

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2017 MTWCC 20

WCC No. 2014-3429

MARC LUNDAY

Petitioner

vs.

LIBERTY NORTHWEST

Respondent/Insurer.

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

Summary: Respondent moves for summary judgment on the grounds that Petitioner does not have sufficient evidence to prove that his workplace exposure to grain dust caused his lung condition, nor sufficient evidence to prove that his work caused his hernias.

Held: The Court denied Respondent's motion. Petitioner met his burden of establishing there is an issue of material fact as to his lung condition by introducing medical evidence that his workplace exposure to grain dust caused his lung condition. An inference can be made from one of the records Respondent attached to its brief that one of Petitioner's medical providers is of the opinion that Petitioner's work caused his hernias. Thus, Respondent has not met its burden of establishing that there are no issues of material fact. Therefore, Respondent is not entitled to summary judgment.

¶ 1 Respondent Liberty Northwest (Liberty) moves for summary judgment on the grounds that Petitioner Marc Lunday does not have evidence to prove that his workplace exposure to grain dust caused any injury, and that Lunday does not have evidence to prove that his work caused bilateral hernias. Lunday asserts that the opinion of his physician assistant (PA) is sufficient to create an issue of fact as to whether his lung condition was caused by his exposure. Lunday also asserts that Liberty's summary judgment motion is "premature" because he is awaiting his surgeon's opinion as to the cause of his hernias.

STATEMENT OF FACTS¹

¶ 2 Lunday worked for Columbia Grain in Plentywood.

Lunday's Lung Claim

¶ 3 On November 11, 2011, Lunday cleaned out a bin and was exposed to grain dust and mold. Lunday avers that before this exposure, he “had no problems with aspiration” and that his exposure resulted in respiratory symptoms which “were none like I had before.”

¶ 4 On November 23, 2011, Lunday saw Thomas Weiner, MD, who has been Lunday's treating physician for throat cancer, for a yearly checkup. Dr. Weiner noted that while Lunday still had problems from the treatment of his throat cancer, Lunday had no chest pain, and no cough.

¶ 5 On December 15, 2011, Lunday saw Ruth Wyckoff, MD, at the Emergency Room (ER) at the Sheridan Memorial Hospital in Plentywood, for complaints of overall weakness. Lunday reported that several of his coworkers had been sick. A chest x-ray did not show any evidence of “acute infiltrate, pleural effusion or pneumothorax.” Dr. Wyckoff diagnosed Lunday with dehydration and weakness likely due to a viral infection.

¶ 6 On March 16, 2012, Lunday saw Justin L. Knowles, MD, at the ER at St. Peter's Hospital in Helena. Lunday complained of lightheadedness, shortness of breath, heart palpitations, trouble breathing, and coughing. A chest x-ray showed right, lower lobe pneumonia. Dr. Knowles noted that Lunday was “critically ill,” and admitted him to the Intensive Care Unit.

¶ 7 On March 30, 2012, Lunday saw William Batey, MD, who has a family practice in Helena, for follow-up for “multiple problems,” including bilateral pneumonia. Dr. Batey thought Lunday's pneumonia was “possibly secondary to repeated episodes of aspiration versus a fungal infection.”

¶ 8 On April 20, 2012, Lunday saw Jason Kjono, PA-C, at Big Sky Pulmonary and Critical Care Associates in Great Falls, for cough with frequent pneumonias.² Kjono's differential diagnoses included aspiration, asthma, postnasal drip, and hypersensitivity

¹ Because this case is before this Court on Liberty's summary judgment motion, this Court has interpreted all facts and drawn all inferences in Lunday's favor.

² Neither party submitted this medical record for review. However, in his Report of Independent Medical Evaluation, which was attached as Ex. 9 to Respondent's Brief in Support of Motion for Summary Judgment, David J. Hewitt, MD, MPH, summarized this record.

pneumonitis, commonly known as “farmer’s lung,” a lung disease caused by an allergic response after inhalation of a variety of organic dusts, including grain dusts and mold.³

¶ 9 Lunday returned to Kjono on May 14, 2012.⁴ Kjono noted that Lunday’s pneumonia symptoms started after he cleaned out an old grain bin. Kjono’s assessment included eosinophilic pneumonitis, most likely hypersensitivity, which Kjono linked to Lunday’s exposure to grain dust. Kjono took Lunday off work.

¶ 10 On June 12, 2012, Liberty denied liability for Lunday’s lung claim. It explained: “At this time, we have not received any healthcare information related to the treatment you received clearly demonstrating a direct relationship to your diagnosed conditions to your work exposure.”

¶ 11 On June 25, 2012, Lunday returned to Kjono for “evaluation of chronic hypersensitivity pneumonitis.” Kjono noted Lunday “did see an allergist in Billings, Montana, who did agree with the diagnosis [of] chronic hypersensitivity pneumonitis.” Kjono noted that Lunday’s “original exposure was November 2011,” and opined, “I do think this was an occupational exposure and will need to be turned over to Workmen’s Compensation for final evaluation and, hopefully, referral to Dr. Hewitt of Occupational Health for Workmen’s Compensation information.”

¶ 12 On July 17, 2012, Lunday underwent an Independent Medical Examination (IME) with David J. Hewitt, MD, MPH. Dr. Hewitt noted a history of aspiration pneumonia and assessed Lunday as having suffered from eosinophilic pneumonia. Dr. Hewitt did not attribute Lunday’s eosinophilic pneumonia to his exposure to grain dust, but could not identify a cause.

¶ 13 On April 3, 2013, Lunday saw Richard Blevins, MD, a pulmonologist. Dr. Blevins noted a “complicated history of gr[ain] dust exposure in August and November 2011 with some airway symptoms following that. He was hospitalized in Helena in March of 2011 with bilateral infiltrates and was thought to have aspirated.” Dr. Blevins also noted: “He was thought to have a hypersensitivity pneumonitis” Dr. Blevin diagnosed, *inter alia*, “[p]neumonitis due to other solids and liquids.” Dr. Blevins stated, “I don’t know what the relationship of his grain dust exposure to current symptomology is. I know he has seen an occupational medicine doctor and I have not had a chance to review those records. I really am wondering if many of . . . his symptoms have not been airway in origin complicated by his pneumonia which may have been aspiration in March of 2011.”

¶ 14 Lunday returned to Dr. Blevins on April 16, 2013. Dr. Blevins noted: “He still has legitimate questions about the cause of this and its relationship to his previous gr[ain] dust exposure. I told him I still could not answer that and that . . . lung biopsy when he was

³ *Polk v. Planet Ins. Co.*, 287 Mont. 79, 82, 951 P.2d 1015, 1017 (1997).

⁴ Here again, this Court relies on Dr. Hewitt’s report of this medical record.

symptomatic and had infiltrates and off the steroids might be helpful. Fortunately he is improved again on the steroids and I do not think lung biopsy would be very beneficial at this time. I'm going to do a little bit more research including looking at his occupational medicine evaluation."

¶ 15 Lunday saw pulmonologist Christian H. Butcher, MD, on December 12, 2013. Dr. Butcher, stated: "This is a very complex case. His lung problems appear to be caused by chronic aspiration"

¶ 16 On January 6, 2014, Lunday saw Randy J. Kjorstad, MD, on referral from Dr. Butcher for possible surgery. Dr. Kjorstad noted: "Initially he was thought to have eosinophilic pneumonitis related to environmental exposure. He ultimately underwent a lung biopsy which confirmed the diagnosis of chronic aspiration pneumonitis."

¶ 17 On May 8, 2017, Dr. Hewitt conducted a medical records review to determine whether Lunday's treatment since the 2012 IME caused him to change his opinion. After summarizing numerous medical records from 2005 to 2015, Dr. Hewitt opined that Lunday's grain exposure did not cause a respiratory condition; rather, Dr. Hewitt opined that Lunday contracted eosinophilic pneumonia and stated he could not determine a cause. Dr. Hewitt explained the reasons for his opinions, including that his research did not show a cause and effect relationship between grain dust exposure and eosinophilic pneumonia and that there were "temporal inconsistencies" between Lunday's exposure and the onset of symptoms.

¶ 18 On August 17, 2017, Lunday's attorney sent a letter to Kjono stating, in relevant part: "He relates to me that he has pulmonary issues that date back to his exposure to grain dust, which he related to you in consultation dated April 20, 2012. Please express your opinion whether it is more likely than not that the condition which you treated him for at that time was related to that exposure." The letter then had lines in which Kjono could check either "yes" or "no." Kjono checked the "yes" box, but did not offer any additional explanation.

Lunday's Hernia Claim

¶ 19 Lunday alleges that on January 30, 2012, he "injured his abdomen when he suffered a hernia arising out of his employment when he was lifting bags of grain."

¶ 20 On February 3, 2012, Lunday saw William Batey, MD, who diagnosed bilateral inguinal hernias. Dr. Batey noted, "No apparent injury. Working in a bagging plant and is lifting most days." Dr. Batey referred Lunday to William J. Harper, MD, for surgery.

¶ 21 On February 29, 2012, Lunday saw Dr. Harper, who confirmed bilateral inguinal hernias, left greater than right. Dr. Harper noted that Lunday reported that the hernias had developed "over the last few years." Dr. Harper recommended surgery to repair the hernias.

¶ 22 Dr. Harper surgically repaired Lunday's hernias on March 14, 2012, and released Lunday to full activities on April 9, 2012.

¶ 23 On February 5, 2013, Liberty denied liability for Lunday's hernia claim. Liberty explained: "We have reviewed the medical records, and there is no medical indication in the records that your hernias were caused by your work with Columbia Grain."

LAW AND ANALYSIS

¶ 24 This case is governed by the 2011 Workers' Compensation Act, as that was the law in effect at the time of Lunday's alleged industrial accidents.⁵

¶ 25 This Court grants summary judgment when the moving party demonstrates an absence of a genuine issue of material fact and entitlement to judgment as a matter of law.⁶ The moving party can meet its burden by showing that, after adequate time for investigation and discovery, the nonmoving party does not have sufficient evidence to prove an essential element of the nonmoving party's case.⁷ After the moving party meets its initial burden to show the absence of a genuine issue of fact and entitlement to judgment, the burden shifts to the party opposing summary judgment either to show a triable issue of fact or to show why the undisputed facts do not entitle the moving party to judgment.⁸

Lunday's Lung Claim

¶ 26 Citing *Ford v. Sentry Casualty Co.* — in which the Montana Supreme Court held that claimants are required to establish injury and causation by objective medical findings and medical expertise or opinion⁹ — Liberty argues that Lunday does not have sufficient evidence to prove that his lung condition was caused by his exposure to grain dust.

¶ 27 In response, Lunday points to Kjono's records. Lunday maintains that Kjono has opined that Lunday's "grain dust exposure was the cause of his pulmonary distress." Citing the general rule that a treating physician's opinion, though not conclusive, is usually entitled to greater evidentiary weight than the opinions of other expert witnesses,¹⁰ Lunday argues that while Kjono is a PA, he works in a pulmonology clinic, and is a treating

⁵ *Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶ 32, 365 Mont. 405, 282 P.3d 687 (citation omitted); § 1-2-201, MCA.

⁶ ARM 24.5.329(2).

⁷ *Blacktail Mountain Ranch, Co. v. State, Dep't of Natural Res. & Conservation*, 2009 MT 345, ¶ 7, 353 Mont. 149, 220 P.3d 388 (citation omitted).

⁸ *Amour v. Collection Prof'ls, Inc.*, 2015 MT 150, ¶ 7, 379 Mont. 344, 350 P.3d 71 (citation omitted).

⁹ 2012 MT 156, ¶¶ 48-49, 365 Mont. 405, 282 P.3d 687.

¹⁰ See, e.g., *Ford*, ¶ 27 (citation omitted).

physician whose opinion is entitled to greater weight than Dr. Hewitt's opinions. Thus, Lunday argues there are material issues of fact that preclude summary judgment.

¶ 28 Lunday has met his burden of establishing that there are material issues of fact as to what type of pneumonia he had, and its cause. Kjono's records and response to Lunday's counsel's letter show that Kjono thinks Lunday's exposure to grain dust on November 11, 2011, caused hypersensitivity pneumonitis. While at least some of the physicians who have seen Lunday have disagreed with Kjono's diagnosis, and the cause of Lunday's lung problems, the difference of medical opinion creates an issue of fact that must be resolved at trial.¹¹

¶ 29 Liberty argues that Kjono's opinions should be given less weight than those of the physicians because the physicians have superior credentials, and that Kjono's opinions are therefore insufficient to create an issue of fact. Liberty's argument is reasoned, but the Montana Supreme Court has explained: "It is inappropriate for a court deciding a motion for summary judgment to weigh evidence, to choose one disputed fact over another, or to assess the credibility of the witnesses."¹² Thus, while this Court will compare Kjono's credentials with the physician's credentials at trial, this Court cannot do so at this stage.¹³

¶ 30 Liberty also cites *Gary v. Montana State Fund*,¹⁴ and argues that Kjono's opinion is insufficient to create an issue of fact because he did not explain the "mechanism of causation." In *Gary*, this Court weighed the treating physician's opinion that an injury in 2005 caused a herniated disk in 2010, against causation opinions of the State Fund's records reviewer and its IME physician, who both explained the basis for their opinions.¹⁵ Because the treating physician did not explain the basis for his opinion, this Court reasoned: "A conclusory statement from a treating physician that there is a cause and effect relationship between an industrial accident and a condition occurring some five years later, without explaining the mechanism for that causation, is insufficient for this Court to conclude the two are related."¹⁶ Thus, this Court gave greater weight to the State Fund's records reviewer and its IME physician and ruled that Gary did not meet his burden of proof.¹⁷

¹¹ See, e.g., *Teeter v. Mid-Century Ins. Co.*, 2017 MT 292, ¶¶ 22, 23, 2017 WL 5714019 (holding that differences in medical opinion evidence on causation created material issues of fact that precluded summary judgment); see also *Floyd v. Zurich Am. Ins. Co. of Illinois*, 2017 MTWCC 4, ¶ 61 (quoting *Doubek v. CNA Ins. Co.*, 2004 MTWCC 76, ¶ 59) ("conflicting medical opinions ordinarily raise issues of fact . . .").

¹² *Tidyman's Mgmt. Servs. Inc. v. Davis*, 2014 MT 205, ¶ 71, 376 Mont. 80, 330 P.3d 1139 (citations omitted).

¹³ See, e.g., *Floyd*, ¶ 47 (citations omitted) (explaining that one of the factors this Court uses when weighing medical opinion evidence is the relative credentials of the physicians).

¹⁴ 2012 MTWCC 38.

¹⁵ *Gary*, ¶¶ 23, 24, 29, 30, 34-36.

¹⁶ *Gary*, ¶ 37.

¹⁷ *Id.*

¶ 31 *Gary* is distinguishable because this Court decided it after the parties submitted the case to this Court for a decision on a stipulated record, a stage at which this Court could weigh conflicting evidence and find facts. In contrast, Lunday's case is at the summary judgment stage, and this Court cannot weigh conflicting evidence and find facts; rather, this Court is to make all reasonable inferences in Lunday's favor, as he is the party opposing summary judgment. A reasonable inference that can be drawn from Kjono's records and response to Lunday's attorney's letter is that the "mechanism of causation" was Lunday's inhalation of grain dust.

¶ 32 Because there are issues of material fact, Liberty is not entitled to summary judgment on Lunday's lung claim.

Lunday's Hernia Claim

¶ 33 Again relying on *Ford*, Liberty argues it is entitled to summary judgment on Lunday's hernia claim because Lunday does not have any medical expertise or opinion evidence that his work on January 30, 2012, caused his hernias.

¶ 34 In response, Lunday did not produce a medical causation opinion, or even point to any medical record in which this Court could reasonably infer that it was the physician's opinion that Lunday's work on January 30, 2012, caused his hernias. Instead, Lunday argued that Liberty's summary judgment motion was "premature." In Petitioner's Memorandum in Opposition to Motion for Summary Judgment, which he filed on September 8, 2017, Lunday explained: "We are still awaiting some word from Dr. Harper concerning the hernia issue. The undersigned represents to the Court that we have been informed by Dr. Harper's office that opinion will be forthcoming." Notwithstanding, as of the date of this Order, Lunday has not submitted any evidence of Dr. Harper's opinion.

¶ 35 Despite Lunday's argument, Liberty's summary judgment motion is not "premature." Lunday filed his hernia claim more than 5 years ago. Lunday filed this litigation more than 3 years ago. Lunday has not filed a causation opinion from Dr. Harper despite his assurance 3 months ago that one would be "forthcoming." Lunday also asserted in his brief that he intends to take depositions for "medical evidence," but he has not scheduled any depositions. Liberty is correct that there has been ample time for investigation and discovery.

¶ 36 Notwithstanding, on this record, this Court concludes that Liberty did not meet its burden of establishing there are no issues of material fact as to the cause of Lunday's hernias. In Dr. Batey's record dated February 3, 2012, Dr. Batey diagnoses Lunday with hernias and, in the next sentence, states that Lunday lifts at work. Although Lunday

inexplicably failed to cite this record in his brief,¹⁸ this Court draws the inference from this record, that Dr. Batey thought Lunday's work was a cause of his hernias.¹⁹

¶ 37 Accordingly, Liberty is not entitled to summary judgment on Lunday's hernia claim.

ORDER

¶ 38 Liberty's Motion for Summary Judgment is **denied**.

DATED this 6th day of December, 2017.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: Charles G. Adams
Leo S. Ward/Morgan M. Weber

Submitted: September 20, 2017

¹⁸ ARM 24.5.329(3) ("Any party opposing a motion filed under this rule shall include in the party's opposition a brief statement of genuine issues setting forth the specific facts which the opposing party asserts establish a genuine issue of material fact precluding summary judgment in favor of the moving party. . . . As to each fact, the statement must refer to a specific pleading, affidavit, or other document where the fact may be found.").

¹⁹ See *Kirk v. Montana Contractors Comp. Fund*, 2016 MTWCC 9, ¶ 33 (ruling that a reasonable inference to be drawn, from the fact that physician's diagnosis of lumbar sprain/strain followed physician's note that the claimant had been doing concrete work, was that physician believed the concrete work caused the injury).