

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2022 MTWCC 3

WCC No. 2020-5195

MICHAEL RAY

Petitioner

vs.

OHIO SECURITY INSURANCE CO.

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Summary: Petitioner alleges that his industrial accident caused a left shoulder injury and a permanent aggravation to his preexisting cervical spine condition.

Held: Respondent is not liable for Petitioner's left shoulder injury nor his cervical spine condition because Petitioner failed to meet his burden of proving that his industrial accident caused his left shoulder injury nor that his industrial accident caused an aggravation to his cervical spine condition. Because neither Petitioner nor his wife was a credible witness, this Court was not convinced that Petitioner's symptoms started with his industrial accident. In turn, because the physicians on whom Petitioner relied for his medical causation opinions based their opinions on Petitioner's history, this Court did not give their opinions any weight. Moreover, the physician on whom Petitioner relied for his medical causation opinion regarding his cervical spine condition opined that the industrial accident did not aggravate his preexisting cervical spine condition.

¶ 1 The trial in this matter was held on March 15, 2021, in Missoula, Montana. Petitioner Michael Ray (Mike) was present and was represented by J. Kim Schulke. Respondent Ohio Security Insurance Co. (Ohio Security) was represented by Joe C. Maynard and Adrianna Potts.

¶ 2 **Exhibits:** This Court admitted Exhibits 1 through 27, 30, 32 through 35, and 37 through 41 without objection.

¶ 3 Witnesses and Depositions: This Court admitted the depositions of Mike Ray, Cindy Ray, Jeff J. Priebe, DC, Connor W. Quinn, MD, and Jessie Wheeler, DC, into evidence. Mike and his wife Cindy Ray (Cindy) were sworn and testified at trial.

¶ 4 Issues Presented: The Pretrial Order sets forth the following issues:

Issue One: Whether Respondent is liable for Michael Ray's left shoulder condition and workers' compensation benefits related thereto.

Issue Two: Whether Respondent is liable for Michael Ray's cervical spine condition and workers' compensation benefits related thereto.

FINDINGS OF FACT

¶ 5 This Court finds the following facts by a preponderance of the evidence.¹

¶ 6 On the morning of January 22, 2019, while driving his employer's pick-up truck to a work site, Mike hit black ice, lost control, and crashed into a concrete median.

¶ 7 Mike told the responding EMTs that he had neck and chest pain. The EMT Patient Care Report states, "No other pains were expressed on our head to toe examination"

¶ 8 At the Emergency Room, Ronald Black, MD, noted that Mike complained of chest pain. Dr. Black also noted that Mike had normal movement in his extremities. Dr. Black did not identify any "significant injury" and diagnosed Mike with multiple contusions along the seatbelt line.

¶ 9 Mike missed a few days of work, and then returned to light-duty work for two or three weeks. He then returned to full-duty work.

¶ 10 On February 21, 2019, Mike saw Jesse Wheeler, DC. Mike told Dr. Wheeler that, since his motor vehicle accident, he had been suffering from waxing and waning pain and stiffness in his low back. Mike told Dr. Wheeler that lifting aggravated his low back pain. Mike also told Dr. Wheeler that he had paresthesia in his left hand, but no radiating pain. Dr. Wheeler conducted a "full examination" and diagnosed Mike with "dysfunction" of his cervical, thoracic, and lumbar spine. Dr. Wheeler treated Mike with chiropractic adjustments.

¶ 11 On February 28, 2019, Mike returned to Dr. Wheeler, reporting moderate pain in his low back, mid back, and between his shoulders, which "increases when he is forced to lift." Mike again reported paresthesia in his left hand. Dr. Wheeler again treated Mike with chiropractic adjustments.

¹ 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).

¶ 12 On March 13, 2019, Mike's employer prepared a First Report of Injury or Illness (First Report). The First Report states that Mike suffered a low-back strain in the accident.

¶ 13 On April 5, 2019, Bradley Fredericks, the adjuster handling Mike's claim, called Mike. Mike told Fredericks that, since the accident, he had low back pain and stiffness. Mike told Fredericks that, at that time, he was "feeling okay" but was considering another chiropractic adjustment. Fredericks planned on calling Mike the following month and in his claims note, wrote, "If additional chiropractic treatment, I will inform him that if he intends on receiving further care, we will need to get him an appointment with an [orthopedic physician] for evaluation and plan."

¶ 14 In May 2019, Mike quit his job because he and Cindy decided to move to Kentucky. In the first part of June 2019, Mike drove a three-quarter ton pickup from western Montana to Kentucky, pulling a fifth wheel trailer with their belongings.

¶ 15 On June 14, 2019, Fredericks called Mike to see if Mike had undergone another chiropractic adjustment. Mike told Fredericks that he had not needed another chiropractic adjustment and that he was "doing fine." Thus, Fredericks told Mike that he was going to "close" Mike's claim. After their conversation, Fredericks sent a letter to Mike stating, in relevant part:

Thanks for taking a minute to speak with me on the phone on June 14, 2019. As we discussed, since you're feeling good and haven't needed any additional chiropractic adjustments since February 28, 2019, your claim is being closed.

¶ 16 In the middle of June 2019, the Rays stayed at a KOA campground in Kentucky for five days. On one of these evenings, Mike slipped and fell while quickly walking down a ramp that led to their cabin's front door.

¶ 17 In July 2019, the Rays returned to Montana.

¶ 18 In August 2019, the Rays moved to Idaho.

¶ 19 On August 7, 2019, Mike started a job driving a semitruck. He hauled wood chips from a log mill in Hayden, Idaho to a paper mill in Lewiston, Idaho. Due to the jarring Mike experienced in the cab, he developed severe neck pain, with pain radiating down his left arm, and severe left shoulder pain. He quit this job after two weeks.

¶ 20 On August 21, 2019, Mike saw Ryan C. Hansen, DC, MS. In Dr. Hansen's intake paperwork, Mike wrote that his chief complaint was, "Pain in Back and Arm." Cindy filled out most of Dr. Hansen's intake paperwork. In response to a question asking when symptoms began, Cindy wrote, "1 month ago." After a question asking whether the patient "had this problem before," Cindy checked the "no" box. Cindy also wrote, "Had

an accident 3 months ago. Left shoulder has never been the same, then fell on a step 1 month ago and has had problems since.”

¶ 21 During the history portion of Dr. Hansen’s examination, Mike told Dr. Hansen that he had been in a motor vehicle accident “3 months ago,” in which he crashed into a median. Mike told Dr. Hansen that he had bruising on his chest and that he felt “pretty good” in the months after the motor vehicle accident. Mike also told Dr. Hansen that he had fallen on his back one month earlier, after which he was sore. Mike told Dr. Hansen that he had a substantial increase in his pain while driving the semitruck over the previous two weeks. Mike described his neck and arm pain to Dr. Hansen as “go[ing] together.” Dr. Hansen ordered x-rays of Mike’s cervical and thoracic spine, and his left scapula, the reports of which contained a history section, stating: “PT FELL 2 MOS AGO/LT SIDED RADICULOPATHY AND UPPER BACK PAIN.”

¶ 22 On August 26, 2019, Mike saw Jeff J. Priebe, DC. Cindy filled out most of Dr. Priebe’s “Workers Comp Injury Patient Information” form. Although Cindy wrote in the top margin that, “Accident occurred end of April 2019,” she wrote in two places on the form that Mike’s “present injury occurred” on July 29, 2019, and that Mike’s injury occurred in the “PM.” In response to a question asking where the pain was immediately after the accident, Cindy wrote, “Shoulder/Chest/Neck.” In the “subjective” section of his report, Dr. Priebe wrote:

Dealing with left upper t spine and rib discomfort. Radiates into the left wrist. The cx pops a lot but, not resolving the issues. Going on for the last 2 weeks. Cx flexion helps. Left shoulder has been elevated since the accident in May. Over the past couple weeks the sxs have been very intense since he began driving again.

On his examination, Dr. Priebe noted that Mike had limited range of motion in his left shoulder, due to pain.

¶ 23 After Mike’s appointment with Dr. Priebe, Cindy called Ohio Security to get the date of his motor vehicle accident. She then called Dr. Priebe’s office and told Dr. Priebe’s staff that when Dr. Priebe wrote, “Left shoulder has been elevated since the accident in May,” in the record of Mike’s visit from August 26, 2019, Dr. Priebe had written down the “wrong date.” Dr. Priebe then revised his record to state, “Left shoulder has been elevated since the accident in January. (Date adjusted as per request of patient.)”

¶ 24 On August 28, 2019, Mike returned to Dr. Priebe, who recommended that Mike see his primary care physician for his shoulder pain.

¶ 25 On August 29, 2019, Mike saw Robert Smith, MD, his primary care physician. Mike told Dr. Smith that he was in a motor vehicle accident in January 2019, after which he had pain in his neck, left shoulder and scapula, and chest. Mike did not tell Dr. Smith about his fall. Mike told Dr. Smith that while hauling wood chips, his shoulder pain

significantly increased and that he started suffering from pain radiating into his left elbow and hand. Dr. Smith noted, “He is here to have symptoms evaluated as he feels his left upper extremity and left shoulder symptoms stem from his Workmen’s Compensation related injuries from January of this year.” However, Dr. Smith told Mike that it was “impossible” for him to “fully evaluate his injuries or verify that these are all more likely than not attributable to the motor vehicle accident that occurred in January.” Dr. Smith referred Mike to an orthopedic evaluation.

¶ 26 On September 11, 2019, Mike saw Connor W. Quinn, MD, an orthopedist, for his neck, left shoulder, and arm pain. Mike told Dr. Quinn that his left shoulder pain had started in January 2019, after his motor vehicle accident, but that his shoulder pain slowly improved thereafter. Cindy told Dr. Quinn “that [Mike’s] main injury complaint was his left shoulder [which] remained higher than his right.” They did not tell Dr. Quinn about Mike’s fall; in fact, Mike denied that he had fallen at all “in the last year.” Mike told Dr. Quinn that his symptoms worsened in August 2019, when he drove the semitruck.

¶ 27 Dr. Quinn ordered an MRI of Mike’s left shoulder, which showed, *inter alia*, a large, full thickness rotator cuff tear.

¶ 28 On November 6, 2019, Dr. Quinn surgically repaired Mike’s rotator cuff and a partial bicep tendon tear. Dr. Quinn explained that the surgery was relatively difficult because it was a large tear, involving three of the four rotator cuff tendons, and because Mike’s rotator cuff had “pulled away” from its normal location.

¶ 29 On February 3, 2020, Mike’s attorney wrote a letter to Dr. Hansen, stating that the history in the x-ray reports from his office was inaccurate. Mike’s attorney wrote that Mike had told her that he had not fallen in the two months before he saw Dr. Hansen in August 2019 and that Mike had told her that “the only incident he discussed with you was the motor vehicle accident of 1/22/2019.” Mike’s attorney asked Dr. Hansen to “advise whether the fall to which you refer is an error in the record and whether Mr. Ray discussed a motor vehicle accident in January 2019 with you.”

¶ 30 On February 4, 2020, Dr. Hansen replied, “Thoracic x-ray report had error, should read 1 mo. ago. Pt. expressed to me fell 1 mo. prior. Wrote on attached form he fell 1 mo. ago.”

¶ 31 On December 1, 2020, Mike saw neurosurgeon Michael Raber, MD, complaining of tingling in his left arm and hand, which he stated started with his January 2019 accident. Upon reviewing Mike’s September 23, 2019, cervical MRI, Dr. Raber noted that Mike had “broad based bulging disks at several levels,” that “may be responsible for some of the tingling and numbness.” Dr. Raber explained that “this [was] mostly an age related injury, but may have been aggravated by the MVA.” He recommended a “multilevel anterior cervical discectomy and fusion, likely C3 to C7.”

¶ 32 Ohio Security has denied liability for Mike's left shoulder injury and for his cervical spine condition.

Credibility Findings

¶ 33 This Court did not find Mike or Cindy to be credible witnesses for several reasons, including the following two.

¶ 34 First, this Court cannot reconcile their testimonies regarding Mike's left shoulder symptoms and limitations after his motor vehicle accident with the other evidence. Mike testified that, after his motor vehicle accident, he had severe shoulder pain and weakness and, consequently, that he could not raise his left arm over his head, lift objects with his left arm, nor lay on his left side. Likewise, Cindy testified that after the motor vehicle accident, Mike could not lift his left arm high enough to hug her. Cindy also testified that, after the motor vehicle accident, Mike constantly held his left shoulder higher than his right and presented a photograph of Mike in which his left shoulder is noticeably higher than his right. She averred that she took this photograph on February 24, 2019, to document the severity of his shoulder injury. Cindy also testified that in May 2019, she had to load their fifth wheel with their belongings for their move to Kentucky because Mike could not lift anything with his left arm.

¶ 35 However, due to the absence of credible evidence corroborating their testimony, this Court is convinced that Mike did not have such symptoms or limitations in the months following his motor vehicle accident. This Court is convinced that if Mike was suffering from such severe left shoulder symptoms in February 2019, he would have reported these symptoms to Dr. Wheeler at his appointments on February 21 and 28, 2019. This Court is also convinced that if Mike was holding his left shoulder noticeably higher than his right in the last week of February 2019, then Dr. Wheeler would have documented that symptom. This Court is also convinced that if Mike was suffering such symptoms and limitations in the months before they moved to Kentucky, he would have sought treatment. Finally, this Court is convinced that if Mike was having such symptoms and limitations in the five months following his motor vehicle accident, then he would have reported it to Ohio Security, particularly during Mike's and Fredericks' telephone conversation on June 14, 2019, when Fredericks told Mike that he was going to "close" Mike's claim.

¶ 36 Second, this Court cannot reconcile their testimonies regarding Mike's fall at the KOA in Kentucky with the other evidence. Mike testified that he just "fell on [his] butt" and suffered no injury. Mike also testified that he did not tell Dr. Smith about his fall because "we knew [that my left shoulder injury] was from the accident, not just a slip and fall." Cindy testified that Mike's fall did not aggravate his symptoms.

¶ 37 However, the other evidence reveals that Mike and Cindy did not tell the whole story about Mike's fall. On Dr. Hansen's intake form, Cindy wrote that the onset of Mike's shoulder symptoms occurred at the same time as his fall, that he had not had "this problem" before, that the fall was a "cause" of his pain, and that he had "had problems

since.” On Dr. Priebe’s intake form, Cindy wrote that the date on which Mike’s “present injury occurred” was July 29, 2019, and that it occurred in the “PM.” In discovery, Mike attested that his fall at the KOA occurred on July 29, 2019, in the evening. At her deposition, Cindy testified that July 29, 2019, was when Mike’s “pain . . . really started.” Their argument that, notwithstanding all this, Mike’s shoulder problems had nothing to do with his fall but were caused solely by the motor vehicle accident is unconvincing. The obvious takeaway from this evidence is that Mike injured his left shoulder when he fell.

¶ 38 Moreover, the Rays’ attempts to explain away this evidence was unconvincing. During Mike’s deposition, Cindy realized that the takeaway from this evidence was that Mike fell on July 29, 2019, and was injured. Thus, in the break between Mike’s deposition and hers, she called the KOA and, based on their arrival and departure dates, testified that she had determined that Mike’s fall actually occurred on June 13, 2019. Thus, at trial, Mike and Cindy asserted that they were just mistaken as to the date of his fall and that the fact that Cindy told Dr. Priebe that Mike’s “present injury occurred” on July 29, 2019, and the fact that Mike attested in discovery that he fell on July 29, 2019, should not be deemed evidence that Mike hurt his shoulder when he fell. However, regardless of the actual date on which Mike fell, the fact remains that when he saw Dr. Hansen and Dr. Priebe, he and Cindy attributed Mike’s left shoulder symptoms to his fall. Thus, their argument that he did not injure his shoulder during his fall was unconvincing.

Medical Causation Opinions

Dr. Quinn

¶ 39 The only causation opinion Mike offered as to his shoulder injury was that of Dr. Quinn, who opined that Mike’s torn rotator cuff and partially torn biceps tendon more likely than not occurred in the motor vehicle accident of January 22, 2019. However, this Court does not give any weight to Dr. Quinn’s opinion because it was based on the history Mike and Cindy provided to him, which was incomplete, at best, because they did not tell him that Mike had fallen. Indeed, when presented with the evidence regarding Mike’s fall at his deposition, Dr. Quinn questioned the causal link between Mike’s rotator cuff tear and his January 2019 motor vehicle accident and testified that if Mike’s symptoms started when he fell, then it would be his opinion that the fall caused Mike’s shoulder injury.

Dr. Raber

¶ 40 The only causation opinion Mike offered as to his cervical condition was that of Dr. Raber. However, Dr. Raber did not support Mike’s position that his industrial accident caused a cervical spine injury. On January 21, 2021, Mike’s attorney wrote to Dr. Raber to ask whether Mike’s preexisting cervical spine condition was aggravated by his January 2019 accident and whether the accident caused or accelerated Mike’s need for fusion surgery. Dr. Raber answered “No,” to both questions and for each, explained that “Symptoms may be exacerbated but not [the] actual degeneration.” However, irrespective of its content, this Court does not give Dr. Raber’s opinion any weight

because it too was based on the history Mike provided him, which was incomplete, at best, because Mike did not tell Dr. Raber about his fall, and misleading, at best, because Mike told Dr. Raber that he had had radiating pain since the motor vehicle accident even though he had told Dr. Wheeler that he did not have radiating pain.

Dispositive Findings

¶ 41 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.

¶ 42 Mike did not suffer a torn rotator cuff nor a torn biceps tendon, or otherwise injure his shoulder, in his industrial accident.

¶ 43 Mike did not suffer an injury to his cervical spine nor aggravate his preexisting cervical spine condition in his industrial accident.

CONCLUSIONS OF LAW

¶ 44 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 Mike's industrial accident.²

¶ 45 Section 39-71-119, MCA, states, in relevant part:

Injury and accident defined. (1) "Injury" or "injured" means:

(a) internal or external physical harm to the body that is established by objective medical findings;

...

(2) An injury is caused by an accident. An accident is:

(a) an unexpected traumatic incident or unusual strain;

(b) identifiable by time and place of occurrence;

(c) identifiable by member or part of the body affected; and

(d) caused by a specific event on a single day or during a single work shift.

¶ 46 Section 39-71-407, MCA, states, in relevant part:

(3)(a) An insurer is liable for an injury, as defined in 39-71-119, only if the injury is established by objective medical findings and if the claimant establishes that it is more probable than not that:

(i) a claimed injury has occurred; or

(ii) a claimed injury has occurred and aggravated a preexisting condition.

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

(b) Proof that it was medically possible that a claimed injury occurred or that the claimed injury aggravated a preexisting condition is not sufficient to establish liability.

....
(10) An employee is not eligible for benefits payable under this chapter unless the entitlement to benefits is established by objective medical findings that contain sufficient factual and historical information concerning the relationship of the worker's condition to the original injury.

¶ 47 In *Ford v. Sentry Casualty Co.*, the Montana Supreme Court ruled that, under these statutes, 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.³

Issue One: Whether Respondent is liable for Michael Ray's left shoulder condition and workers' compensation benefits related thereto.

¶ 48 Based on the above findings of fact, Mike did not meet his burden of proving that his industrial accident caused his torn rotator cuff and partially torn biceps tendon. Thus, under § 39-71-407(3)(a)(i), MCA, Ohio Security is not liable for this injury.

Issue Two: Whether Respondent is liable for Michael Ray's cervical spine condition and workers' compensation benefits related thereto.

¶ 49 Based on the above findings of fact, Mike did not meet his burden of proving that his industrial accident caused a new cervical spine injury or aggravated his preexisting cervical spine condition. Thus, under § 39-71-407(3)(a)(ii), MCA, Ohio Security is not liable for Mike's cervical spine condition.

JUDGMENT

¶ 50 Ohio Security is not liable for Mike's left shoulder injury.

¶ 51 Ohio Security is not liable for Mike's cervical spine condition.

¶ 52 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.

³ *Ford*, ¶¶ 44-49.

DATED this 31st day of January, 2022.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: J. Kim Schulke
Joe C. Maynard and Adrianna Potts

Submitted: March 15, 2021