IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2003 MTWCC 4

WCC No. 2002-0564

NICHOLAS MARKOVICH

Petitioner

vs.

HELMSMAN MANAGEMENT SERVICES, INCORPORATED

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Claimant was hit in the head by a 20-pound wrench which fell from several feet above him. He suffered neck pain soon after the incident and a week later experienced low-back and leg pain. The low-back pain improved over the next couple of weeks and was not mentioned again in medical records until several months later. Meanwhile, claimant continued to have severe neck pain and ultimately underwent neck surgery. Even before that surgery, he complained of renewed low-back pain radiating into his legs. An MRI disclosed a herniated lumbar disk. The insurer, however, denied liability for the low-back condition, contending it is unrelated. An IME physician designated by the insurer opined that the low-back condition is unrelated to the industrial accident; claimant's treating neurosurgeon opined that it is related.

Held: The low-back condition is related to the industrial accident. The treating physician testified that it is related. The IME physician in his testimony provided support for the proposition that the herniated disk was caused by trauma and the only trauma in evidence is the industrial accident. The IME physician conceded that it was possible that the low-back condition was caused by the industrial accident. The treating physician rule, which gives greater weight to the treating physician's opinion, also comes into play since there is nothing in the experience, medical credentials, or reasoning of the IME physician which would cause the finder of fact to prefer his opinions over those of the treating physician. While the lack of persistence in the claimant's low-back complaints over the months immediately following his accident is a factor the Court must consider in determining causation, the treating physician testified that his condition may have waxed and waned, ultimately worsening. There is credible evidence of low-back complaints a week after the accident and of a worsening of his back complaints five months later.

Topics:

Causation: Medical Condition. An insurer is liable only for medical conditions and disability caused by the industrial accident. §§ 39-71-701 through 704, MCA (1999).

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-704, MCA (1999). An insurer is liable only for medical conditions caused by the industrial accident.

Proof: Conflicting Evidence: Medical. Where the claimant's treating physician and an IME physician designated by an insurer disagree as to causation, and the IME physician is not shown to have greater expertise or experience in the matter under consideration, and there is no other reason to prefer the IME physician's opinion, the opinion of the treating physician is entitled to greater weight.

Proof: Conflicting Evidence: Medical. Where the claimant's treating physician and an IME physician designated by the insurer disagree as to causation but the IME physician provides testimony which supports the proposition that the claimant's condition was caused by trauma, and the only trauma in evidence is the industrial accident, the treating physician's opinion concerning causation is persuasive.

¶1 The trial in this matter was held in Billings on October 17, 2002. Petitioner, Nicholas Markovich (claimant), was present and represented by Mr. Paul E. Toennis. Respondent, Helmsman Management Services, Incorporated, was represented by Mr. William J. Mattix.

¶2 Exhibits: Exhibits 1, 2, 4, 5, and 7 were admitted without objection. Exhibit 3 was withdrawn. Exhibit 6 was not offered.

¶3 Witnesses and Depositions: Claimant and Terry Ruff testified. The parties have also submitted depositions of Randolf P. Michael, Dr. John I. Moseley, and Dr. Dean C. Sukin for the Court's consideration.

¶4 Issues Presented: The sole issue presented for decision is whether the claimant's low-back condition is causally related to his September 22, 1999 industrial injury.

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

FINDINGS OF FACT

¶6 The claimant was a credible witness.

¶7 On September 22, 1999, the claimant was working as a pipe-fitter helper for Cennex Harvest State Cooperative (Cennex) at its Laurel, Montana refinery. He was working on the ground level, while another worker was working above him. The worker above him dropped

a hydraulic torque wrench weighing 20 pounds. The wrench fell a distance of 8½ to 10½ feet before striking claimant on the head. Claimant was wearing a hard hat and the wrench struck the left backside of the hat, knocking it off.

¶8 The claimant saw stars, although he remained conscious. He ultimately fell to the right and onto the ground. He felt dazed and numb and was unable to get up. Apparently out of fear of a neck injury, medics placed him on a backboard and transported him to St. Vincent Hospital in Billings. At the hospital claimant complained of "pain to the back of the head and to the neck." (Ex. 2 at 2.) The severity of his head and neck pain is indicated by the fact that he "required titrated doses of morphine to get his pain under control." (*Id*.) Cervical x-rays and a CT scan were done but were within normal limits. (*Id*.) He was discharged with restrictions allowing him to return to work in a sedentary position within a few days but not to full duty for at least a couple of weeks. (*Id*. at 3.)

¶9 Claimant thereafter treated his pain with medication and ice, but returned to work the next day. He initially was assigned to the Cennex office but did no actual work for the first two days. Thereafter, he performed office work, mainly filing.

¶10 A week and a half after the accident, claimant was assigned by Cennex to a light-duty inventory job which required walking, much of it on cement. After one hour the claimant noted that his back hurt. His pain was in his low back, buttocks, and down at least one leg into the calf and heel. His pain was alleviated by sitting down.

¶11 Claimant's low-back pain is mentioned in a physical therapy note of October 7, 1999, which was two weeks after the accident and shortly after the claimant began his inventory duties. (*Id*. at 57.) Physical therapy had been prescribed for claimant's neck (*id*. at 44) , but on October 7th the therapist wrote:

> Pt [patient] stated that his neck & Shl [shoulder] are feeling better **but his back has really been aching. "**I think it's probably from standing on that cement floor all day @ work."

(*Id*. at 57, emphasis added.) The physical therapy notes mention back pain again on October 21and October 25, 1999, indicating that it is "better" while his neck was not improving. (*Id*. at 62-63.) The PT notes do not reflect a total subsidence of the back pain.

¶12 Back pain is not thereafter mentioned in medical records until May 30, 2000. Meanwhile, on January 27, 2000, Dr. John I. Moseley, a neurosurgeon who examined claimant on that date, noted that claimant's "[l]ow back and legs are symptom free." (*Id*. at 69.) But on May 31, 2000, when he examined claimant again, Dr. Moseley noted that claimant reported "in the **past three months** he has had back pain going down the left leg." (*Id*. at 81, emphasis added.) There are no medical reports between January 30 and May 30, 2000.

¶13 Dr. Stuart Goodman, another neurosurgeon, examined claimant on May 31, 2000, and comments in his record of that date that claimant "has also been trying to walk a lot to stay in shape and has developed left leg pain radiating down the posterior leg with some numbness in the foot." (*Id.* at 14.)

¶14 The lack of recorded low-back and leg complaints between October 7, 1999 and May 30, 2000, plays an important part in the medical opinions expressed by Dr. Dean C. Sukin, an orthopedic surgeon, who examined claimant at the insurer's request. Claimant, however, testified at trial that he did have back pain between October 7th and May 30th, and had in fact reported the pain during some of the medical examinations he had during that time period even though those complaints were not recorded in the medical records. In this case, I find claimant's testimony credible, and here is why:

> ¶14a Claimant's back complaints on May 30 and 31, 2000 were similar to those reported to the physical therapist on October 7, 1999. His May report attributing his back pain to walking was similar to his belief on October 7th that his pain was brought on by standing. His reports and complaints, although many months apart are consistent.
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> ¶14b Claimant did not work after late October. According to his own testimony, his back pain subsided when not standing or walking.
>
> ¶14c On May 30, 2000, he reported the duration of his pain as three months and related to his walking to try to stay in shape. As stated earlier, there are no medical reports from January 30 until May 30, 2000, apparently because the request for neck surgery was in limbo.
>
> ¶14d Claimant's primary and overwhelming problem following his September 1999 industrial accident was his neck. While Dr. Scott Ross, a specialist in occupational medicine, brushed off claimant's neck complaints as simple cervical and trapezius pain, and released him to return to work without restrictions as of December 7, 1999 (*id.* at 142), less than two months after Dr. Ross' release, the claimant was diagnosed by Dr. Moseley with cervical radiculopathy. (*Id.* at 71.) Dr. Moseley recommended a posterior cervical foraminotomy. In a letter dated March 29, 2000, Dr. Moseley noted that claimant suffered "neurologic abnormalities" and had "numbness in his left arm and some weakness in his shoulder girdle." (*Id.* at 80.) He attributed claimant's cervical condition to his industrial accident (*id.*), and on August 10, 2000, performed surgery on claimant's neck, noting spinal cord and nerve root compression in his operative findings. (*Id.* at 84.)[(1)] The surgery was successful. (*Id.* at 95, 103, 108.)
>
> ¶14e Claimant testified that he had significant neck pain from the time of his accident until his surgery, at times taking hydrocodone for pain. Claimant's pain is

evident in the medical records. (*See* Ex. 2 at 47-64, 69, 71, 76, 124, 130, 148.) By the beginning of November, claimant was complaining of "significant discomfort" of his neck with significant aching and burning in his left arm. (*Id.* at 152.) The pain was significant enough for Dr. Gregg Singer, a physiatrist, to prescribe a "Medrol Dosepak" on November 9, 1999. (*Id.*) Both Drs. Moseley and Sukin testified in their depositions that the neck pain may have to some extent masked claimant's back pain. (Sukin Dep. at 40-42; Moseley Dep. at 16-18, 21.)

¶14f Referrals to medical specialists in the months prior to May 30, 2000, were for evaluation of claimant's neck, as would be expected given the severity and nature of his neck complaints. Dr. Singer, who initially saw claimant on October 12, 1999, noted that he was referred for "evaluation of neck pain." (Ex. 2 at 148.) Similarly, the referral to Dr. Moseley was for evaluation of possible nerve root irritation at C6-7. (*Id.* at 124.) It is entirely possible that claimant may have mentioned his back pain in passing to physicians treating him in October, November, and December and that those complaints were not noted on account of the focus on the neck. I note that Dr. Goodman, who saw claimant on May 31, 2000, devoted one sentence to claimant's back and leg complaints (quoted above in paragraph 13), and made no further mention of the matter in the rest of his notes, including in his impression.

¶15 Dr. Moseley's January 27, 2000 report states that claimant's "[l]ow back and legs are symptom free." (*Id.* at 69.) This note, along with claimant's report in late October that his back pain had improved, persuades me that claimant's back pain had largely subsided by January 2000. However, I am also persuaded that by March 2000, the back pain had recurred in response to claimant's attempts to keep fit by walking and that it thereafter increased. By the time of Dr. Moseley's examination on May 30th, he not only reported back and leg pain but also had a positive straight leg raising sign in his left leg at 30°. (*Id.* at 81.)

¶16 As noted earlier, claimant underwent successful neck surgery in August 2000. On December 11, 2000, he returned to Dr. Moseley for followup. (*Id.* at 110.) At that time he complained of "recurrent low back pain going down his left leg two weeks ago." (*Id.*) Dr. Moseley noted that claimant stated that he had "been having back and leg discomfort since his injury, although he has not focused on it because of his neck disease." (*Id.*) The doctor ordered an MRI.

¶17 An MRI was done and it showed:

"Minimal annular disk bulge at L4-5 with small to moderate sized superimposed broad based central and left paracentral disk herniation with a moderate sized sequestered disk fragment within the left lateral recess and left ventral epidural space of L5 as described above. There is also a small far left posterolateral annular tear and disk protrusion.

(*Id*. at 7, *and see Id*. at 111.) The MRI report also noted "lateral recess stenosis." (*Id*.)

¶18 Dr. Moseley saw claimant again on February 5, 2002. At that time he noted his impression of "[L]umbar radiculopathy" and recommended an updated MRI with a view to possible surgery. (*Id*. at 118.) At deposition he reiterated his recommendation for an MRI and predicted that surgery will be necessary. (Moseley Dep. at 10.)

¶19 Notwithstanding the caption in this case, the insurer at risk for claimant's injury was Liberty Northwest Insurance Corporation (Liberty). (Uncontested Fact 2.) Liberty has accepted liability for the claimant's neck condition and surgery but has denied liability for his low-back condition, alleging that it is unrelated to his industrial accident.

¶20 Both Dr. Moseley and Dr. Sukin testified on the causation issue. Dr. Moseley, as mentioned before, is claimant's treating physician and performed the surgery on claimant's neck. Dr. Sukin performed an independent medical examination (IME) of the claimant at the request of Liberty.

¶21 In his testimony, Dr. Moseley described claimant's disk protrusion as "a very large disk protrusion." (Moseley Dep. at 9.) He further testified that claimant's stenosis, as imaged in the December 1999 MRI, is probably congenital but that his "predominant problem" is the "disk herniation." (*Id*. at 11.) Most importantly, he testified that the "disk herniation is traumatically induced" and that the inducing trauma was the claimant's September 22, 1999 industrial accident. (*Id*. at 11, 19.)

¶22 In reaching his opinions, Dr. Moseley took into consideration the claimant's history of low-back complaints to medical providers. He noted that claimant's neck pain could have masked low-back pain. He also testified that the initial injury could have caused "a small rupture that gradually gets worse with activity, with exercise, with therapy, with work." (*Id*. at 16.) Finally, he noted that a herniated disk "can migrate out slowly, and sometimes in the early stages they won't have a lot of discomfort or it will be back pain and not necessarily leg symptoms." (*Id*.)

¶23 Dr. Moseley also addressed the mechanism of injury, testifying that the herniated disk could have been caused by either the blow to claimant's head being transmitted down the spine or the unexpected flexion of the spine following the blow. (*Id*. at 15.)

¶24 While acknowledging that it was "possible" that the claimant's industrial accident caused claimant's low-back problems (Sukin Dep. at 30), Dr. Sukin opined that the claimant's low-back condition is unrelated to his industrial accident. (*Id*. at 12.) However, he also testified that if the claimant's condition was due to trauma he

> would expect to see a high likelihood of a tear in the annulus, which is the O-ring of the disk, as well as seeing disk material, with minimal to no degenerative changes in

> the disk or degenerative changes in the surrounding elements around the spine, such as the posterior elements.
>
> If, however, this was a degenerative process, I would expect to see more of those degenerative changes, i.e., bone spurs, osteophytes, dehydration of the disk, things such as that.

(*Id*. at 32-33.) When questioned about claimant's low-back condition, particularly as evidenced by the MRI, Dr. Sukin acknowledged that the MRI showed a "disk fragment" and an "annular tear and disk protrusion." (*Id*. at 33.) He further acknowledged that the degenerative changes described in the MRI report were "mild." (*Id*. at 34.) Finally, and most importantly, he was asked,

> **[I]f in fact there are no other lifting incidents or traumatic incidents, would you agree with Dr. Goodman that his low back pain may be related to the accident?**

(*Id*. at 46, emphasis added.) He replied:

> **A. I can't disagree with that statement, no.**

(*Id*.)

¶25 There is no evidence of any other trauma or lifting which would explain claimant's symptoms or his herniated disk.

¶26 I find Dr. Moseley's opinions more persuasive for two reasons. First, his opinion that claimant's herniated disk most likely has a traumatic origin is supported by Dr. Sukin's testimony, thus I conclude that trauma produced the herniation. The only trauma in evidence which could have caused the herniation was the industrial accident.

¶27 Second, under the treating physician rule, the opinion of the treating physician must be given deference, all other things being equal. In other words, unless there is a good reason to prefer the opinions of a non-treating physician, the treating physician's opinion is controlling. In this case, I find no reason to prefer Dr. Sukin's opinions. Both he and Dr. Moseley are board certified, Dr. Sukin in orthopedic surgery (Sukin Dep. at 6) and Dr. Moseley in neurosurgery (Moseley Dep. at 7). No evidence has been presented which would demonstrate that orthopedic surgeons are generally more qualified regarding the issue at hand than are neurosurgeons, or vice versa. On the experience level, it is not clear how long Dr. Sukin has been in practice (at least 4½ years, Sukin Dep. at 5), but Dr. Moseley has been in practice since he completed his neurosurgical residency in 1979 (Moseley Dep. at 7). Dr. Moseley's practice includes spinal surgery. (*Id*.) I do not suggest that Dr. Sukin is less qualified than Dr. Moseley, but the evidence does not show that he is *more* qualified.

CONCLUSIONS OF LAW

¶28 This case is governed by the 1999 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).

¶29 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).

¶30 Section 39-71-704(1)(a), MCA (1999), requires the insurer to furnish medical care only for "conditions resulting from the injury." Compensation benefits are payable only for disability resulting from the industrial injury. §§ 39-71-701, -702, -703, MCA (1999). Thus, claimant must show that his low-back condition resulted from or was caused by his industrial accident.

¶31 The claimant has carried his burden of proof. While there are two conflicting medical opinions concerning causation, all other things being equal, the treating physician's opinion is entitled to deference.

> "As a general rule . . . . the testimony of a treating physician is entitled to greater evidentiary weight," although it is not conclusive. *Kloepfer v. Lumbermen's Mut. Cas. Co.*, 276 Mont. 495, 498, 916 P.2d 1310, 1312 (1996). At minimum, the treating physician is the tiebreaker where there is evenly balanced, conflicting medical testimony.

Key v. Liberty Northwest Ins., 2001 MTWCC 53, ¶ 30. In this case, the insurer has failed to provide good reason to prefer the opinion of Dr. Sukin. He has not been shown to have more expertise or more reasoned opinions than Dr. Moseley. Indeed, Dr. Sukin's testimony concerning the relationship of trauma to the claimant's herniated disk provides support for the treating physician's opinion.

JUDGMENT

¶32 Claimant's low-back condition is related to and was caused by his September 22, 1999 industrial accident. Liberty is liable for both compensation and medical benefits for that condition.

¶33 Claimant is entitled to his costs and shall file his memorandum of costs in accordance with Court rules.

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

¶35 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 31st day of January, 2003.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Paul E. Toennis
Mr. William J. Mattix
Submitted: October 21, 2002

1. Surgery was delayed because the insurer refused to initially authorize it. (Ex. 2 at 79.)