employers Preferred is liable because, "An insurer is liable only for those medical conditions caused or materially aggravated by an industrial accident."<sup>5</sup> Employers Preferred is not liable for benefits for Lorenzen's medical conditions that were not caused or materially aggravated by his industrial accident.

¶ 70 Lorenzen specifically asks this Court to rule that he is entitled to TTD benefits, permanent partial disability (PPD) benefits, rehabilitation benefits, and medical benefits. This Court will address these benefits in turn.

### TTD benefits

¶ 71 Lorenzen argues that he is entitled to TTD benefits dating back to December 2018, when he voluntarily resigned his position at the Silver Fox Casino. He asserts that he could no longer work because of the injuries he suffered in his industrial accident and resulting disabilities. However, "[c]ompensation benefits are payable only for disability resulting from the industrial injury."<sup>6</sup> Here, Lorenzen has not proven that the disability resulting from his industrial injuries is the reason he quit working at the casino. At the time, Dr. Ross considered Lorenzen's cervical injury and determined that he had no physical restrictions and released him to return to work. Dr. Gentry and Dr. Erpelding also opined that the disability resulting from Lorenzen's herniated disc at C5-6 did not preclude him from returning to his time-of-injury job. Lorenzen returned to work but, by

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<sup>4</sup> *Ford*, ¶ 32 (citation omitted); § 1-2-201, MCA.

<sup>5</sup> *McCauley v. Liberty Nw.*, 2004 MTWCC 43, ¶ 47.

<sup>6</sup> *Markovich v. Helmsman Mgmt. Services, Inc.*, 2003 MTWCC 4, ¶ 30 (citing §§ 39-71-701, -702, -703, MCA).

his own admission at trial, he could not continue working because of the sequelae of his right-foot and left-ankle injuries, neither of which resulted from his industrial accident. At that time, Lorenzen was not eligible for TTD benefits under § 39-71-701(a), MCA, which states, in relevant part, “a worker is eligible for temporary total disability benefits: (a) when the worker suffers a total loss of wages as a result of an injury and until the worker reaches maximum healing . . . .” In short, Lorenzen did not suffer a total loss of wages as a result of his industrial injuries. Instead, he suffered a total loss of wages as a result of nonindustrial injuries. Thus, he was not eligible for TTD benefits.

¶ 72 Lorenzen also argues that he is entitled to TTD benefits because Employers Preferred did not comply with § 39-71-609(2), MCA, before it terminated his TTD benefits. For claimants who have been eligible for and receiving TTD benefits, § 39-71-609(2), MCA, governs the termination of the claimant’s TTD benefits and, when applicable, the conversion of the claimant’s TTD benefits to PPD benefits. It states:

(2) Temporary total disability benefits may be terminated on the date that the worker has been released to return to work in some capacity. Unless the claimant is found, at maximum healing, to be without a permanent physical impairment from the injury, the insurer, prior to converting temporary total disability benefits or temporary partial disability benefits to permanent partial disability benefits:

(a) must have a physician’s determination that the claimant has reached medical stability;

(b) must have a physician’s determination of the claimant’s physical restrictions resulting from the industrial injury;

(c) must have a physician’s determination, based on the physician’s knowledge of the claimant’s job analysis prepared by a rehabilitation provider, that the claimant can return to work, with or without restrictions, on the job on which the claimant was injured or on another job for which the claimant is suited by age, education, work experience, and physical condition;

(d) shall give notice to the claimant of the insurer’s receipt of the report of the physician’s determinations required pursuant to subsections (2)(a) through (2)(c). The notice must be attached to a copy of the report.

The criteria for terminating a claimant’s TTD benefits, or converting a claimant’s TTD benefits to PPD benefits, in § 39-71-609(2)(a)-(d), MCA, are commonly called the “*Coles* criteria,” as this Court first adopted similar criteria in *Coles v. Seven Eleven Stores*.<sup>7</sup>

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<sup>7</sup> WCC No. 2000 at 11 (Findings of Fact and Conclusions of Law and Judgment (Nov. 20, 1984)), *aff’d*, 217 Mont. 343, 704 P.2d 1048 (1985). The Montana Supreme Court ratified the *Coles* criteria in *Wood v. Consol. Freightways, Inc.*, 248 Mont. 26, 30, 808 P.2d 502, 505 (1991). In 2001, the Montana Legislature enacted the criteria now codified at § 39-71-609(2)(a)-(d), MCA. 2001 Mont. Laws, Ch. 174, §§ 1 and 2.

¶ 73 Lorenzen is correct that the general rule is that an insurer cannot terminate TTD benefits without complying with the *Coles* criteria. This Court has explained, “Non-compliance with the *Coles* criteria extends temporary total disability benefits **irrespective** of whether the claimant continues to meet the criteria for payment of such benefits.”<sup>8</sup> However, an exception to this general rule exists when the claimant has returned to work. Section 39-71-609(1), MCA, states, in relevant part: “if an insurer has knowledge that a claimant has returned to work, compensation benefits may be terminated as of the time the claimant returned to work.” The Montana Supreme Court has held that, under this subsection, the *Coles* criteria do not apply when the claimant returns to work, explaining: “When a claimant returns to work, he or she is no longer experiencing a loss in wages and, therefore, the insurer can rightfully terminate temporary total disability benefits [under § 39-71-609(1), MCA].”<sup>9</sup>

¶ 74 Here, Employers Preferred had grounds to terminate Lorenzen’s TTD benefits without complying with the *Coles* criteria because Lorenzen returned to work on December 10, 2018. Although Lorenzen then quit working, he did so because of the problems he was having with his left ankle and right foot, injuries for which Employers Preferred is not liable. Lorenzen has not proven that he is entitled to ongoing TTD benefits retroactive to December 2018.

#### PPD benefits

¶ 75 Lorenzen asserts that he is entitled to PPD benefits under § 39-71-703, MCA, because he suffered an actual wage loss as a result of his industrial injuries. Lorenzen points out that Dr. Erpelding imposed a 35-pound lifting restriction and argues that he could not return to work as a host at the casino because it required him to lift cases of soda which weigh in excess of 35 pounds. However, § 39-71-703(1)(a), MCA, provides, in relevant part, that a worker is entitled to a PPD award if the worker has “an actual wage loss as a result of the injury . . . .” To the extent that Lorenzen has a wage loss, it is not as a result of his industrial injuries. Instead, Lorenzen’s alleged wage loss is a result of preexisting conditions that were not permanently aggravated in his industrial accident, and his left-ankle injury. Again, Dr. Ross opined that Lorenzen has no physical restrictions as a result of his C5-6 disc herniation. Likewise, Dr. Erpelding opined that Lorenzen had no physical restrictions as a result of his industrial injuries and explained

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<sup>8</sup> *Sears v. Travelers Ins.*, 1998 MTWCC 12, ¶ 18 (citing *Ness v. Anaconda Minerals Co.*, 257 Mont. 335, 339-40, 849 P.2d 1021, 1023-24 (1993) (emphasis in original)).

<sup>9</sup> *Larson v. Cigna Ins. Co.*, 276 Mont. 283, 294, 915 P.2d 863, 870 (1996). See also *Wallace v. Pro. Farm Sys.*, 2000 MT 310, ¶¶ 11-14, 302 Mont. 442, 14 P.3d 1234 (holding that although insurer did not comply with the *Coles* criteria, it lawfully terminated the claimant’s TTD benefits when he returned to work); *Purkey v. AIG and Liberty Mut. Fire Ins. Co.*, 2005 MTWCC 2, ¶ 48 (ruling that even if the insurer failed to “technically comply” with § 39-71-609(2), MCA, it could terminate his TTD benefits when he returned to work because § 39-71-609(1), MCA, “expressly provides that benefits may be immediately terminated without any sort of notice upon a workers’ actual return to work . . . .”); *Stacks v. Travelers Prop. Cas.*, 2001 MTWCC 9, ¶ 114 (ruling that although insurer did not comply with the *Coles* criteria, it did not have any liability for TTD benefits once the claimant returned to work).

that his 35-pound lifting restriction was due to Lorenzen's preexisting conditions and his left-ankle injury, which, as noted above, are conditions for which Employers Preferred is not liable. Therefore, Employers Preferred is not liable for PPD benefits.

#### Rehabilitation benefits

¶ 76 Lorenzen asserts that he is entitled to rehabilitation benefits under § 39-71-1014, MCA, because he is a "disabled worker" under the definition in § 39-71-1011(3), MCA, which states:

"Disabled worker" means a worker who has a permanent impairment, established by objective medical findings, resulting from a work-related injury that precludes the worker from returning to the job the worker held at the time of the injury or to a job with similar physical requirements and who has an actual wage loss as a result of the injury.

However, here again, Lorenzen does not have physical restrictions resulting from his industrial injuries that preclude him from returning to his time-of-injury job or to a job with similar physical requirements. His alleged inability to work is a result of his preexisting conditions and a nonindustrial injury, conditions and an injury for which Employers Preferred is not liable.

#### Medical benefits

¶ 77 Lorenzen argues that he is entitled to medical benefits for his cervical condition, lumbar spine condition, right-foot condition, alleged brain injury, and chronic pain. However, § 39-71-704(1)(a), MCA, requires the insurer to furnish medical benefits only "for conditions that are a direct result of the compensable injury."<sup>10</sup> This Court has found that Lorenzen's industrial accident did not cause these injuries, with the exception of the herniated disc at C5-6, or conditions nor permanently aggravate them. Thus, Employers Preferred is not liable for medical benefits for these injuries and conditions, with the sole exception of his herniated disc at C5-6. Although Employers Preferred remains liable for medical benefits for the natural progression, if any, of the injury at C5-6 because an insurer that is liable for a workers' compensation injury is liable for treatment of the natural progression of that injury,<sup>11</sup> Lorenzen did not present any evidence that Dr. Ross or any other medical provider has prescribed additional treatment for the injury at C5-6. Thus, at this time, Employers Preferred is not liable for additional medical benefits.

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<sup>10</sup> *Strom v. Mont. Mun. Ins. Auth.*, 2005 MTWCC 42, ¶ 25 (stating, "Insurers are responsible only for medical expenses and disability which are causally related to a work-related injury.").

<sup>11</sup> *Cooper v. Chevron Corp.*, 2003 MTWCC 16, ¶ 56 (citation omitted).

JUDGMENT

¶ 78 Lorenzen is not entitled to additional workers' compensation benefits.

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

DATED this 5th day of November, 2021.

(SEAL)

/s/ DAVID M. SANDLER  
JUDGE

c: R. Russell Plath  
Michael P. Heringer

Submitted: January 4, 2021