

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2009 MTWCC 35

WCC No. 2008-2092

KURT VANDERVALK

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Appealed to Montana Supreme Court 2/11/10

Joint Motion for Dismissal and REMAND to WCC for further proceedings

Summary: Petitioner argued that one of his settled workers' compensation claims should be reopened and that he should receive wage-loss and vocational rehabilitation benefits. He further argued that his use of Vioxx for his carpal tunnel syndrome caused him to suffer cardiovascular problems and that Respondent should be liable for his cardiovascular condition. Petitioner further argued that Respondent should reimburse him for travel expenses and for out-of-pocket expenses he has incurred in filling prescriptions. Respondent responded that it is only liable for medical expenses incurred in the treatment of Petitioner's carpal tunnel syndrome for which it accepted liability. Respondent further responded that the evidence demonstrates that Vioxx did not cause Petitioner's cardiovascular condition and further contends that it has paid for all of Petitioner's prescriptions relating to his carpal tunnel syndrome symptoms. Respondent alleges that Petitioner is not entitled to reopen his settlement, and that Petitioner is not statutorily entitled to rehabilitation benefits or reimbursement of the specific travel expenses he has incurred.

Held: Petitioner has not presented evidence upon which the Court can order his settlement reopened. He is therefore not entitled to additional indemnity or rehabilitation benefits. Petitioner has not proven that his cardiovascular condition was accelerated by his use of Vioxx. Petitioner is not entitled to reimbursement of the travel expenses he seeks as these expenses are not compensable under § 39-71-704, MCA. As for his out-of-pocket

prescription expenses, Petitioner has proven that he is entitled to reimbursement of \$142.99 for an OxyContin prescription from September 2006.

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 28-2-1711. An urgent need to pay debts does not constitute “duress.” While Petitioner may have been suffering from financial hardship at the time he settled his claim, he suffered no duress as defined under § 28-2-1711, MCA, and therefore he is not entitled to reopen his settlement.

Settlements: Reopening: Duress and Undue Influence. An urgent need to pay debts does not constitute “duress.” While Petitioner may have been suffering from financial hardship at the time he settled his claim, he suffered no duress as defined under § 28-2-1711, MCA, and therefore he is not entitled to reopen his settlement.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-704. Section 39-71-701(1)(d)(i), MCA, provides only for reimbursement of expenses incurred in traveling to a medical provider for treatment of an injury. A claimant’s trips to and from a pharmacy to fill prescriptions are not reimbursable travel expenses under § 39-71-701(1)(d)(i), MCA.

Benefits: Travel Expenses. Section 39-71-701(1)(d)(i), MCA, provides only for reimbursement of expenses incurred in traveling to a medical provider for treatment of an injury. A claimant’s trips to and from a pharmacy to fill prescriptions are not reimbursable travel expenses under § 39-71-701(1)(d)(i), MCA.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-704. Section 39-71-701(1)(d)(ii)(A), MCA, excludes from reimbursement the first 100 miles of qualified automobile travel for each calendar month. Since Petitioner’s pertinent travel consists of a round trip of 26 miles approximately every 90 days, he is not entitled for reimbursement of this travel expense.

Benefits: Travel Expenses. Section 39-71-701(1)(d)(ii)(A), MCA, excludes from reimbursement the first 100 miles of qualified automobile travel for each calendar month. Since Petitioner’s pertinent travel consists of a round trip of 26 miles approximately every 90 days, he is not entitled for reimbursement of this travel expense.

¶ 1 The trial in this matter was held on August 6, 2009, at the Workers' Compensation Court in Helena, Montana. Petitioner Kurt Vandervalk (Vandervalk) was present and represented himself. Respondent Montana State Fund (MSF) was represented by Greg E. Overturf.

¶ 2 Exhibits: Exhibits 1 through 33, 35, 36, and 38 through 86 were admitted without objection. Exhibit 34, Dr. John C. Schumpert's independent medical examination report, was admitted over Vandervalk's objection that Dr. Schumpert was not qualified to render this medical opinion. MSF objected to Exhibit 37 on the grounds that it contained a compact disk which had not been exchanged with MSF, but withdrew its objections when Vandervalk confirmed that the compact disk was not submitted to the Court as part of that exhibit.

¶ 3 Depositions: Vandervalk objected to the admission of Dr. Schumpert's deposition, arguing that he had been unable to attend the deposition and cross-examine Dr. Schumpert, and that Dr. Schumpert was not qualified to render a medical opinion on Vandervalk's condition. I questioned Vandervalk and determined MSF had notified him of the deposition. Vandervalk did not attend because he could not afford to travel to Missoula where the deposition occurred. Vandervalk admitted that MSF offered to arrange for him to participate by telephone, but Vandervalk did not think it was "practical" to do so since he has a cellular phone with poor local reception. I overruled Vandervalk's objection as I concluded that MSF had met the notice requirements and had attempted to accommodate Vandervalk's inability to travel. I further noted that Vandervalk's objections as to Dr. Schumpert's qualifications go to the weight and not the admissibility of the deposition. I therefore admitted Dr. Schumpert's deposition over Vandervalk's objections.

¶ 4 Witnesses: At the start of trial, I quashed two witness subpoenas which Vandervalk had served improperly – one to Dr. James J. Maher at the Helena Physicians Clinic, which Vandervalk personally served, and one to Mary Dalton at the Department of Health and Human Services, which Vandervalk sent by U.S. mail. Vandervalk, Jacqui Garcia, John Doubek, Larry Thomas, and Nanette Preszler were sworn and testified at trial.

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

¶ 5a Should Petitioner's settlements be reopened?

¶ 5b Is the Petitioner entitled to additional indemnity (wage loss) benefits?

¶ 5c Was Petitioner's cardiovascular condition accelerated by the use of Vioxx?

- ¶ 5d Is Petitioner entitled to reimbursement for out of pocket expenses for prescriptions?
- ¶ 5e Is Petitioner entitled to payment for travel expenses related to medical treatment?
- ¶ 5f Is Petitioner entitled to rehabilitation benefits?¹

FINDINGS OF FACT

¶ 6 On May 27, 1985, Vandervalk suffered an injury to his low back and right shoulder arising out of his employment. MSF insured Vandervalk's employer at the time of his industrial injury. Vandervalk and MSF settled his claim in a petition approved by the Department of Labor and Industry on July 11, 1987.² Vandervalk settled his entitlement to all benefits except future medical and hospital benefits.³ Attorney Richard E. Bach represented Vandervalk at that time. After the settlement, Vandervalk returned to work in the same type of employment as his time-of-injury employment.⁴

¶ 7 On September 1, 1989, Vandervalk learned that he suffered from an occupational disease – carpal tunnel syndrome caused by using vibratory hand tools and repetitive motion – arising out of his employment with Swank Construction. MSF insured Swank Construction at the time Vandervalk developed his occupational disease. MSF and Vandervalk settled this occupational disease claim via a petition approved by the Department of Labor and Industry on June 27, 2001.⁵ Vandervalk settled his entitlement to all benefits except future medical and hospital benefits on his 1989 claim.⁶

¶ 8 At trial, Vandervalk testified that he has had difficulty getting MSF to approve medical treatments. Vandervalk testified that he has also had ongoing difficulties getting his prescriptions filled. He asserted that he has been unable to fill numerous prescriptions because of MSF's denials. He stated that MSF paid for several medications for his cardiovascular condition from 2004 until 2006, but that MSF began denying liability for

¹ Pretrial Order at 2-3.

² Pretrial Order, Uncontested Facts, at 2.

³ Ex. 3 at 1.

⁴ Trial Test.

⁵ Pretrial Order, Uncontested Facts, at 2.

⁶ Ex. 3 at 4.

these prescriptions in 2006. Vandervalk argued that MSF is liable for these medications because he believes he needs them as a result of taking Vioxx, which was in turn given to him because of his carpal tunnel syndrome.⁷ Vandervalk asserted that currently, MSF has not reimbursed him \$142.99 for an OxyContin prescription he filled in 2006.⁸

¶ 9 Vandervalk testified that he does not want to reopen the settlement for his 1985 back injury, but he reserved medical benefits and wants MSF to pay medical benefits relating to that claim. Vandervalk further testified that he believes he should receive wage-loss benefits because he is unable to return to his previous employment. I questioned Vandervalk as to specific incidents in which MSF denied payment for medical treatment relating to his back condition, and Vandervalk admitted that he did not ask MSF to authorize those medical treatments. Vandervalk stated that he did not even submit these treatments to MSF for payment because he assumed MSF would deny them.⁹ On cross-examination, Vandervalk acknowledged that he does not have an opinion from any doctor stating that his current back complaints are related to his 1985 industrial injury, although he believes Dr. P.A. Baggenstos' notes support this contention.¹⁰

¶ 10 Vandervalk further testified that he was treated with Vioxx which caused him additional health problems. Vandervalk does not know specifically when he took Vioxx or for how long, and few records exist because his doctor gave him samples and not a prescription. Vandervalk testified that while he was taking Vioxx, he lost consciousness twice, and on one of those occasions this caused a motor vehicle accident. Vandervalk admitted that his treating physician had previously told him to discontinue using Vioxx, but until the automobile accident, Vandervalk did not heed his advice because Vioxx gave him relief from his carpal tunnel syndrome symptoms. Vandervalk further acknowledged that no doctor has opined that his cardiovascular problems were caused by his use of Vioxx.¹¹ On cross-examination, Vandervalk also acknowledged that the police report for the motor vehicle accident at issue¹² states that he was intoxicated and that alcohol use led to the accident. However, Vandervalk disagrees that the accident was caused by intoxication, but rather believes he lost consciousness from Vioxx.¹³ Vandervalk acknowledged that he

⁷ Trial Test.

⁸ Trial Test.

⁹ Trial Test.

¹⁰ Trial Test.

¹¹ Trial Test.

¹² See Ex. 40.

¹³ Trial Test.

also smokes cigarettes and has done so since approximately 1972 or 1974. He stated that he currently smokes one-half to one pack of cigarettes daily.¹⁴ Vandervalk denied the accuracy of medical records which indicated that his doctor had concerns that his blackouts and elevated blood pressure were caused by alcohol use and smoking.¹⁵

¶ 11 Vandervalk contends that he is entitled to travel reimbursement from MSF because he has to travel into town every thirty days to fill his OxyContin prescription, and on occasion the prescription has not been ready to be picked up and he has to make more than one trip. Vandervalk explained that traveling from his residence into Helena is approximately thirteen miles. Vandervalk also visits his treating physician every three months and he believes MSF should pay for his travel to and from his doctor's office.¹⁶

¶ 12 Vandervalk further argued that he believes he should be entitled to vocational rehabilitation services. However, he further stated that he is not interested in obtaining a GED or pursuing other educational training. He stated that he thought he might like to learn "networking." Vandervalk testified that due to cardiovascular problems he has difficulties with memory and he believes his opportunities for retraining are limited.¹⁷ From the records submitted to the Court, it appears that Vandervalk underwent vocational rehabilitation counseling sometime after his 1985 industrial injury but prior to April 30, 1987.¹⁸

¶ 13 John Doubek (Doubek), a Helena attorney who practices law with the firm of Doubek and Pyfer, testified at trial. Doubek testified that he has been handling workers' compensation cases since 1978. I found Doubek to be a credible witness. Doubek began representing Vandervalk for a workers' compensation claim in October 1999. That matter was ultimately settled on June 27, 2001. Doubek testified that at the time he began representing Vandervalk, Vandervalk was not receiving workers' compensation benefits. After Doubek got involved with the case, Vandervalk received treatment for carpal tunnel syndrome, including surgery.¹⁹

¹⁴ Trial Test.

¹⁵ Trial Test.

¹⁶ Trial Test.

¹⁷ Trial Test.

¹⁸ Ex. 6 at 7-8.

¹⁹ Trial Test.

¶ 14 Doubek represented Vandervalk at the time of the second settlement. Vandervalk contends that Doubek was not present at the time he signed the settlement agreement and that Doubek did not explain the legal issues to him. Vandervalk does not recall discussing the settlement agreement with Doubek, but he admits he understood that he was settling his claim. Vandervalk testified that he needed money at the time he signed the second settlement agreement, and that he did not realize he would have difficulty reopening the settlement later. Vandervalk stated that he believes he signed the settlement agreement under duress because his truck had been repossessed and he was in danger of losing his home.²⁰

¶ 15 Doubek testified that Vandervalk fired and rehired him a few times between October 1999 and June 2001.²¹ Doubek testified that Vandervalk was very eager to have his claim resolved as quickly as possible. Among the other terms of the settlement agreement, vocational rehabilitation benefits were closed. Doubek testified that, prior to signing the agreement, he explained the terms of the agreement to Vandervalk.²² Vandervalk ultimately did not rehire Doubek after firing him in June 2001.

¶ 16 Doubek further testified that he does not recall discussing the process for reopening the settlement during the same time period as the settlement negotiations, and he doubts he would have discussed reopening a settlement just recently reached. At a later date, Vandervalk contacted Doubek and wanted to hire him to pursue reopening the settlement and they discussed the process for reopening a settlement at that time.²³

¶ 17 Nanette Preszler (Preszler), current team leader and former claims examiner for MSF, testified at trial. I found Preszler to be a credible witness. Preszler was the adjuster on Vandervalk's carpal tunnel syndrome claims file from approximately February 2000 until July or August 2003. Shortly after Preszler took over the claims file, she received a call from Vandervalk requesting temporary total disability (TTD) benefits. At the time, the parties had not settled Vandervalk's second claim. She informed Vandervalk that she could not speak to him since he was represented by counsel, and she then contacted Doubek. Preszler informed Doubek of the contact, requested a medical release, and asked that Vandervalk participate in a recorded statement. Preszler received some medical records,

²⁰ Trial Test.

²¹ Trial Test.

²² Trial Test.

²³ Trial Test.

which she sent to MSF's peer review doctor for his evaluation. The peer review doctor opined that Vandervalk's treatment appeared to be related to his carpal tunnel syndrome.²⁴

¶ 18 Preszler believed Vandervalk was entitled to TTD benefits based on the peer review doctor's opinion. Preszler informed Vandervalk's treating physician that MSF had authorized further treatment. She then requested wage information and further approved an EMG and referral to an orthopedist. Although she had some difficulty in obtaining Vandervalk's wage information, Preszler eventually was able to calculate a TTD rate and MSF began paying wage-loss benefits. Preszler testified that at that point, MSF paid TTD benefits prospectively, but not retroactively. She knew that Vandervalk believed he was entitled to TTD benefits as far back as late 1994 or early 1995, but Preszler did not have a medical opinion for that time period which stated that Vandervalk was off work because of his industrial injury. She contacted several doctors who had treated Vandervalk during that time period in an effort to acquire that information. She was unable to get a satisfactory response from any of Vandervalk's medical providers. At that point, Preszler ordered an independent medical examination (IME). The IME report stated that Vandervalk was at maximum medical improvement (MMI); that he was not entitled to an impairment award; and that he was off work for personal and not work-related reasons. Preszler offered to settle the claim with Vandervalk for one-half of what he would have been entitled to had a doctor opined that he was off work due to his industrial injury.²⁵

¶ 19 In August 2000, Vandervalk had surgery for his right carpal tunnel and ulnar nerves, and in December 2000, he had surgery for the left carpal tunnel. MSF accepted liability and paid for the surgeries. Preszler and Doubek negotiated a settlement of the claim. Preszler remained the adjuster on the file for approximately two more years, but currently has no involvement with the claim.²⁶

¶ 20 Jacqui Garcia (Garcia), MSF's current claims adjuster on Vandervalk's claim, testified at trial. I found her to be a credible witness. Garcia has worked as a claims adjuster for ten and a half years. Garcia testified that she became the claims adjuster on Vandervalk's claim in 2005, and at the time she took over the claim file, MSF was not paying for any prescriptions on an ongoing basis.²⁷

²⁴ Trial Test.

²⁵ Trial Test.

²⁶ Trial Test.

²⁷ Trial Test.

¶ 21 After Garcia began adjusting Vandervalk's claim, Vandervalk called her to ask what conditions MSF was liable for. In particular, he wanted to know if MSF would cover treatment of his neck. Garcia looked at the claims files and could not find any indication that MSF was liable for Vandervalk's neck pain. Vandervalk informed Garcia that he believed multiple conditions were related to his industrial injuries and further indicated that other medical records existed which MSF had not received. To investigate Vandervalk's contentions, Garcia asked Vandervalk to sign an authorization for release of information. Vandervalk did not return the authorization and Garcia sent the form to him multiple times before he returned the signed authorization several months later. Garcia then sent for the medical records, reviewed them, and concluded that MSF was only liable for Vandervalk's bilateral hand pain from carpal tunnel syndrome.²⁸

¶ 22 On February 10, 2006, Garcia wrote to Vandervalk to clarify some of the issues surrounding MSF's liability for Vandervalk's medical treatment. Regarding his back and shoulder complaints, she explained:

For the shoulder and low back you were at MMI in 1/1987 with no further treatment needed. You continued to work in heavy labor for many years after that with your only ongoing pain complaint on medicals being for your bilateral hands. . . . [In his last note, Dr. Baggenstos states: "As soon as his right shoulder is healed, he is able to go back to heavy labor. In my opinion, he does not have any functional capacity limitations with his lower back and probably not also with his right shoulder." Therefore, pain in your low back at this time would be supported as not related to a sprain/strain from 1985, almost 20 years [ago].²⁹

Garcia further noted that medical evidence did not support Vandervalk's claim that his neck pain was related to his carpal tunnel syndrome, and that Vandervalk had never filed a claim related to his complaints of knee pain, loss of concentration, and gout. Garcia stated that the only treatment which could be submitted for review and possible payment would be treatment for bilateral hand pain or carpal tunnel syndrome. She requested that Vandervalk submit any medical evidence he had supporting claims of ongoing bilateral hand pain.³⁰

¶ 23 On November 27, 2006, Garcia wrote to Vandervalk, informing him that she had received medical records from Dr. Mulgrew and that MSF would authorize a prescription

²⁸ Trial Test.

²⁹ Ex. 73 at 46.

³⁰ Ex. 73 at 46-47.

for OxyContin since Dr. Thomas D. Mulgrew had prescribed it for multiple pain complaints including hand pain. Garcia advised Vandervalk that this would be a one-time authorization and was not ongoing but would continue to be reviewed.³¹

¶ 24 Garcia acknowledged that Vandervalk had many difficulties in getting his approved prescriptions filled. Garcia stated that she sent multiple letters and e-mails to Vandervalk explaining the prescription process, and she also asked his doctor's office to submit Vandervalk's prescriptions to the pharmacy earlier so that MSF could process the authorization and have the prescription ready for pick up immediately after Vandervalk's follow-up appointments.³² On February 20, 2008, Garcia faxed Dr. Mulgrew's office and requested that the office transmit Vandervalk's prescriptions to the pharmacy on the 29th day so that MSF could provide authorizations and Vandervalk could pick up his prescription immediately on each 30th day.³³ Garcia stated that on two occasions, she provided Dr. Mulgrew with clarification as to which conditions MSF had accepted liability. Garcia explained to Dr. Mulgrew that MSF was only liable for Vandervalk's carpal tunnel syndrome, and that MSF would only cover Vandervalk's pain medication if it was related to his hand pain.³⁴

¶ 25 Garcia explained that when MSF approves a prescription at a particular pharmacy, requests for authorization to fill the same prescription at other pharmacies are automatically denied. When a claimant submits a prescription to a pharmacist, the pharmacy calls MSF's pharmacy liaison. The liaison then alerts the claims examiner to the prescription. If the claims examiner is familiar with the claim, the examiner may instantly authorize or deny the prescription and the liaison will immediately inform the pharmacy. Otherwise, the examiner will look up the claim file and respond within a few hours. If the examiner is unavailable, an alternate person will look up the claim. Garcia testified that MSF's goal is to authorize or deny all prescription requests within 24 hours.³⁵

¶ 26 Garcia works in close physical proximity to the pharmacy liaison and therefore she is generally able to authorize or deny prescriptions very quickly. Garcia explained that while with narcotic medications she could not authorize prescriptions for more than a thirty-day supply at a time, she could and did file a document with MSF's liaison which would allow the liaison to instantly approve the prescriptions upon arrival. Garcia noted that this

³¹ Ex. 73 at 54.

³² Trial Test.

³³ Ex. 48 at 2.

³⁴ Trial Test.

³⁵ Trial Test.

would shorten the time it would take a pharmacy to fill the prescription because the liaison could instantly authorize the prescription instead of speaking to Garcia first.³⁶

¶ 27 Garcia explained that Vandervalk would go to a pharmacy, drop off his prescription, and get upset at the processing delay while the pharmacy contacted MSF for approval. Vandervalk would demand the return of his prescription slip, and he would then take it to another pharmacy. When the second pharmacy attempted to authorize the prescription, the authorization would be denied since MSF was already processing the authorization from the first pharmacy. Garcia stated that on one occasion, Vandervalk submitted his prescription and then demanded its return at three successive pharmacies, and that by the time he submitted the slip at the second pharmacy, MSF had already approved the prescription at the first pharmacy.³⁷

¶ 28 Garcia stated that she explained the pharmacy process to Vandervalk on multiple occasions. She did so by letter, e-mail, and telephone conversations. However, the problems with Vandervalk's prescriptions were never resolved, and a few days before trial, MSF denied prescriptions requested by Vandervalk which were prescribed by a nurse practitioner whom he saw without authorization from MSF and from whom MSF had received no medical records to review.³⁸

¶ 29 Garcia testified that she reviewed the records MSF's counsel gave her regarding Vandervalk's prescriptions and compared those records to MSF's records of payment. She determined that MSF has only accepted liability for Vandervalk's Oxycodone or OxyContin prescriptions, and that MSF has paid all of those except for a prescription from September 2006 which cost \$142.99 to fill. Garcia stated that she has been unable to find any other unpaid prescriptions for conditions related to Vandervalk's workers' compensation claims.³⁹

¶ 30 After Vandervalk alleged that his cardiovascular problems were caused by his use of Vioxx, Garcia and MSF's counsel attempted to arrange for Vandervalk to have an IME with a cardiologist, but they could not find a willing cardiologist. Some refused to consider doing a workers' compensation IME and others stated that they had a conflict of interest as they were associated with the cardiologist who had treated Vandervalk. Garcia testified that she inquired of cardiologists in several Montana cities. With no IME available, Garcia decided to investigate Vandervalk's claim through other available means. Garcia reviewed

³⁶ Trial Test.

³⁷ Trial Test.

³⁸ Trial Test.

³⁹ Trial Test.

Vandervalk's medical records and sent inquiry letters to Drs. Stephanie A. Tahta and William Hull. Based on their responses, Garcia decided that Vandervalk's heart condition was not related to his workers' compensation claims and she denied liability for heart-related medical treatment and prescriptions.⁴⁰

¶ 31 On February 21, 2007, Garcia wrote to Vandervalk in response to an e-mail he had sent to her regarding his claims. Garcia explained that MSF is liable for Vandervalk's treatment for carpal tunnel syndrome and as such was not liable for payment of Vandervalk's visit to Dr. Maher on October 17, 2006, in which Vandervalk sought no treatment for carpal tunnel syndrome but merely wanted to discuss Vioxx with Dr. Maher. Garcia advised that both Drs. Hull and Tahta had been unable to find any relationship between Vandervalk's heart condition and his use of Vioxx, and therefore MSF was denying liability for any treatment Vandervalk sought in connection with his heart condition or his use of Vioxx.⁴¹ On November 26, 2007, Garcia wrote to Vandervalk and, among other issues discussed, informed him that no objective medical evidence indicated that his heart condition was related to his use of Vioxx and MSF was not liable for treatment for his heart condition.⁴²

¶ 32 Garcia wrote to Vandervalk on February 20, 2008, advising him that MSF would not accept liability relating to the medical complaints he attributed to his use of Vioxx. Garcia further advised Vandervalk that she would authorize payment for his February 17, 2008, emergency room visit, but that further trips to the emergency room were not authorized. Garcia explained that Dr. Mulgrew was Vandervalk's treating physician for his carpal tunnel syndrome and was authorized for continued evaluation and treatment. Garcia added, "As previously advised you will need to stay with one pharmacy and allow 24 to 48 hours for approval of medications." She further stated that she had faxed information to Dr. Mulgrew's office to assist with expediting Vandervalk's prescriptions.⁴³

¶ 33 John C. Schumpert, M.D., testified by deposition taken April 21, 2009. Vandervalk did not appear for Dr. Schumpert's deposition.⁴⁴ Dr. Schumpert is board-certified in occupational medicine.⁴⁵ In his practice, Dr. Schumpert primarily performs IMEs,

⁴⁰ Trial Test.

⁴¹ Ex. 73 at 61.

⁴² Ex. 73 at 56.

⁴³ Ex. 48 at 1.

⁴⁴ Schumpert Dep. 4:17-23.

⁴⁵ Schumpert Dep. 6:11-13.

occupational disease evaluations, medical surveillance, and site evaluations for workplace hazards.⁴⁶

¶ 34 Dr. Schumpert performed an IME of Vandervalk on August 18, 2008.⁴⁷ Dr. Schumpert reviewed Vandervalk's medical records and concluded that it was difficult to determine how long Vandervalk had taken Vioxx, but estimates it was approximately one month in 2000 based on references to anti-inflammatories found in Dr. L.J. Toder's medical notes.⁴⁸ Dr. Schumpert testified that he noted in his report that Vandervalk has a history of coronary artery disease, but he neglected to mention that Vandervalk also suffers from chronic obstructive pulmonary disease (COPD). Dr. Schumpert testified that Vandervalk has COPD and he opined that it was most likely caused by tobacco smoking.⁴⁹ Dr. Schumpert noted that Vandervalk underwent bypass surgery and opined that the bypass surgery had no relationship to Vandervalk's 1985 and 1989 industrial injuries.⁵⁰ Dr. Schumpert opined that it was more likely than not that Vandervalk's coronary artery disease was caused by his use of tobacco⁵¹ and that it is not related to either of Vandervalk's industrial injuries.⁵² Dr. Schumpert further opined that Vandervalk's hypertension is not related to either the 1985 or 1989 industrial injuries.⁵³ Finally, Dr. Schumpert opined that Vandervalk's use of Vioxx has no relationship to his coronary artery disease.⁵⁴ Dr. Schumpert likewise agreed with the opinion Dr. Hull expressed in his February 8, 2007, letter: no scientific evidence shows a relationship between coronary artery disease and the use of Vioxx.⁵⁵

¶ 35 Finally, Dr. Schumpert testified that, although the question was not posed to him prior to the IME, he had formulated an opinion regarding Vandervalk's ability to return to work. Dr. Schumpert opined that he believed Vandervalk was able to return to work in a

⁴⁶ Schumpert Dep. 8:2-12.

⁴⁷ Schumpert Dep. 10:7-8.

⁴⁸ Schumpert Dep. 28:1-22.

⁴⁹ Schumpert Dep. 32:8 - 33:2.

⁵⁰ Schumpert Dep. 34:3-10.

⁵¹ Schumpert Dep. 34:11-16.

⁵² Schumpert Dep. 44:20 - 45:1.

⁵³ Schumpert Dep. 45:8-14.

⁵⁴ Schumpert Dep. 45:15-22.

⁵⁵ Schumpert Dep. 46:7-17.

light- or possibly light- to medium-duty job, and nothing from his 1985 or 1989 industrial injuries would preclude him from doing so.⁵⁶

Summary of Medical Records

¶ 36 The parties submitted extensive medical records as exhibits in this case. I have summarized below the records I found pertinent in reaching my decision.

¶ 37 On July 11, 2000, James J. Maher, M.D., saw Vandervalk for a medical appointment and noted:

Kurt is here today for two reasons. 1. He is taking VIOXX per Dr. Toder for some hand pain. The VIOXX has caused him to have some bilateral CVA area pain. 2. Also, we note that he has hypertension which probably need[s] to be treated now. He said that he was given some CARDURA for his hypertension in the past and when he started himself on some ZYBAN in an attempt to stop smoking he passed out three times and he attributed that to the CARDURA and would not like to take that medication again I would just ask that he stay off the VIOXX and continue to use ASPIRIN or IBUPROFEN for his hand pain until he can further complete his diagnostic work-up. . . .⁵⁷

¶ 38 At a follow-up appointment on November 1, 2000, Dr. Maher noted, "Kurt is here today regarding his blood pressure. He has a way of couching all of his stories such that the problems appear work related." Dr. Maher made no further mention of Vioxx.⁵⁸

¶ 39 On December 12, 2003, Dr. Maher saw Vandervalk when he was taken to the emergency room by the police after he was pulled over for driving under the influence. Dr. Maher noted that he intended to admit Vandervalk to the hospital, but Vandervalk left against medical advice. He further noted that at this office visit, Vandervalk did not appear to grasp the seriousness of the situation and that he reported having black-out spells which he admitted were likely related to his alcohol use.⁵⁹

⁵⁶ Schumpert Dep. 47:3 - 48:7.

⁵⁷ Ex. 9 at 8.

⁵⁸ Ex. 9 at 9.

⁵⁹ Ex. 58 at 32.

¶ 40 Vandervalk entered St. Patrick Hospital on January 8, 2004, for coronary bypass surgery. His final diagnosis was: “1) Critical three vessel coronary artery disease[;] 2) Forty-pack-a-year smoker[;] 3) Upper extremity weakness secondary to carpal tunnel syndrome.” According to the medical record, Vandervalk underwent surgery on January 8 and was expected to be released on January 12, 2004. However, he left the hospital without being discharged.⁶⁰

¶ 41 During a medical appointment on October 18, 2004, Thomas D. Mulgrew, M.D., noted that Vandervalk was unemployed and while he stated that he was interested in employment, Vandervalk also indicated that he had no plans for education or retraining, and no plans for returning to the workforce.⁶¹ On September 21, 2006, Dr. Mulgrew noted, “In my impression, he seems completely unmotivated to return to work. . . . He was advised to seek gainful employment.”⁶²

¶ 42 On October 17, 2006, Dr. Maher recorded notes from an appointment with Vandervalk. Dr. Maher noted that it was the first time he had seen Vandervalk since 2003. Pertinent to the present issues, Dr. Maher stated:

[Vandervalk] wanted some information regarding his use of VIOXX. My records indicate that he was given this prescription by his orthopedist in Missoula, Dr. Toder. Actually at the time that I was seeing him in 2000, he was told to discontinue the VIOXX because it seemed to be responsible for a modest elevation in his blood pressure, 162/100.⁶³

¶ 43 On February 8, 2007, William L. Hull, D.O., responded to Garcia’s inquiries regarding Vandervalk’s condition and his use of Vioxx. Dr. Hull stated, “There is no science-based evidence that shows there is a relationship between coronary artery disease and the use of Vioxx.”⁶⁴ Dr. Hull further opined that Vandervalk’s use of Vioxx had no component in his development of heart disease. Dr. Hull further opined that Vandervalk’s tobacco use “certainly” is associated with his development of coronary artery disease. Dr.

⁶⁰ Ex. 7 at 7-8.

⁶¹ Ex. 8 at 4-5.

⁶² Ex. 8 at 26.

⁶³ Ex. 9 at 15.

⁶⁴ Ex. 12 at 12.

Hull concluded that Vandervalk had several contributing factors, most notably his smoking, but that Vioxx was not a factor in the development of his coronary artery disease.⁶⁵

¶ 44 On February 14, 2007, Stephen A. Tahta, M.D., who had treated Vandervalk for his cardiovascular problems, wrote to Garcia in response to her inquiry regarding Vandervalk's use of Vioxx. Dr. Tahta stated:

I am not in a position to respond to your questions. The Vioxx issue around coronary artery disease is extremely complicated, and I am not-up-to-date with all the data. As a surgeon, my recommendation would be that a cardiologist respond to these inquiries.⁶⁶

¶ 45 On February 23, 2007, Richard D. Paustian, M.D., issued a report regarding Vandervalk's cardiovascular condition in which he opined that Vandervalk had suffered cardiovascular harm induced by cigarette smoking. Dr. Paustian noted that Vandervalk mentioned his use of Vioxx and in a report from a follow-up visit on July 30, 2007, noted that Vandervalk continued to smoke and continued to deny the possibility that his smoking had contributed to his cardiovascular problems.⁶⁷

¶ 46 On February 17, 2008, Vandervalk went to the emergency room at St. Peter's Hospital because he had run out of OxyContin. The emergency room physician gave him a prescription for 10 Oxycodone and recorded that Vandervalk was scheduled to see Dr. Mulgrew on February 19, 2008.⁶⁸

¶ 47 On February 20, 2008, Vandervalk saw Dr. Maher, who reported that it was difficult to discern the reason for Vandervalk's appointment, but Vandervalk wished to discuss his various medical conditions including his coronary artery disease and its alleged relationship to Vioxx. Dr. Maher encouraged Vandervalk to follow up with a cardiologist.⁶⁹ On February 21, 2008, Dr. Maher wrote to Vandervalk and informed him that he would no longer be able to see him as a patient as he believed they no longer had an effective provider-patient relationship.⁷⁰

⁶⁵ Ex. 12 at 12.

⁶⁶ Ex. 7 at 9.

⁶⁷ Ex. 31.

⁶⁸ Ex. 22 at 1.

⁶⁹ Ex. 58 at 38.

⁷⁰ Ex. 58 at 37.

¶ 48 Dr. Schumpert performed an IME of Vandervalk on August 18, 2008. Dr. Schumpert reviewed Vandervalk's medical records, noting:

Dr. Maher saw the individual on 11 July 2000. The individual was being seen for hand pain and hypertension. The individual had been prescribed Vioxx by Dr. Toder for his hand pain. . . . Dr. Maher recommended [that] the individual "stay off the Vioxx and continue to use Aspirin or Ibuprofen for his hand pain until he can further complete his diagnostic workup". This note also reports that the individual was placed on Vioxx by Dr. Toder at his last appointment, which would be 15 June 2000.⁷¹

¶ 49 Dr. Schumpert further noted that Dr. Hull found no relationship between Vandervalk's coronary artery disease and Vioxx, but rather Dr. Hull believed Vandervalk's condition could be attributed to his long history of cigarette smoking.⁷² Dr. Schumpert reported that Vandervalk informed him that he had taken Vioxx twice a day for approximately one to three months in 1999. Vandervalk further told Dr. Schumpert that while he was taking Vioxx, he twice experienced a choking sensation followed by a loss of consciousness.⁷³

¶ 50 After examining Vandervalk, Dr. Schumpert enumerated an extensive list of diagnoses:

1. Right shoulder strain, related to 5 December 1985 injury, at maximum medical improvement. 840.9
2. Lumbar region strain, related to 5 December 1985 injury, at maximum medical improvement. 847.2
3. Right shoulder impingement syndrome, related to 5 December 1985 injury, at maximum medical improvement. 726.19
4. Right shoulder distal clavicle resection, related to 5 December 1985 injury, at maximum medical improvement. 77.81
5. Bilateral carpal tunnel syndrome, related to 1 September 1989 injury, at maximum medical improvement. 354.0
6. Bilateral cubital tunnel syndrome, related to 1 September 1989 injury, at maximum medical improvement. 354.2

⁷¹ Ex. 34 at 6.

⁷² Ex. 34 at 11.

⁷³ Ex. 34 at 14.

7. History of bilateral carpal tunnel releases, related to 1 September 1989 injury, at maximum medical improvement. 04.43
8. History of bilateral subcutaneous ulnar nerve transpositions, related to 1 September 1989 injury, at maximum medical improvement. 04.6
9. History of coronary artery disease, not work-related. 414.00
10. History of alcoholism, not work-related. 303.9
11. History of tobacco dependence, not work-related. 305.1
12. History of hypertension, not work-related. 401.9
13. History of hypercholesterolemia, not work-related. 272.0
14. History of chronic left knee pain, not work-related. 719.46
15. History of chronic cervical region pain, not work-related. 723.1
16. History of chronic prostatitis, not work-related. 601.1
17. History of lumbar region surgery, not work-related. 80.51
18. History of three-vessel coronary artery bypass graft, not work-related. 36.13⁷⁴

¶ 51 In response to specific questions posed by Garcia, Dr. Schumpert opined that Vandervalk's coronary artery disease appears to be related to "his long-term smoking, hyperlipidemia, family history, and chronic alcoholism."⁷⁵ Dr. Schumpert further opined that no scientific evidence links Vioxx to coronary artery disease.⁷⁶

¶ 52 According to the medical records submitted, Vandervalk treated regularly with Dr. Mulgrew from September 22, 2004, until September 22, 2008, for the accepted conditions from both his workers' compensation claims. On September 22, 2008, Dr. Mulgrew saw Vandervalk primarily for counseling and stated that he had nothing more to offer Vandervalk.⁷⁷

Motions to Compel

¶ 53 At the close of the witness' testimony, I denied two motions to compel that Vandervalk had filed regarding two subpoenas which he served in this case. The first was

⁷⁴ Ex. 34 at 17.

⁷⁵ Ex. 34 at 19.

⁷⁶ Ex. 34 at 19.

⁷⁷ Ex. 8.

a subpoena to Judge Eldon E. Fallon of the United States District Court for the Eastern District of Louisiana. I denied Vandervalk's motion to compel on the grounds that the Montana Workers' Compensation Court does not have jurisdiction to enforce subpoenas served outside the State of Montana.⁷⁸

¶ 54 The second motion to compel pertained to a subpoena Vandervalk served upon the International Heart Institute of Montana. I noted that the return of service filed with the Court was blank, and questioned Vandervalk as to the reason why. Vandervalk asserted that he served the subpoena on the Heart Institute by mail. I therefore denied his motion to compel on the grounds that service of the subpoena did not comply with ARM 24.5.331.

¶ 55 I granted Vandervalk twenty days from the date of trial in which to file motions for reconsideration for either denial of his motions to compel and the motions to quash which I granted to Dr. Maher and Mary Dalton shortly before trial. The Court received no motions for reconsideration and my rulings on the motions to quash and motions to compel stand as issued.

CONCLUSIONS OF LAW

¶ 56 Vandervalk bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.⁷⁹

Issue One: Should Petitioner's settlements be reopened?

¶ 57 Vandervalk argued that his settlement of his 1989 carpal tunnel syndrome claim should be reopened because he entered into the agreement under duress. Vandervalk testified that at the time he signed the agreement, his vehicle had been repossessed and he was in danger of losing his home. His then-attorney, John Doubek, further testified that Vandervalk was very eager to settle the claim.

¶ 58 The full and final settlement entered into by the parties is a contract, thus contract law governs the agreement.⁸⁰ This Court has recognized that under § 28-2-1711, MCA,

⁷⁸ Mont. R. Civ. P. 45(b)(2)(A).

⁷⁹ *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).

⁸⁰ *Morrisette v. Zurich American Ins. Co.*, 2000 MTWCC 2, ¶ 61 (citing *Kienas v. Peterson*, 191 Mont. 325, 329, 624 P.2d 1, 3 (1980)).

a contract may be rescinded if it was entered into under duress.⁸¹ “Duress” is defined in pertinent part as:

Duress consists in:

- (1) unlawful confinement [of the person or certain relatives];
- (2) unlawful detention of the property of any such person; or
- (3) confinement of such person, lawful in form but fraudulently obtained or fraudulently made unjustly harassing or oppressive.⁸²

¶ 59 In the present case, Vandervalk claims that his urgent need to pay debts constitutes “duress.” Vandervalk testified that at the time he settled his 1989 occupational disease claim, he intended to use the funds obtained to alleviate pressing financial concerns and then attempt to reopen the settlement. However, the situation Vandervalk describes does not meet the legal definition of duress. This Court has previously held that financial distress does not constitute “duress” and cannot be grounds for reopening a settlement.⁸³ The evidence in the present case demonstrates that, while Vandervalk may have been suffering from financial hardship at the time he entered into the occupational disease claim settlement, he suffered no duress as defined under the statute and therefore he is not entitled to reopening his settlement.

¶ 60 Regarding his earlier settlement of his 1985 industrial injury claim, Vandervalk argued at trial that he does not want the settlement reopened, but rather wants MSF to pay for medical benefits which he expressly reserved under the terms of that settlement agreement. Under the terms of his settlements, Vandervalk reserved his right to medical and hospital benefits. From the evidence presented at trial, it appears that MSF is currently paying for ongoing treatment Vandervalk receives for his carpal tunnel syndrome, but that MSF is currently not paying for any treatment related to Vandervalk’s 1985 industrial injury. Although Vandervalk testified at trial that he believes he is entitled to some medical benefits relating to his back condition, he presented no evidence in support of this assertion. No medical providers have opined that his current back complaints are related to his 1985 industrial injury, and Vandervalk admitted that he has neither sought authorization for treatment nor reimbursement because he “assumed” MSF would deny his request. Therefore, I do not find that Vandervalk is entitled to any specific unpaid medical benefits relating to his claims with the exception of the out-of-pocket prescription expense discussed below.

⁸¹ *Frazer v. Montana State Fund*, 2005 MTWCC 41, ¶ 12.

⁸² § 28-2-402, MCA.

⁸³ *Frazer v. Montana State Fund*, 2005 MTWCC 41, ¶¶ 14-15.

Issue Two: Is the Petitioner entitled to additional indemnity (wage loss) benefits?

¶ 61 Since Vandervalk settled his entitlement to indemnity benefits under both his workers' compensation claims, and since I have concluded that he does not have grounds for reopening the settlements, Vandervalk is not entitled to any additional indemnity benefits.

Issue Three: Was Petitioner's cardiovascular condition accelerated by the use of Vioxx?

¶ 62 Vandervalk argues that MSF should be liable for medical expenses he has incurred as a result of his cardiovascular condition. Vandervalk alleges that his cardiovascular problems are caused by his use of Vioxx, which he took to alleviate symptoms of his work-related carpal tunnel syndrome. However, as the findings above indicate, and as Vandervalk admits, no doctor has opined that a causative relationship exists between Vandervalk's use of Vioxx and his cardiovascular condition. Therefore, he has not met his burden of proof and I conclude that his cardiovascular condition was not accelerated by his use of Vioxx.

Issue Four: Is Petitioner entitled to reimbursement for out of pocket expenses for prescriptions?

¶ 63 The evidence presented at trial demonstrates that after a thorough investigation, Garcia agreed that MSF was liable for payment of Vandervalk's prescriptions for OxyContin or Oxycodone from his treating physician because those medications were prescribed to alleviate Vandervalk's pain, including bilateral hand pain. Garcia reasoned that since MSF was liable for Vandervalk's carpal tunnel syndrome, it was liable for prescription medication which Vandervalk was prescribed in part to alleviate his carpal tunnel syndrome pain complaints. At trial, Vandervalk only specified a single prescription for OxyContin or Oxycodone for which he paid out-of-pocket and has not been reimbursed: \$142.99 from September 2006. At trial, Garcia testified that she reviewed all the pharmacy records available to her and she concurred that Vandervalk has not received reimbursement for one OxyContin or Oxycodone prescription in the amount of \$142.99 from September 2006. Garcia did not indicate that there was any reason why MSF would not be liable for this prescription. I therefore conclude that Vandervalk is entitled to reimbursement of \$142.99 for a September 2006 prescription for OxyContin or Oxycodone which he paid for out-of-pocket.

Issue Five: Is Petitioner entitled to payment for travel expenses related to medical treatment?

¶ 64 Vandervalk argues that he is entitled to reimbursement of certain travel expenses he has incurred relating to his workers' compensation claim. He testified that he travels from his residence to a pharmacy to fill his prescriptions once a month and he travels from his residence to his treating physician approximately once every three months. Vandervalk further testified that he lives outside of Helena and a trip into town is approximately thirteen miles.

¶ 65 Under § 39-71-704(1)(d)(i), MCA, an insurer shall reimburse a worker for reasonable travel incurred to a medical provider for treatment of an injury. However, under § 39-71-704(1)(d)(ii), MCA, certain items of travel are excluded from reimbursement, including: (A) 100 miles of automobile travel for each calendar month unless the travel is requested or required by the insurer pursuant to 39-71-605; and (B) travel to a medical provider within the community in which the worker resides.

¶ 66 Vandervalk's claim of entitlement to reimbursement for travel expenses is problematic for several reasons. Section 39-71-704(1)(d)(i), MCA, provides only for reimbursement of expenses incurred in traveling to a medical provider for treatment of an injury. Vandervalk's pharmacy trips are not a trip to a medical provider for treatment and therefore they are not reimbursable travel expenses under § 39-71-704(1)(d)(i), MCA. As for Vandervalk's trips to follow up with his treating physician approximately every three months, Vandervalk testified that this is a round trip of twenty-six miles incurred approximately every ninety days. Since § 39-71-704(1)(d)(ii)(A), MCA, excludes from reimbursement the first one-hundred miles of automobile travel for each calendar month, Vandervalk is not entitled to reimbursement for his quarterly visits to his treating physician. I further note that in any event, Vandervalk would likely be ineligible for reimbursement of medical expenses incurred in traveling to and from Helena as he arguably resides within the community and would therefore be excluded from reimbursement under § 39-71-704(1)(d)(ii)(B), MCA. However, since this argument was not specifically addressed by the parties, I make no ultimate finding as to whether Vandervalk resides "within the community" of Helena.

¶ 67 Since Vandervalk's travel to pick up prescription medications is not covered as a reimbursable expense under § 39-71-704(1)(d)(i), MCA, and since his trips to see his treating physician do not exceed the one-hundred-mile monthly exclusion of § 39-71-704(1)(d)(ii)(A), MCA, he is not entitled to the reimbursement for travel expenses related to medical treatment he has requested here.

Issue Six: Is Petitioner entitled to rehabilitation benefits?

¶ 68 Vandervalk gave up his right to rehabilitation benefits when he settled his claims. Since I have concluded that Vandervalk is not entitled to reopen his settlements, I therefore conclude he is not entitled to further rehabilitation benefits.

JUDGMENT

- ¶ 69 Petitioner is not entitled to reopening his settlements.
- ¶ 70 Petitioner is not entitled to additional indemnity (wage loss) benefits.
- ¶ 71 Petitioner's cardiovascular condition was not accelerated by the use of Vioxx.
- ¶ 72 Petitioner is entitled to \$142.99 in reimbursement for out-of-pocket prescription expenses.
- ¶ 73 Petitioner is not entitled to payment for travel expenses related to medical treatment.
- ¶ 74 Petitioner is not entitled to rehabilitation benefits.
- ¶ 75 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.
- ¶ 76 Any party to this dispute may have twenty days in which to request reconsideration from these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 5th day of November, 2009.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Kurt Vandervalk
Greg E. Overturf
Submitted: August 6, 2009