

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2008 MTWCC 30

WCC No. 2007-1987

JERRY NARUM

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Appealed to the Montana Supreme Court July 1, 2008

Affirmed April 14, 2009

Summary: In March 2004, Petitioner and Respondent settled Petitioner's claim for a hip condition with Respondent accepting liability and leaving medical benefits reserved. In December 2006, Respondent ceased paying for Petitioner's medical treatment for his hip, and further refused to pay for hip replacement surgery, stating that it did not believe Petitioner's need for a hip replacement was caused by his industrial accident.

Held: Respondent cannot accept liability for a hip condition and settle a claim with medical benefits reserved and then later simply change its mind and refuse to pay benefits. Petitioner is entitled to payment of his medical benefits for treatment of his left hip, and is further entitled to his costs, attorney fees, and a penalty for Respondent's unreasonable refusal to pay benefits which were agreed to as part of the settlement of Petitioner's claim.

Topics:

Settlements: Generally. Where, after reviewing the medical evidence and doctors' opinions, Respondent accepted liability for Petitioner's left hip condition and settled the claim with medical benefits left open, Respondent cannot later refuse to pay for medical treatment of Petitioner's left hip condition.

Settlements: Medical Benefits. Where, after reviewing the medical evidence and doctors' opinions, Respondent accepted liability for Petitioner's left hip condition and settled the claim with medical benefits left open, and where the settlement agreement stated that the parties acknowledge Petitioner may require a hip replacement in the future, Respondent cannot refuse to pay for the hip replacement surgery, arguing that it is not causally related to Petitioner's industrial accident.

Claims: Acceptance. Where, after reviewing the medical evidence and doctors' opinions, Respondent accepted liability for Petitioner's left hip condition and settled the claim with medical benefits left open, and where the settlement agreement stated that the parties acknowledge Petitioner may require a hip replacement in the future, Respondent cannot refuse to pay for the hip replacement surgery, arguing that it is not causally related to Petitioner's industrial accident.

Contracts: General. The full and final settlement entered into by the parties is a contract and governed by contract law. Where the settlement agreement provides for medical benefits to be left open and acknowledges the parties' awareness that a hip replacement may become necessary, Respondent is liable for further medical benefits related to Petitioner's left hip.

Settlements: Contracts. The full and final settlement entered into by the parties is a contract and governed by contract law. Where the settlement agreement provides for medical benefits to be left open and acknowledges the parties' awareness that a hip replacement may become necessary, Respondent is liable for further medical benefits related to Petitioner's left hip.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-611. In a case which was settled with medical benefits left open, Respondent stopped paying for ongoing medical treatment without notifying Petitioner, denied authorization for hip replacement surgery even though the possibility of this surgery was specifically identified in the settlement agreement, and provided no persuasive explanation that could justify stopping payment of Petitioner's medical treatment. The Court concludes Respondent's actions are unreasonable and Petitioner is entitled to reasonable attorney fees.

Attorney Fees: Cases Awarded. In a case which was settled with medical benefits left open, Respondent stopped paying for ongoing medical treatment without notifying Petitioner, denied authorization for hip replacement surgery

even though the possibility of this surgery was specifically identified in the settlement agreement, and provided no persuasive explanation that could justify stopping payment of Petitioner's medical treatment. The Court concludes Respondent's actions are unreasonable and Petitioner is entitled to reasonable attorney fees.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-2907. In a case which was settled with medical benefits left open, Respondent stopped paying for ongoing medical treatment without notifying Petitioner, denied authorization for hip replacement surgery even though the possibility of this surgery was specifically identified in the settlement agreement, and provided no persuasive explanation that could justify stopping payment of Petitioner's medical treatment. The Court concludes Respondent's actions are unreasonable and Petitioner is entitled to a penalty award.

Penalties: Insurers. In a case which was settled with medical benefits left open, Respondent stopped paying for ongoing medical treatment without notifying Petitioner, denied authorization for hip replacement surgery even though the possibility of this surgery was specifically identified in the settlement agreement, and provided no persuasive explanation that could justify stopping payment of Petitioner's medical treatment. The Court concludes Respondent's actions are unreasonable and Petitioner is entitled to reasonable attorney fees.

¶ 1 The trial in this matter was held on April 17, 2008, in Billings, Montana. Petitioner Jerry Narum was present and was represented by Patrick R. Sheehy. Respondent was represented by Larry W. Jones.

¶ 2 Exhibits: Exhibits 1 through 11 were admitted without objection.

¶ 3 Witnesses and Depositions: The depositions of Petitioner and Dr. Michael C. Willis were taken and submitted to the Court, and can be considered part of the record. Petitioner was sworn and testified at trial.

¶ 4 Stipulations: The parties stipulated that Respondent did not pay Petitioner's medical benefits under a reservation of rights. After the Court questioned counsel for both parties regarding the drafting of the settlement agreement at issue in this case, the parties stipulated that the discussion on the record of the settlement agreement is sufficient and that amended pleadings are not necessary.

¶ 5 Issues Presented: The Pretrial Order states the following contested issues:

¶ 5a Whether Respondent is liable for further medical and hospital benefits related to treatment of Petitioner's left hip.

¶ 5b Whether Petitioner is entitled to an award of reasonable attorneys' fees and costs from the Respondent.

¶ 5c Whether Petitioner is entitled to the 20% penalty from the Respondent.

¶ 5d For such additional relief as the Court may deem appropriate.¹

FINDINGS OF FACT

¶ 6 Petitioner testified at trial. I find Petitioner to be a credible witness.

¶ 7 Petitioner worked in the beer and wine business for 37 years. For the last 17 years of his career, he drove a small semi-truck and delivered beer to businesses. As part of his job, he assisted with loading delivery trucks at the start of his shift, and then he would drive his route and deliver beer by unloading the product onto a cart and pulling the cart to each destination, often over curbs and up and down stairwells. Petitioner testified that the work was fairly heavy, with a great deal of lifting and pulling.²

¶ 8 In March 2003, Petitioner was making a delivery and as he stepped out of the cab of his semi-truck, he either slipped or missed the last step and fell onto the pavement, landing on his left side. Petitioner had a slight pain in his left side, but he did not pay much attention to it. He finished his route and continued to perform his job. When the pain did not subside in the ensuing weeks, he filed a workers' compensation claim.³ Petitioner claimed injury to his left hip.⁴

¶ 9 Petitioner filed the First Report of Occupational Injury or Occupational Disease (FROI) on April 4, 2003.⁵ On the form, he indicated that the injury occurred on March 6, 2003, and described the accident:

¹ Pretrial Order at 3.

² Trial Test.

³ Trial Test.

⁴ Pretrial Order at 2, Statement of Uncontested Facts.

⁵ Ex. 1.

While getting out of the semi-truck I slipped on the bottom step and fell to the ground. A sharp pain developed in my upper left leg in the hip joint area. I continued to work with this pain and feel that it was aggravated by my climbing in and out of the truck and pressing the clutch with my left leg many times.⁶

¶ 10 Prior to the industrial accident, Petitioner had never had any treatment for either hip. He first experienced symptoms after the fall.⁷ Respondent accepted liability for the claim and paid benefits through December 3, 2003.⁸

¶ 11 After filing the FROI, Petitioner sought medical treatment with PA-C Rebecca Rinehart, who referred him to Dr. Michael C. Willis on April 9, 2003.⁹ Dr. Willis is Petitioner's treating physician for his hip condition.¹⁰

¶ 12 Dr. Willis is board-certified by the American Board of Orthopedic Surgeons and also has a subspecialty in sports medicine.¹¹ Dr. Willis first saw Petitioner on April 9, 2003.¹² At the time, Dr. Willis was not aware that Petitioner had fallen at work in March 2003.¹³ Dr. Willis stated that while he usually would have reviewed Rinehart's notes prior to seeing Petitioner, in this case Rinehart's notes were probably not yet transcribed since the appointment was only days after the referral.¹⁴

¶ 13 Based on the April 2003 x-rays of Petitioner's hip, Dr. Willis opined that Petitioner had degenerative joint disease in his left hip which predated his March 2003 industrial accident.¹⁵ At Dr. Willis' deposition, he testified:

⁶ *Id.*

⁷ Petitioner Dep. 17:3-9.

⁸ Pretrial Order at 2, Statement of Uncontested Facts.

⁹ Ex. 2 at 15-16.

¹⁰ Petitioner Dep. 6:21-25.

¹¹ Willis Dep. 3:24 - 4:5.

¹² Willis Dep. 4:20-25.

¹³ Willis Dep. 11:20 - 12:3.

¹⁴ Willis Dep. 12:18-23.

¹⁵ Willis Dep. 13:4 - 14:4.

Q So if [Petitioner] fell and lit on his left hip on March 6th of 2003, and from that point forward he had left hip pain, wouldn't it be fair to state that it's more probable than not that the injury on March 6th of '03 was the cause or the aggravant to his degenerative joint disease that caused the pain?

A If he had had continued pain related to that fall, then it would be my opinion that that injury exacerbated his pain. He certainly had interims of very little, if no pain.¹⁶

¶ 14 Petitioner continued to work for his employer until June 2003, when the business was sold and Petitioner was not rehired by the new owner. He has not worked since that time.¹⁷ Petitioner considered himself to be retired when his relationship with the beer delivery business ended.¹⁸

¶ 15 Dr. Scott K. Ross saw Petitioner for an occupational medical consultation regarding his ongoing hip pain on July 18, 2003, with a report issued on July 23, 2003. Dr. Ross reviewed Petitioner's medical records from Rinehart and Dr. Willis, took a history from Petitioner, and conducted his own physical examination. Dr. Ross reported that on the day of the consultation, Petitioner stated that his hip pain had improved about 20% since the accident, but that he continued to have sharp pain in his left hip with radiation into his left thigh and knee, with occasional groin pain. Petitioner reported that the pain is not constant and he is sometimes pain-free, although he uses daily pain medication. Dr. Ross found no objective findings from his physical examination of Petitioner, but noted that Petitioner had subjective complaints of pain with radiographic evidence of significant degenerative osteoarthritis. Dr. Ross opined that Petitioner was not at MMI on that date.¹⁹

¶ 16 Dr. Ross re-evaluated Petitioner on September 9, 2003. He noted that Petitioner continued to experience left hip pain while sitting, and that Petitioner had developed a limp. Dr. Ross further noted that Petitioner reported an almost-constant pain in his left hip, and that Petitioner experienced mild relief with over-the-counter topical pain patches and from some exercises which had been prescribed by a physical therapist. He found Petitioner to be at MMI on this date, and determined Petitioner to have an 8% whole person impairment rating. Dr. Ross stated, "While his left hip arthritis has obviously been present for some time, [Petitioner] was totally asymptomatic before the 03/06/2003 work injury, and

¹⁶ Willis Dep. 14:19 - 15:3.

¹⁷ Trial Test.

¹⁸ Petitioner Dep. 8:16-25.

¹⁹ Ex. 2 at 17-23.

he has not recovered to his pre injury status. He continues to note constant left hip pain and he ambulates with a mildly antalgic gait.”²⁰

¶ 17 Dr. Ross set forth a “plan” for Petitioner, including:

4. Follow-up with Dr. Willis, as needed. [Petitioner] may require follow-up in the future, for consideration of more aggressive therapy (possible Synvisc injections, corticosteroid injections, or total hip replacement).

. . .²¹

¶ 18 Dr. Ross’ history contrasts noticeably with that of Dr. Willis’. Dr. Willis was unaware of Petitioner’s industrial accident, and based his opinion that it did not exacerbate Petitioner’s degenerative hip condition on his understanding that Petitioner experienced periods of little to no pain subsequent to the industrial accident. Dr. Ross’ history, however, reflects that Petitioner had ongoing and continuous pain which worsened over time and was relieved only through the use of medication.

¶ 19 Petitioner testified that since the day of his industrial accident, he has had constant pain, but it has waxed and waned depending on his activity level. He also received several cortisone shots which almost completely alleviated his pain for three or four months after each shot. However, the shots eventually ceased working.²² Petitioner described his hip pain as a “steady, slow-moving increase” from the day of the industrial accident forward, and asserted that the pain has never entirely gone away since the accident.²³ Petitioner may have experienced low-pain or pain-free periods subsequent to his industrial accident, but these periods were due to pain management of one type or another. I find that Dr. Willis misapprehended Petitioner’s alleged “interims of very little, if no pain.”²⁴ I find that the evidence demonstrates Petitioner had ongoing pain from the time of his industrial accident.

¶ 20 Dr. Michael H. Schabacker performed an independent medical examination (IME) of Petitioner on October 17, 2003. Dr. Schabacker issued a report in which he summarized Petitioner’s medical records, recorded notes of his own examination of Petitioner, gave his diagnostic impressions, and answered specific questions which had been posed to him

²⁰ Ex. 2 at 24-26.

²¹ Ex. 2 at 26.

²² Trial Test.

²³ Petitioner Dep. 13:9-21.

²⁴ Willis Dep. 15:3.

prior to the IME by Respondent's representative.²⁵ In reviewing Petitioner's records, Dr. Schabacker noted that Petitioner's hip was asymptomatic prior to his March 2003 industrial accident. He further noted that Dr. Willis' notes indicated that Dr. Willis believed that Petitioner could be a candidate for a hip replacement at some point. However, Dr. Willis further noted that Petitioner "may have to give up some of his physical activity" if he underwent the surgery.²⁶

¶ 21 Dr. Schabacker also summarized Petitioner's May 23, 2003, appointment with Dr. Willis:

As of the time of that visit, Dr. Willis documents that [Petitioner] was complaining of mild left hip pain. At least part of the reduction in symptomatology was suggested to be possibly related to [Petitioner] not driving a delivery truck any longer. . . . [I]t was felt that [Petitioner] had left hip osteoarthritis that was exacerbated by work-related injury. It was felt that further consideration of total hip arthroplasty was not appropriate.²⁷

¶ 22 Dr. Schabacker further reviewed Petitioner's appointments with Dr. Ross.²⁸ Dr. Schabacker noted, "Dr. Ross acknowledges that the hip arthritis has been present for some time and indicates that it was not symptomatic prior to the fall."²⁹

¶ 23 On the day of his IME, Petitioner reported to Dr. Schabacker that he had ongoing left hip pain which varied from no pain to moderate pain in relation to his activity level.³⁰ Dr. Schabacker's impression was that Petitioner had persistent left hip pain following a fall at work on March 6, 2003, with left hip degenerative joint disease.³¹

¶ 24 In response to specific questions posed by Respondent, Dr. Schabacker opined that Petitioner suffered from persistent left hip pain with an etiology related to degenerative changes of the hip joint. Dr. Schabacker concurred with Dr. Willis' opinions regarding Petitioner's candidacy for hip replacement surgery. He noted that since Petitioner was

²⁵ Ex. 2 at 3-10.

²⁶ Ex. 2 at 3-4.

²⁷ Ex. 2 at 4.

²⁸ *Id.*

²⁹ Ex. 2 at 5.

³⁰ *Id.*

³¹ Ex. 2 at 7.

relatively young and “quite physically active,” he would advise Petitioner to delay hip replacement as long as possible since a prosthetic hip has a limited life expectancy and that Petitioner’s normal activity level would further shorten the life expectancy of the prosthetic hip. Dr. Schabacker characterized Petitioner’s hip pain as relatively mild and not warranting the risk of surgery.³²

¶ 25 Dr. Schabacker further opined:

The presumed etiology of [Ppetitioner’s] pain is degenerative joint disease. It is of note that hip films, taken some 29 days after [Ppetitioner’s] reported industrial injury, show evidence of degenerative joint disease. With a high degree of medical certainty, it can be concluded that the degenerative joint disease . . . preceded the industrial injury. . . . On a more probable than not basis, the fall on 03/06/03 led to left hip pain because of the clearly pre-existing problem. . . . It is unlikely, had [Ppetitioner] not had degenerative joint disease in the left hip, that he would have had a prolonged recovery from the 03/06/03 industrial injury.

. . .

It cannot be concluded that the fall on 03/06/03 led to the development of degenerative arthritis of the left hip.³³

¶ 26 Dr. Schabacker also opined that although Dr. Ross concluded that Petitioner was entitled to an 8% whole person impairment award, in Dr. Schabacker’s opinion only 25% of Petitioner’s condition could be attributed to his industrial accident and therefore he should only have received a 2% impairment rating.³⁴

¶ 27 On November 18, 2003, Dr. Willis wrote a letter in which he explained that he had been treating Petitioner for his left hip osteoarthritis. Dr. Willis opined, “His symptoms were exacerbated by a work injury he sustained on 3/06/03.” Dr. Willis further stated,

“I believe that his injury has been disconnected from Workers Compensation Claim, as it was more than likely a pre-existing condition, exacerbated by work. [Ppetitioner] has significant hip pain, which has since the time of this

³² Ex. 2 at 8.

³³ Ex. 2 at 8-9.

³⁴ Ex. 2 at 9.

injury, limited his ability to return to work, and he really feels that he is unable to return to the form of work which he was doing prior to this exacerbation.”

Dr. Willis opined that Petitioner’s degenerative hip condition made it unlikely that he could return to his time-of-injury type of employment.³⁵

¶ 28 Respondent continued to pay Petitioner medical benefits until December 2003, when Gail Martin, a claims adjuster for Respondent, informed Petitioner that it would no longer pay for his medical expenses. In a letter to Petitioner, Martin stated:

Dr. Willis and Dr. Schabacker have indicated you would not be a candidate for a total hip replacement due to your limited symptoms, young age and your active lifestyle. In addition they indicate a presumed etiology of your pain is degenerative joint disease which preceded your injury of 03/06/03. Therefore, it can not be concluded that the fall led to the development of the degenerative arthritis of your left hip.

Previously Dr. Scott Ross placed you at Maximum Medical Improvement (MMI) and rendered an 8% impairment. . . .

. . .

Because you have reached MMI and have been returned to a pre-injury status [Respondent] will be unable to accept liability for future treatment. . .

³⁶

¶ 29 After Petitioner received this letter, he sought legal counsel who worked to get the claim settled. Petitioner testified that at the time they negotiated the settlement, his primary concern was ensuring that his medical benefits remained open, because he knew he would eventually need a hip replacement. Since Petitioner knew he would need surgery at some point in the future, he was more concerned with keeping his medical benefits open than in a financial settlement of his claim, and he insisted that leaving his medical benefits open would be a condition of the settlement.³⁷

¶ 30 In early 2004, Petitioner, through his counsel and Respondent through its counsel, began to negotiate a possible settlement of Petitioner’s claim. On February 23, 2004,

³⁵ Ex. 2 at 30.

³⁶ Ex. 4.

³⁷ Trial Test.

Petitioner's counsel sent a letter to Respondent's counsel memorializing recent conversations between them. Petitioner's counsel stated that the parties had agreed to \$25,000 new money with specific offset language and "reservation of medical benefits."³⁸ Petitioner's counsel had stated in previous negotiation letters, such as one written February 20, 2004, that reservation of medical benefits was a requirement for settling the claim.³⁹

¶ 31 Respondent's counsel prepared the settlement documents, which were approved by an Order of the Department of Labor and Industry Employment Relations Division on March 11, 2004.⁴⁰ The agreement was drafted using the standard Petition for Settlement form provided by the Department of Labor and Industry. It stated in pertinent part:

The claimant and the insurer petition the Department of Labor & Industry for approval of this settlement allowing the claim to be fully and finally closed. **Further medical and hospital benefits are reserved by the claimant, excepting those conditions stated specifically in the Special Provisions below.*** The **claimant understands** that by entering into a settlement, both the insurer and the claimant agree to assume the risk that the condition of the claimant, as indicated by reasonable investigation to date, may be other than it appears or may change in the future. Specifically, the parties acknowledge that the claimant may require a total hip replacement in the future. . . .⁴¹

¶ 32 On May 11, 2004, Dr. Willis saw Petitioner and in his progress report stated:

It has been some time now since I last saw [Petitioner] in the clinic in evaluation of his pain, which was work related and exacerbated by work. . . . He has not been back to work as a driver as I felt that his symptoms of hip degeneration were exacerbated by this position and I felt that he could not return to this position. . . .
. . .

³⁸ Ex. 7 at 1.

³⁹ Ex. 6 at 1-2.

⁴⁰ Ex. 8 at 2.

⁴¹ Ex. 8 at 3. Emphasis in original. The "Special Provisions" excepted in the agreement concern the offset of Petitioner's Social Security disability benefits and are not pertinent to the issues at hand.

I continue to feel that [Petitioner] will not be able to return to his previous occupation as a driver as this had significantly exacerbated his symptoms.

. . .⁴²

¶ 33 Respondent paid medical benefits related to Petitioner's left hip after the settlement, but after receiving additional information from Petitioner's treating physician in January 2006, Respondent refused to make further payment of medical benefits related to Petitioner's left hip.⁴³ On January 12, 2006, Chris Helmer sent a letter to Dr. Willis in which he asked him questions about the causation of Petitioner's hip condition.⁴⁴ Dr. Willis circled "TRUE" after the statement, "Mr. Narum's present condition is related to his preinjury degenerative hip joint disease and not his work injury of 03-06-2003." Dr. Willis circled "FALSE" after the statement, "Mr. Narum's present condition is related to his ongoing physical activities and is not related to his work injury of 03-06-2003." Dr. Willis then wrote, "His condition is related to DJD of his hip. His 'activities' are not causative."⁴⁵

¶ 34 At his deposition, Dr. Willis clarified his response to Helmer's inquiry. Dr. Willis explained that he read the second question to be an either/or proposition: that Petitioner's condition was either due to his work or to his other activities. Dr. Willis' opinion is that Petitioner's degenerative joint disease was caused by neither, and therefore he responded "FALSE" and wrote in an explanation of his answer.⁴⁶

¶ 35 In January 2007, Petitioner realized that he was going to need hip replacement surgery in the near future. During that time period, he also received cortisone shots for his hip pain which Respondent refused to pay for. Petitioner testified that Respondent did not inform him that it would no longer pay for his cortisone shots; his medical provider called him and informed him that Respondent had refused to pay the submitted bills.⁴⁷

⁴² Ex. 10 at 69-70.

⁴³ Pretrial Order at 2, Statement of Uncontested Facts.

⁴⁴ Ex. 2 at 32-33. In the letter, Helmer also stated that Respondent had accepted Petitioner's claim under a reservation of rights. At trial, both parties stipulated that Respondent had accepted the claim and that Helmer incorrectly stated that the claim was paid under a reservation of rights.

⁴⁵ Ex. 2 at 32-33.

⁴⁶ Willis Dep. 21:3-22.

⁴⁷ Trial Test.

¶ 36 Petitioner had hip replacement surgery on September 7, 2007.⁴⁸ Respondent denied liability for Petitioner's hip replacement surgery and related treatment based on Dr. Willis' response to a letter sent by Respondent's Senior Case Manager Chris Helmer on January 12, 2006.⁴⁹ Petitioner experienced some surgical complications which required an additional surgery, but he testified that his condition has improved from his pre-surgical condition.⁵⁰

CONCLUSIONS OF LAW

¶ 37 This case is governed by the 2001 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Petitioner's industrial accident.⁵¹

¶ 38 Petitioner bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.⁵²

¶ 39 The basic facts of this case are not in dispute. The controversy lies in whether, as Petitioner argues, Respondent is liable for his medical benefits because Respondent accepted the claim and settled it with medical benefits left open, or whether, as Respondent argues, Petitioner's current medical needs are not a result of the industrial accident for which Respondent accepted liability.

¶ 40 Respondent does not argue that Petitioner sustained a new injury which superceded the injury for which Respondent was liable. Rather, Respondent argues that Petitioner's need for surgery stems from the progression of the degenerative joint disease which preexisted his industrial accident. The difficulty with Respondent's position is that it accepted liability and settled the claim with medical benefits left open. Therefore, the underlying causation is no longer at issue in this case. As the findings above demonstrate, the doctors who examined Petitioner had all offered their opinions as to whether Petitioner would someday need hip replacement surgery and to what extent they found his hip condition to be caused by his industrial accident *prior to* Respondent's decision to settle this claim on an accepted liability basis.

⁴⁸ Ex. 10 at 16.

⁴⁹ Pretrial Order at 2, Statement of Uncontested Facts.

⁵⁰ Trial Test.

⁵¹ *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

⁵² *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).

¶ 41 The progression of Petitioner's hip condition which ultimately led to surgery is no surprise. The earliest medical reports from Drs. Willis, Schabacker, and Ross reference the possibility of a future hip replacement which would be delayed as long as possible due to Petitioner's relatively mild symptoms, active lifestyle, and the life expectancy of the replacement prosthesis. Petitioner testified that because he knew that he faced the possibility of hip replacement surgery in the future, he insisted on leaving his medical benefits open as part of the settlement agreement. For that matter, the settlement agreement itself states in part, "Specifically, the parties acknowledge that the claimant may require a total hip replacement in the future."⁵³

¶ 42 In entering the settlement agreement with Petitioner, Respondent acknowledged that it knew at the time that it settled the claim that at some point in the future, Petitioner might require a total hip replacement. Respondent cannot accept liability for a claim, settle the claim, and then un-accept the claim at a later date because it has changed its mind about whether it should have accepted liability in the first place.

¶ 43 The full and final settlement entered into by the parties is a contract, thus contract law governs the agreement.⁵⁴ Under § 28-3-303, MCA, when a written contract exists, the intention of the parties is to be ascertained by the writing alone, if possible. In the present case, the written contract provides for medical benefits to remain open, and acknowledges the parties' awareness that a hip replacement might become necessary. Therefore, as agreed to in the settlement agreement, Respondent is liable for further medical and hospital benefits related to treatment of Petitioner's left hip.

¶ 44 As the prevailing party, Petitioner is entitled to his costs.⁵⁵ As to the issue of attorney fees, pursuant to § 39-71-611, MCA, an insurer shall pay reasonable attorney fees if the insurer denies liability for a claim for compensation, the claim is later judged compensable by this Court, and this Court determines the insurer's actions in denying liability were unreasonable. In the present case, Respondent stopped paying for Petitioner's ongoing medical treatment for which Respondent had accepted liability and had paid for years. Petitioner testified that Respondent never informed him that it was denying payment for the cortisone injections for which it had been paying; he learned of Respondent's refusal when his medical provider contacted him. Regarding Petitioner's hip replacement surgery, Respondent denied payment for that procedure even though medical

⁵³ Ex. 8 at 3.

⁵⁴ *Morrisette v. Zurich American Ins. Co.*, 2000 MTWCC 2, ¶ 61, citing *Kienas v. Peterson*, 191 Mont. 325, 329, 624 P.2d 1, 3 (1980).

⁵⁵ *Marcott v. Louisiana Pac. Corp.*, 1994 MTWCC 109 (*aff'd after remand at 1996 MTWCC 33*).

benefits were reserved and the possibility of hip replacement surgery was **specifically** identified in the settlement agreement. Respondent has provided this Court with no persuasive explanation as to how it could justify stopping payment for the ongoing treatment of Petitioner's hip condition for which it had accepted liability. I have already concluded that Petitioner's claim is compensable. I further conclude that Respondent's actions in denying liability for an accepted liability are unreasonable and therefore Petitioner is entitled to reasonable attorney fees.

¶ 45 Pursuant to § 39-71-2907, MCA, I may increase by 20% the full amount of benefits due a claimant during the period of delay or refusal to pay if the insurer's delay or refusal to pay is unreasonable. In light of the fact that Respondent entered into an accepted-liability settlement agreement which reserved Petitioner's medical benefits, I conclude that Respondent's refusal to pay for Petitioner's medical benefits was unreasonable. Therefore, Petitioner is entitled to a 20% increase in the full amount of benefits due.

JUDGMENT

¶ 46 Respondent is liable for further medical and hospital benefits related to treatment of Petitioner's left hip.

¶ 47 Petitioner is entitled to an award of reasonable attorney's fees and costs from Respondent.

¶ 48 Petitioner is entitled to a 20% penalty from Respondent.

¶ 49 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 in Helena, Montana, this 4th day of June, 2008.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Patrick R. Sheehy
Larry W. Jones
Submitted: April 25, 2008