IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2003 MTWCC 16

WCC No. 2002-0693

ANTHONY COOPER

Petitioner

vs.

CHEVRON CORPORATION

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Claimant suffered a work-related back injury in 1988 and underwent L5-S1 surgery in 1988 and 1990. Thereafter he had no verifiable medical care for his back until 1998. In 1998 he sought care for back pain, reporting he had injured his back "4-5 days ago." Over the next year and a half he obtained narcotics from several physicians, sometimes two or three simultaneously, and obtained narcotics on four occasions after reporting his drugs were stolen, reports that the Court finds were false. A December 1999 MRI was done but did not disclose an acute problem. In April 2001 claimant reported he suffered increased back pain while moving a washing machine. Within days he required hospitalization for pain and an MRI showed a large herniated disk impinging on a nerve root. Shortly thereafter he underwent surgery for the herniated disk.

Held: Medical testimony established that claimant suffered a new injury in April 2001, therefore the insurer is not liable for his April 2001 surgery or his subsequent care. With respect to medical treatment from1998 to April 2001, claimant has not provided persuasive evidence that the treatment was due to his 1988 injury. His medical treatment appears to have in great part been motivated by his desire for narcotics. Also, when initiating treatment in 1998, he indicated he had suffered a new injury while working in construction but at trial and in deposition he denied both that he was injured or that he was working in construction. His credibility was so undermined that the Court does not believe his denials. In any event, the claimant bears the burden of proof and he has not persuaded the Court that his medical care in 1998 and thereafter was due to his 1988 injury.

Topics:

Injury and Accident: Natural Progression. The insurer liable for a worker's industrial injury is liable for treatment of the natural progression of that injury.

Injury and Accident: Causation. The insurer is not liable for subsequent conditions of the same body part which are caused by intervening events and not by the original injury.

Proof: Conflicting Evidence: Medical. Where an independent medical examiner testifies credibly that the claimant's recurrent herniated disk, which occurred eleven years after his first herniated disk, was caused by a subsequent, specific incident, and the facts provide support for that testimony, the Court is persuaded by the opinion where the only contrary opinion is a written one of a physician who did not mention the subsequent incident and may not have been aware of it.

¶1 The trial in this matter was held on February 20, 2003, in Helena, Montana. Petitioner, Anthony Cooper (claimant), was present and represented by Mr. Cameron Ferguson. Respondent, Chevron Corporation (Chevron), was represented by Mr. Joe C. Maynard.

¶2 Exhibits: Exhibits 1 through 54 were admitted without objection. Exhibit 55 was objected to on hearsay and irrelevancy grounds and withdrawn.

¶3 Witness and Depositions: The parties agreed that the depositions of Anthony Cooper and Thomas Dietrich, M.D. can be considered part of the record. The Court participated by telephone in Dr. Dietrich's deposition. Petitioner, Anthony Cooper, was sworn and testified.

¶4 Issues Presented: The issues as set forth in the Pretrial Order are:

1. Is Petitioner's recent medical treatment relating to his back caused by his injury of September 19, 1988?

2. Is Petitioner entitled to an award of attorney's fees under Sections 39-71-611 and 39-71-612?

3. Is Petitioner entitled to a 20% penalty pursuant to Mont. Code Ann. Section 39-71-2907?

(Pretrial Order at 2.)

¶5 Having considered the Pretrial Order, the testimony presented at trial, the demeanor and credibility of the witness, the depositions and exhibits, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

¶6 On September 19, 1988, the claimant injured his low back in a fall at work at the Stillwater Mine in Nye, Montana. At the time he was working as a miner.

¶7 At the time of his industrial accident, the Stillwater Mine was owned or operated by Chevron which was self insured under Plan I of the Montana Workers' Compensation Act,

Title 39, ch. 71, part 21, MCA. Chevron accepted liability for the claimant's September 19, 1988 injury.

¶8 On September 27, 1988, the claimant underwent back surgery, specifically a percutaneous lumbar diskectomy. (Ex. 4 at 7-8.) The level of the surgery is not clear from the operative report (*id.*) but later reports indicate the L5-S1 level was involved. Following the surgery, at his request, claimant was released to return to work.

¶9 Claimant thereafter experienced renewed low-back and right leg pain, as well as numbness in his right foot. (Exs. 4 at 14, 26 at 11.) His pain worsened and on June 1, 1990, he again underwent back surgery. This time, a large protruded disk compressing the right L5 nerve root was discovered and excised. (Ex. 4 at 32.)

¶10 Following claimant's second surgery, his foot numbness and leg pain resolved, but he continued to have some back pain, (Exs. 23 at 18-19, 26 at 11.) On December 6, 1990, Dr. William Shaw, who had been treating claimant in follow-up to his surgeries, declared claimant at maximum medical improvement (MMI) and rated his impairment at 16% of the whole person. (Ex. 23 at 19-20.) With respect to his condition, Dr. Shaw noted: "He is doing well without leg pain or sharp back pain. There is still the dull aching in the low back particularly with exercise and activity." (*Id.* at 19.)

¶11 On March 7, 1991, claimant entered into a Compromise and Release Settlement with respect to his September 19, 1988 industrial accident. The settlement agreement closed his future entitlement to compensation benefits in return for payment of $33,500. (Ex. 40 at 1.) The agreement reserved future medical benefits. (*Id.*)

¶12 Claimant testified that between 1991 and 1992 he continued to have back pain. He cites treatment on January 3, 1991, by Dr. Don Thomas in Lewistown. Dr. Thomas' records indicate claimant was suffering from back pain but he suspected kidney problems. (Exs. 8 at 1, 30 at 1.) Claimant testified that Dr. Thomas suspected that he had a kidney stone but ultimately concluded that his bad back was causing his pain. However, there is no indication in the records furnished the Court that that was the case.

¶13 He also cites treatment by a chiropractor and massage therapist in Lewistown. Claimant testified he "did not try" to obtain the records of the massage therapist. With respect to the chiropractor, he could not recall the chiropractor's name, the dates he saw the chiropractor, or even whether the chiropractor was in Lewistown, where he was living at the time. Thus, there are no chiropractic records which would support his testimony.

¶14 Claimant further testified that for several years after 1990 he did not seek further care from an orthopedic surgeon because he did not want to have additional surgery. I did not find that testimony credible.

¶15 Between 1991 and 1996 claimant says he treated his back pain with over-the-counter pain relievers.

¶16 Sometime in the early 1990s the claimant moved to Alaska permanently and has continued to reside there.

¶17 On November 13, 1996, Dr. Jim Lewis, an Alaska physician, prescribed hydrocodone for claimant. The prescription was refilled one time on November 18, 1996. Hydrocodone is a narcotic pain medication. According to claimant, Dr. Lewis prescribed the drug for his back pain. Dr. Lewis' records are unavailable. According to claimant, Dr. Lewis lost his medical license and vanished. In any event there is no confirmation of claimant's assertion that Dr. Lewis prescribed the hydrocodone for back pain.

¶18 There is no further indication of medical care for claimant's back until 1998 when, on June 23rd, claimant saw Ed Manning (Manning), a physician's assistant. (Ex. 16 at 1.) Manning was aware of claimant's prior back surgery, noting a "laminectomy 1987/1988," but recorded that claimant was "**self employed" in construction**" and "**[i]njured back 4-5 days ago - lower back.**" (*Id.*, emphasis added.) At trial claimant **denied** any new back injury or that he was engaged in a construction business.

¶19 On June 23, 1998, Manning prescribed the following medications: Soma, Anexsia and Votaren. Anexsia is hydrocodone (a narcotic pain reliever) with acetaminophen. Other brand names for the drug are Vicodan, Co-Gesic, Hydrocet, Lorcet, Lortab, Maxidone, Norco, and Zydone.

¶20 On July 3, 1998, claimant called Manning and told him his backpack had been stolen while he was fishing. He asked for new prescriptions for all three medications. (*Id.*) This is the first of four incidents in which claimant sought early refills of a narcotic prescriptions on account of the alleged theft or destruction of his backpack. Claimant made similar claims on three more occasions:

¶20a On December 15, 1998, claimant contacted Dr. Peterson's office and claimed that he needed a prescription for pain medication because his dog had "got ahold of his" previous prescription. (Ex. 18 at 4.) At trial he testified that his dog stole his backpack and that although he thereafter found part of it, he did not find his prescription drugs.

¶20b On July 21, 1999, claimant reported to Dr. Yates that he had been beaten up and his medications stolen from his briefcase. He sought replacement medication and Dr. Yates prescribed 50 Vicodan. (Ex. 38 at 9.)

¶20c On May 27, 2001, claimant sought care at the ER reporting that his backpack, wallet, and medications had been stolen the day before. (Ex. 25 at 1.) He sought pain medication and received another prescription for Vicodan. (*Id.*) Of note, the ER report indicates that "it did not occur to him to file a [police] report as he only lost a few dollars in cash." (*Id.*)

Four so similar incidents strains credulity!

¶21 On July 3, 1998, Manning also indicated that claimant had scheduled an appointment with an orthopedic surgeon for July 22, 1998. (Ex. 16 at 1.) Claimant was to call back with the name of the surgeon. (*Id*.) Claimant did not follow through. He did not see an orthopedic surgeon until five months later. (See ¶ 26.)

¶22 On August 28, 1998, Manning saw claimant again. He recorded that claimant was complaining of low-back pain with radiation "into the right hip and posterior aspect of the right leg." (Ex. 16 at 2.) He also noted that claimant was scheduled to see Dr. Garner in Anchorage "as soon as we get the records from his health-care providers in the Lower-48." (*Id*.) While prescribing more Lorcet (Oxycodone), Manning also advised claimant that he would not continue to prescribe "pain meds" and suggested he see Dr. Robert Martin. (*Id*.)

¶23 On September 10, 1998, claimant called Manning for another refill of Lorcet (Oxycodone). Manning declined the request and noted that claimant had not filled out a release for his medical records as previously requested.[(1)] Manning also noted that claimant had recently been to the ER for back pain and wrote:

Phone call from this patient today (9/10/98) requesting refills of his Lorcet. **He did not want any anti-inflammatory agents, only pain pills. He says he signed a medical records release when he was here, but we have no record of that.** We still do not have his medical records and **he has not made an appointment w/ Dr. Robert Martin in Wassila about his back. I fax'd in a prescription for him for Ultram. He called back stating that he did not want Ultram he wanted hydrocodone.**

(*Id*., emphasis added.)

¶24 The day after Manning's refusal to prescribe additional narcotic medication, claimant went to see Dr. James Yates, who he testified is a "good friend." According to Dr. Yates' note, claimant "was working around house [and] back pain got worse." (Ex. 38 at 2.) Claimant informed Dr. Yates he had been to the ER but there is no indication he told the doctor about his treatment by Manning.

¶25 Claimant convinced Dr. Yates to continue to prescribe significant narcotics for him. The prescriptions in late 1998 were as follows:

October 13, 1998 40 Hydrocodone

October 21, 1998 20 Hydrocodone

November 3, 1998 30 Vicodan (Hydrocodone)

November 19, 1998 50 Vicodan (Hydrocodone)

December 15, 1998 30 Anexsia (Hydrocodone)

(Ex. 38 at 3-4.) This was just the beginning of numerous prescriptions for narcotics from several doctors.

¶26 Dr. Davis Peterson, an orthopedic surgeon, became involved in claimant's care on December 8, 1998. (Ex. 18 at 1.) He recorded claimant's history of a prior back injury but noted that following the Montana surgeries, "**He had done well until about 6 months ago when he noticed insidious onset of buttock, leg pain, posterior calf pain into the heel which has progressively worsened.**" (*Id*., emphasis added.) The onset noted by Dr. Peterson corresponds with claimant's seeking care in 1998. It is **inconsistent** with claimant's assertion that he had continual back pain since 1990, and is just another in a long line of medical entries which are inconsistent with the claimant's testimony.

¶27 Dr. Peterson found "no clear sciatica." (*Id*.) He ordered a "gadolinium MRI scan." (*Id*. at 2.) The MRI showed "no evidence of recurrent herniated nucleus pulposus or stenosis" and "[n]o significant encroachment of the exiting nerve roots," although it did indicate evidence of scarring from the prior surgeries and "bilateral recess stenosis in conjunction with a broad-based dis[k] bulge at L5-S1." (*Id*. at 4-5.) He recommended a caudal block and commented that "**if** he develop [sic] recurrent leg pain, particularly with radiculopathy, we may need to consider a recess unroofing along the course of the S1 nerve root." (*Id*. at 5, emphasis added.)

¶28 Claimant sought narcotics from Dr. Peterson. When he first saw Dr. Peterson, the doctor recorded, "So far he [claimant] has managed with ibuprofen 800 t.i.d. and taken Percodan 3 to 4 times per week for pain manage." (Ex. 18 at 1.) Claimant's statement to Dr. Peterson flies in the face of his recent narcotic use and his seeking of narcotics. Further, there is no record of prior prescriptions for Percodan, which is Oxycodone with aspirin rather than acetaminophen. When confronted with that fact at trial, claimant asserted that Percodan is essentially the same as Hydrocodone. His explanation was not convincing and the Court is left wondering where claimant was obtaining Percodan. I have read Dr. Peterson's records and he is very specific as to the brands of Oxycodone, thus I am unpersuaded his recording of Percodan was a mistake.

¶29 From December 1998 through mid-March 1999, Dr. Peterson prescribed narcotics on several occasions. He did so in response to claimant's repeated calls to his office. He prescribed Anexsia, Percocet, and Lorcet. In seeking those drugs, claimant reported on one occasion that his "dog got ahold of" his drugs. (*Id*. at 4.) On another occasion he reported that he had to seek ER care and had three shots of morphine for pain control. (*Id*. at 6.) On yet another occasion, the claimant told Dr. Peterson's office that even though he was not out of his prescriptions his friends were going to town and he wanted them to pick up refills. (*Id*. at 9).

¶30 On March 9, 1999, Dr. Peterson declined to prescribe further narcotics until claimant had EMG testing or pain management. (*Id*. at 11.)

¶31 Meanwhile, claimant was securing narcotics from other sources, sometimes securing narcotics from two sources on a single day.

¶31a On December 15, 1998, the same date that claimant obtained a prescription from Dr. Yates for 30 Anexsia (Ex. 38 at 4), claimant obtained a prescription for 30 Anexsia from Dr. Peterson. (Ex. 18 at 4.) Dr. Peterson's office was informed of the overlapping prescriptions and the doctor cancelled his prescription. (*Id*.)

¶31b On January 5,1999, claimant obtained 40 Vicodan (Oxycodone) from Dr. Yates. (Ex. 38 at 4.) Three days later, on January 8, 1999, he obtained 30 Anexsia (Oxycodone) from Dr. Peterson. (Ex. 18 at 6.) On that same day - January 8, 1999 - he visited the ER and received an injection of Demoral, Vistaril, and Toradol along with a prescription for 15 Anexsia (Oxycodone.) (Ex. 28 at 2.)

¶31c On January 10, 1999 - two days after his visit to the ER and obtaining 15 Anexsia from the ER doctor and 30 Anexsia from Dr. Peterson - claimant sought care from Dr. Del Ducca and received IV Morphine and a prescription for 30 Percocet (Oxycodone). (Ex. 5 at 3.) There is no indication that claimant informed any of the medical providers of the other provider's latest prescriptions, and it is difficult to believe that he did.

¶31d On February 2, 1999, claimant obtained narcotic drugs from both Dr. Peterson and Dr. Yates. Dr. Peterson prescribed 40 Lorcet (Oxycodone) and Dr. Yates prescribed Darvocet ("Propoxyphene Napsylate", which is a mild narcotic). (Exs. 18 at 8, 38 at 4.)

¶32 Over the next few months, Dr. Yates continued to prescribe narcotics. (Ex. 38 at 5-9.)

¶33 On January 8, 1999, claimant told an ER physician that his back pain had been waxing and waning for several months but that the "pain seems to have begun spontaneously in July 1998." (Ex. 28 at 1.) The ER note further states that claimant "reports following this [1988 and 1990] surgery his back did well and **he was essentially pain-free for 10 years only to begin having problems again last summer.**" (*Id.,* emphasis added.)

¶34 Despite the claimant's need for significant narcotics in early January 1999, he missed an appointment with Dr. Peterson, an orthopedic surgeon, on January 19, 1999. (Ex. 18 at 7.) In his deposition the claimant testified that he must have had car trouble or there was adverse weather. (Cooper Dep. Vol. I at 70.) Dr. Peterson's record indicates that claimant was "unaware of appt [appointment] today." (Ex. 18 at 7.) When that medical note was brought to the claimant's attention at trial, he agreed that he must not have known of the appointment. I do not believe him and find that his failure to keep his appointment was inconsistent with his pain which would require the level of narcotic drugs he was obtaining.

¶35 When cross-examined at trial about obtaining simultaneous prescriptions for narcotic from both Drs. Yates and Peterson, clamant testified that if Chevron had paid for his

medical care he would not have taken as many narcotics. His explanation makes no sense whatsoever and I find it incredible.

¶36 In November 1999, the claimant was incarcerated in jail, where he stayed until July 2000. During that time, claimant's access to narcotics was largely cut off. (*See* Ex. 6.) Medical records from claimant's prison stay document continued back pain and some complaints of foot pain but fail to support the claimant's assertion that his pain required the level of narcotics he had previously been able to obtain. The records also contradict his claim of continuing pain since 1990. A nursing note of December 31, 1999, states that claimant reported

pain and spasms in back. Reports he had herniated dis[k] [with] surgery 1988. Symptoms have been present for **"two . . . no . . four months**." States he was treated with muscle relaxants and pain pills previously and got relief . . . .

(*Id*. at 12, emphasis added.) On January 26, 2000, claimant complained of loss of feeling in his left foot. (*Id*. at 16.) He was seen by a physician's assistant, who recorded nothing all that significant in his examination other than that claimant refused over-the-counter pain medication "since they don't help anyway." (*Id*. at 17.) Claimant did receive some Darvocet -100 during his incarceration but not in the amounts and frequency characterizing his drug use in 1998 and 1999.

¶37 Following claimant's release from jail in early July 2000, claimant immediately returned to Dr. Yates for narcotic drugs. (Ex. 38 at 13-14.)

¶38 On July 19, 2000, claimant told Dr. Yates that he had "been playing ball swung bat/back pain [increased] since . . . ." (*Id*. at 14.) Claimant testified he had played softball in jail but was unable to swing a bat and had to have a pinch hitter. Even if his explanation is true, which I doubt, his participation in softball is inconsistent with his prior reports of pain of a magnitude requiring significant narcotic medication.

¶39 During the rest of 2000 and early 2001, the claimant continued to receive Oxycodone from Dr. Yates, however, not in the quantities or frequency as 1998 and early 1999. (*Id*. at 13-18.)

¶40 According to Dr. Yates' office notes, on October 7, 2000, claimant reported increased back pain after "cutting trees, running heavy equipment, not using chain saws but lots of heavy work." (*Id*. at 15.) At trial, claimant denied cutting trees or doing heavy work. He testified that his sons were doing the cutting and that he was only driving the truck.

¶41 Then, on April 10, 2001, claimant went to the ER for "increasing lower back pain." (Ex. 20 at 1.) The ER notes state:

He reports he has had a problem with L5/S1 dis[k] surgery in 1988 and 1989 secondary to a mining accident. He is followed by Dr. Peterson in Anchorage. He has had chronic

problems with numbness in the lateral aspect of the right foot. **He was moving a washing machine yesterday, and suddenly developed increased pain. He reports the foot developed increased numbness with pain all the way down the right buttock and leg.**

(Ex. 20 at 1, emphasis added.)

¶42 Within three days of the ER visit (April 13, 2001), claimant was hospitalized with severe low-back and leg pain. (Ex. 27 at 16.) On April 17, 2001, another MRI was done. The MRI showed an "acute recurrent intervertebral disk herniation at this level compressing the thecal sac . . . ." (Ex. 17 at 1.)

¶43 On April 27, 2001, Dr. Thomas P. Vasileff operated on claimant. (Ex. 32 at 11.) The operation disclosed a "very large extruded disk in the L5-S1 area, tenting the S1 nerve root, and causing compression of the S1 nerve root." (*Id.*)

¶44 In a letter to Cathy Anderson, who was the adjuster for Chevron, Dr. Vasileff opined,

It is my opinion that this [herniated disk] is as a result of his previous problem - that is, it is a continuation of his previous ruptured dis[k]. If he had not had the ruptured dis[k] years ago at this level, he might not have had his herniated dis[k] at this level.

(*Id.* at 7.) There are two problems in evaluating Dr. Vasileff's opinion. First, there is no indication in his records that he was aware of the washing machine incident described in the ER note of April 10, 2001. Second, his statement that "he might not have had his herniated dis[k] at this level" may only indicate that the claimant's 1988 injury merely predisposed him to subsequent injury at the L5-S1 level.

¶45 Claimant was examined and evaluated by Dr. Thomas Dietrich, a board certified neurosurgeon. Dr. Dietrich is a former professor of neurosurgery at the University of Oregon. His current medical practice is limited to consultations and charity work. Dr. Dietrich opined that claimant's recurrent herniated disk and the resulting surgery were due to a new injury or aggravation that claimant suffered in April 2001, while moving a washing machine. (Dietrich Dep. at 36-37.) He noted the new MRI finding on April 17, 2001, of a significant herniated disk. Based on claimant's history of moving the washing machine, the severity of his pain following the incident, and the MRI finding within days afterwards, he testified that he was "reasonably certain" that the herniated disk occurred when the claimant moved the washing machine. (*Id*. at 16.) He testified that a reherniation of the L5-S1 disk is not inevitable. He noted that the rate of recurrence of herniated disks at the L5-S1 level is 15%, most of which occur within two years. (*Id.* at 19.) After two years, the rate of recurrence falls to 5%. Thus, while the claimant's original herniation predisposed him to further herniation, reherniation was not inevitable or even probable. (*Id.* at 20.)

¶46 I find Dr. Dietrich's opinions persuasive. The MRI finding of April 17th was shortly after the claimant moved the washing machine: It was a new and different finding than the

December 1999 MRI. Further, claimant reported his moving the washing machine as giving rise to his increased pain. His increased pain was significantly greater and more extensive than before, requiring hospitalization, then surgery.

¶47 The more difficult question is whether claimant's treatment in 1998 through April 2001 is attributable to his 1988 injury. My decision on this question largely depends on my assessment of his credibility concerning his continued pain since 1991 and his testimony that he did not suffer any new injuries or aggravations.

¶48 When I heard claimant's testimony at trial and observed his demeanor, my first impression was that he was not telling the truth about some matters but that he might be telling the truth about most things. After reflecting on his testimony and going back through the exhibits, I am absolutely convinced that my first impression was wrong. After further consideration and evaluation, I am convinced that claimant has lied to his medical providers and lied to the Court. I am not sure he knows where the truth begins, and I certainly am unable to determine that point.

¶49 Careful review of his medical records reveals significant contradictions between the claimant's assertion that he had continuous pain in his back since 1990 and that he suffered no further exacerbations of his low-back condition.

¶49a There was no verifiable medical care for his back between 1991 and 1996. Claimant has numerous excuses for his inability to provide records of back-related treatment and some of those excuses might be true. However, significantly, claimant did not attempt to obtain records of the massage therapist and could not provide even the most basic information about a chiropractor whom he claims provided treatment.

¶49b There is no care even alleged between 1992 and 1996 and there are no records which would document that the one Oxycodone prescription written by Dr. Lewis in December 1996, was on account of back pain.

¶49c Beginning in 1998, claimant sought continuous treatment for back pain, however, the records fail to indicate any true radiculopathy and his medical records demonstrate he lied to his doctors when seeking narcotics. On four occasions he sought a resupply of narcotics by reporting his backpack or briefcase had either been stolen or taken by his dog. In late 1998 and early 1999, he simultaneously obtained prescriptions for narcotics from two physicians, and on one occasion from three physicians. During his time in jail from November 1999 to July 2000, his narcotics were significantly reduced without the instances of ER visits and the sort of persistent "need" for narcotics occurring in 1998 and 1999.

¶49d Medical records show that on several occasions the claimant reported activities aggravating his back, however, he denied **every one** of those reports.

¶49e Medical records show that claimant indicated that he had been symptom free for many years prior to 1998, then experienced an onset of back pain. An ER note in January 1999, states that claimant "reports following this [1988 and 1990] surgery his back did well and **he was essentially pain-free for 10 years only to begin having problems again last summer.**" (Ex. 28 at 1, emphasis added.) Dr. Peterson recorded on December 8, 1998, that claimant reported, "He had done well until about 6 months ago when he noticed insidious onset of buttock, leg pain, posterior calf pain into the heal which has progressively worsened." (Ex. 18 at 1.) Claimant, of course, denied the accuracy of these medical notes.

¶50 Claimant's assertion that he was never engaged in construction and earned only $5000 on average after 1988 also raises serious questions concerning his credibility. As far as I can determine, he has admitted to the following jobs:

¶50a In the early 1990s before moving to Alaska he drove a dump truck in Missoula for two to three weeks, worked in a mine for three days, and worked for a salvage company in Missoula for a week using a cutting torch.

¶50b In 1993 he drove a truck in Alaska for Alaska Corporation for two to three weeks.

¶50c He has managed a small motel in which he was a partner. The motel was purchased in 1997 or 1998. Claimant sold his interest to his partner in October 2001 for $8,000.

¶50d He raised and cross-bred wolves and Malamutes, which he sold.

¶50e He operated a guide service for a couple of hunting seasons.

¶50f He has guided fishermen and served as a "bear guard" in Alaska.

¶50g He operated a towing service using the large commercial truck he owns. His services were by word of mouth.

¶50h He has hauled supplies with his truck, including 100 pound propane bottles. He testified that he did not load or unload the propane.

¶50i Hauled firewood, although he denied loading or off-loading it.

¶50j Skidded logs.

¶50k Plowed roads in the spring time.

¶50l Sold Christmas trees in the early 1990s, although he denied loading or unloading the trees.

¶50m Bought and sold a handful of motor vehicles.

¶50n House sat for both cash and in-kind remuneration.

¶50o Operates a small photography business, taking, and selling nature photographs.

¶51 Claimant has kept no records of his income over the years, so it is impossible to verify how much work he has actually done. I note that some of his purchases seem too good to be true in light of the limited income he says he has had. He testified that in 1993 he and his brother bought land with a cabin for $30,000 with no money down. The cabin subsequently burned down and in 1996 he and his brother received $108,000 in an insurance settlement. Either the property appreciated at an extraordinary rate, or they purchased the property at an extraordinary discount, or they improved the property. Then claimant says he and a partner were able to purchase a motel for no money down. Then I note the entries in the medical records indicating he was engaged in construction. I am not persuaded that claimant has fully disclosed his work over the years.

¶52 I am persuaded that claimant's back pain between 1991 and 1998 was insignificant. I am unable to determine how significant it was from July 1998 to April 2001 or what events may have aggravated or exacerbated his pain. I am absolutely convinced that he exaggerated his back pain between 1998 and April 2001 to obtain narcotics. I am also persuaded that despite the claimant's denials, his renewed pain in 1998 was triggered by some sort of event. I am therefore unpersuaded that claimant's medical care between July 1998 and April 2001, was due to his industrial injury.

CONCLUSIONS OF LAW

¶53 This case is governed by the 1987 version of the Montana Workers' Compensation Act since that was the law in effect at the time of the claimant's industrial accident. *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶54 Claimant bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks. *Ricks v. Teslow Consolidated,* 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wicken Bros. Construction Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

¶55 Claimant settled his entitlement to compensation benefits, therefore, the only issue is his entitlement to payment for his medical care since 1998.[(2)]

¶56 If the claimant's medical care in 1998 and thereafter was the result of a natural progression of his 1988 injury, then it is compensable. *Burglund v. Liberty Mut. Fire Ins. Co.,* 286 Mont. 134, 950 P.2d 1371 (1997).

¶57 If not a natural progression, the issue is more complicated by the fact that the claimant's injury was in 1988. In 1989 the legislature amended section 39-71-407, MCA, to specifically provide that an insurer is not liable for a "subsequent nonwork-related injury to the same part of the body." (§ 39-71-407(5), MCA (1989); enacted by 1989 Laws of Montana ch. 184, § 1.) The 1989 amendment appears to modify the rule laid out in *Rightnour v. Kare-More, Inc.,* 225 Mont. 187, 732 P.2d 829 (1987), in which the Supreme Court held that "subsequent injury is compensable [under the original workers' compensation injury] if it is

the direct and natural result of a compensable primary injury, and not the result of an independent intervening cause attributable to the claimant's own intentional conduct." *Id*. at 189, 732 P.2d at 831. Therefore, I must analyze this case under *Rightnour* since it interpreted the law in effect at the time of the claimant's 1988 injury, and it is that law that applies here. Moreover, his moving the washing machine constituted "intentional conduct" under *Rightnour*.

¶58 Dr. Dietrich's testimony, which I have found persuasive, establishes that the claimant's April 2001 herniated disk and surgery were not due to any natural progression of his original 1988 injury. It also establishes, under the *Rightnour* standard, that it was not a "direct and natural result" of the claimant's 1988 injury. Dr. Dietrich's testimony shows that the disk herniation was not inevitable, indeed it was not even probable. At best, claimant's risk for reherniation was only 5%. Further, Dr. Dietrich's testimony directly attributed claimant's reherniation to his moving a washing machine. That testimony was credible and is directly supported by the facts that the claimant's acute problem and change in his MRI imaging occurred immediately after he moved the washing machine. Dr. Dietrich's testimony establishes that there is no continuous chain of causation with respect to claimant's April 2001 herniated disk and surgery.

¶59 The harder question is whether Chevron is liable for the claimant's medical care between 1998 and April 2001. Initially, I conclude that it is not liable for his prescriptions for narcotics. I am convinced that he exaggerated his pain and lied to his physicians to obtain drugs. He bears the burden of proof. He has failed to carry that burden: I am unable to determine what medications were medically necessary.

¶60 Similarly, I am unable to determine what medical visits were medically necessary. It is clear that some of his medical visits were calculated to obtain additional narcotics. Moreover, I am persuaded that some new event triggered his July 1998 visit to Manning but am unable to determine the nature or significance of the event because claimant has not fully disclosed information as to the event. Again, claimant bears the burden of proof and has failed to carry his burden of proving which medical visits were medically necessary.

JUDGMENT

¶61 Claimant has failed to persuade the Court that medical expenses since 1991 are attributable to his 1988 industrial accident. His petition for medical benefits is **dismissed with prejudice**.

¶62 Claimant is not entitled to his costs or other relief.

¶63 This JUDGMENT is certified as final for purposes of appeal.

¶64 Any party to this dispute may have twenty days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 5th day of March, 2003.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Cameron Ferguson
Mr. Joe C. Maynard
Submitted: February 20, 2003

1. Manning's records contain a release of Manning's records to Cathy Anderson at Crawford and Company but no release of medical records to Manning. (Ex. 16 at 3.)

2. No bills or records are submitted for Dr. Lewis' care in 1996. Lacking those records, claimant has failed to show that his 1996 prescriptions for narcotics are related to his back. In light of my finding that he is not a credible witness, I am unwilling to take his word that they were.