IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2003 MTWCC 10

WCC No. 2002-0547

MONTANA CONTRACTOR COMPENSATION FUND

Petitioner/Insurer

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer

RON RUSCO

Respondent/Claimant.

SUMMARY JUDGMENT

Summary: Dispute between two insurers as to which is liable for claimant's current condition. Claimant, a truck driver, had underlying back disease which was "lit up" and made symptomatic by a December 1998 fall at work. Liberty, which insured his employer, accepted liability. Thereafter, claimant suffered low-back and leg pain, which improved with multiple epidural injections and nerve root blocks. In December 1999 he was found at maximum medical improvement (MMI) but his treating physician had previously opined that his condition could deteriorate and require surgery. Meanwhile claimant continued working.

In March 2000 claimant required additional epidural treatment for his back and leg pain. Then, on April 12, 2000, while driving for his employer, he experienced an increase in pain when he drove over a bump. He was again treated with epidural injections. His back and leg pain again improved and he was found at MMI in July 2000, with no increase in impairment. Thereafter, his pain increased again and ultimately he required surgery. His physicians opined that the April incident was a temporary and immaterial aggravation and that his surgery was a consequence of his preexisting, pre-April 2000 condition. Based on those opinions, the second insurer, which has paid benefits since the April 2000 incident, moved for a summary judgment holding that the first insurer is liable for benefits after July 2000.

Held: The unrebutted medical evidence establishes that the April 2000 incident was a temporary aggravation and that the first insurer is liable for medical and compensation benefits after July 2000, including payment for claimant's surgery. The first insurer

presented no evidence to rebut the medical opinions, rather it argued that claimant's increase in pain and medical history create an issue of fact requiring denial of the motion. While the Court must consider that history, it cannot disregard unrefuted medical opinions unless there is good cause to do so. Since the claimant's history was considered by his physicians, and is consistent with their opinions, there is no reason to do so and no triable issue of fact.

Topics:

Injury and Accident: Aggravation: Generally. Liability, as between insurers, has been the grist of a number of decisions over the past few years. The rules are straightforward. If a claimant has reached MMI with respect to a first industrial injury and he thereafter suffers a work-related, permanent, and material aggravation of a medical condition, then the insurer at risk at the time of the aggravation is liable for compensation and medical benefits for the condition. If, on the other hand, the subsequent aggravation is temporary or immaterial, and the disabling condition results from a natural progression set in motion by a previous workers' compensation injury, then the insurer for the previous injury is liable for compensation and medical benefits. *Burglund v. Liberty Mutual Fire Ins. Co.*, 286 Mont. 134, 950 P.2d 1371 (1997).

Injury and Accident: Aggravation: Temporary Aggravations. Liability, as between insurers, has been the grist of a number of decisions over the past few years. The rules are straightforward. If a claimant has reached MMI with respect to a first industrial injury and he thereafter suffers a work-related, permanent, and material aggravation of a medical condition, then the insurer at risk at the time of the aggravation is liable for compensation and medical benefits for the condition. If, on the other hand, the subsequent aggravation is temporary or immaterial, and the disabling condition results from a natural progression set in motion by a previous workers' compensation injury, then the insurer for the previous injury is liable for compensation and medical benefits. *Burglund v. Liberty Mutual Fire Ins. Co.*, 286 Mont. 134, 950 P.2d 1371 (1997).

Summary Judgment: Criteria. A disagreement over the "interpretation" of uncontested facts does not give rise to a material issue of fact preventing summary judgment. *Stanley v. Holms,* 1999 MT 41, ¶ 32, 293 Mont. 343, 975 P.2d 1242, 293 Mont. 343 (1999). The party opposing a motion for summary judgment is entitled to a trial only when minds can "reasonably differ" as to the facts essential to the resolution of the legal issues in the case. *Schmidt v. Washington Contractors Group, Inc.,* 1998 MT 194, ¶6, 290 Mont. 276, 964 P.2d 34, 290 Mont. 276 (1998).

Summary Judgment: Disputed Facts. A disagreement over the "interpretation" of uncontested facts does not give rise to a material issue of fact preventing summary judgment. *Stanley v. Holms,* 1999 MT. 41, ¶ 32, 293 Mont. 343, 975 P.2d 1242, 293 Mont. 343 (1999). The party opposing a motion for summary judgment is entitled to a trial only

when minds can "reasonably differ" as to the facts essential to the resolution of the legal issues in the case. *Schmidt v. Washington Contractors Group, Inc.,* 1998 MT 194, ¶6, 290 Mont. 276, 964 P.2d 34, 290 Mont. 276 (1998).

Summary Judgement: Criteria. A court cannot substitute its own judgment for the unrefuted medical judgments of medical practitioners. While it has been said that a finder of fact, including a judge sitting without a jury, is not bound by the opinion of a particular expert, that holding has generally been made in cases where there is **conflicting** expert testimony. *E.g., Tefft v. State,* 271 Mont. 82, 94, 894 P.2d 317, 325 (1995). To disregard unrefuted medical opinions, there must be some rational basis to do so.

Proof: Conflicting Evidence: Medical. A court cannot substitute its own judgment for the unrefuted medical judgments of medical practitioners. While it has been said that a finder of fact, including a judge sitting without a jury, is not bound by the opinion of a particular expert, that holding has generally been made in cases where there is conflicting expert testimony. *E.g., Tefft v. State,* 271 Mont. 82, 94, 894 P.2d 317, 325 (1995). To disregard unrefuted medical opinions, there must be some rational basis to do so.

¶1 The issue in this case is which of two insurers is liable for the claimant's current low-back condition. Montana Contractor Compensation Fund (MCCF) moves for summary judgment on the merits of the case.

Summary Judgment - Issue and Initial Discussion

¶2 The issue in this case is which of two insurers is liable for the claimant's present back condition. Liberty Northwest Insurance Corporation (Liberty) was the insurer at risk when the claimant suffered an initial industrial injury on December 8, 1998. It does not contest its liability for that injury. Claimant returned to work in his same job - truck driver - following that injury. He then suffered a work-related flare-up of his back condition in April 2000. By that time, his employer had changed insurers, and MCCF was the insurer at risk. MCCF has been paying claimant benefits since April 2000 but alleges that claimant had not reached MMI prior to the April incident and that, in any event, any aggravation he suffered in April was temporary and immaterial. It seeks reimbursement of benefits paid to the claimant and a determination that Liberty is liable for further benefits.

¶3 Rule 24.5.329 governs summary judgments. Subsection (2) provides:

(2) Subject to the other provisions of this rule, summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and responses to requests for production, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Under this rule, which is the equivalent of Rule 56(c), *Mont.R.Civ.P.*, the moving party has the initial burden of advancing its motion for summary judgment, however, once the moving party has presented facts, which if uncontroverted, entitle it to summary judgment, the burden is on the opposing party to present other facts which demonstrate a true conflict of evidence requiring trial. As said in *Spinler v. Allen,* 1999 MT 160, ¶ 15, 295 Mont. 139, 983 P.2d 348:

The party moving for summary judgment has the initial burden of establishing the absence of any genuine issue of material fact which would allow the nonmoving party to recover and entitlement to judgment as a matter of law. Montana Metal Buildings, 283 Mont. at 474, 942 P.2d at 696. If this burden is met, the party opposing summary judgment must come forward with substantial evidence raising a genuine issue of material fact precluding summary judgment. Montana Metal Buildings, 283 Mont. at 474, 942 P.2d at 696. "Material issues of fact are identified by looking to the substantive law which governs the claim." McGinnis v. Hand, 1999 MT 9, ¶ 6, 972 P.2d 1126,¶ 6, 56 St. Rep. 39, ¶ 6.

¶4 In this case, both parties base their arguments on two sworn statements, one by claimant and one by Dr. Steven R. Speth, and various documents, especially medical records. The two sworn statements, taken pretrial, are essentially depositions: attorneys for all parties were present and participated. Verbatim transcripts were prepared. None of the parties challenge the authenticity of any of the exhibits.

¶5 After reading the initial summary judgment briefs in this case, it appeared to me that the issue in this case is a medical one, hence medical opinions are paramount. In reading Liberty's opposition to the motion, I did not find any reference to medical opinions *contrary* to those proffered by MCCF. I therefore wondered whether there is any dispute regarding the medical opinions and requested that Liberty file a supplement brief

stating whether it contends that there is any **medical testimony** which would support a finding that the subsequent incident at issue in this case was a material and permanent aggravation of his preexisting condition. If it [Liberty] contends that there is such testimony, it shall cite the testimony. . . .

(Order Requiring Further Briefing Regarding MCCF Summary Judgment Motion (May 23, 2002).)

¶6 Liberty thereafter filed a supplemental brief. However, it cited **no** medical testimony contradicting the opinions cited by MCCF. It proffered **no** new evidence. It did not indicate that it would call other physicians to testify. It did **not** claim that further discovery is necessary to enable it to respond to the summary judgment motion. Rather, it cited information from medical records and from claimant's sworn statement which it contends contradicts the medical opinions on which MCCF is relying. In that light, the motion for summary judgment is more in the nature of a submission of the case on an agreed record.

Undisputed Facts

¶7 The claimant is Ron Rusco. He is a party in this action and appears through counsel.

¶8 On December 8 ,1998, claimant injured his low back when he tripped and fell while working for D'Agostino Concrete. (Petitioner/Insurer's Motion for Summary Judgment, With Supporting Brief, Ex. A; Rusco Statement at 4.) At the time of his injury he was working as a truck driver. (*Id.*)

¶10 On December 8, 1998, D'Agostino was insured by Liberty. Liberty accepted liability for the December 8th injury and thereafter paid claimant benefits. (Response to Petition for Hearing.)

¶11 Following his December 8, 1998 fall, claimant experienced back pain, left leg pain, and left testicular pain. (Speth Ex. 6 at 136; Ex. 1 at 89.)[(1)]

¶12 On account of his continuing complaints, the claimant was referred to Dr. Steven R. Speth, an orthopaedic surgeon practicing in Bozeman. (Speth Ex. 6 at 136.)

¶13 Dr. Speth first examined claimant on June 4, 1999. (Speth Ex. 1 at 89.) He recorded claimant's history and complaints, in relevant part:

Hx: Ron is a 49 year old truck driver for DAgostino who has an on the job injury from 12/98. He apparently slipped on the ice falling on his back and left side against a street curb. This gave him acute low back pain and within the next *3-5* days had developed his leg symptoms.

He currently complains of 30% left iliolumbar low back pain and 70% constant left leg pain at the posterior buttock radiating into the thigh in a L4 distribution. This terminates at the medial malleoli. He also has left testicular pain and tingling and numbness in the L4 distribution. He states his left testicle feels like he has been kicked. He also states his right leg was painful at the knee immediately after the fall but now feels much better within the last 3-4 days. He states he still gets an intermittent sensation of his knee feeling like it is going to pop.

It was originally treated with chiropractics by Drs. Linebarger and Satchell. This has helped his low back pain greatly. He was also given a right shoe lift as well as instructions for home exercises and stretches. He has been taking ASA for a current cold but does not regularly take NSAIDs for his current symptoms and has not been taking any narcotics or muscle relaxers. He has not had any epidural injections.

Since his initial injury he feels approximately 40% better and has been able to return to work driving 10-12 hours per day. His symptoms are worse with walking which seems to make his leg numb, prolonged sitting seems to give him foot weakness. Lifting and performing home gardening or cutting the grass significantly aggravates his symptoms. His

best positions are short periods of sitting and standing as well as lying down and in general inactivity is better for him.

Dr. Speth diagnosed acute L4 radiculopathy and degenerative disk disease, especially at the L2-3 and L5-S1 levels. (*Id*. at 90.)

¶14 Dr. Speth ordered an MRI, which was done on June 11, 1999. The MRI identified severe degenerative disk disease at the L2-3 level; a L2-3 level disk bulge which "comes close, but does not obviously impinge the left L2 nerve sleeve"; some "neural foraminal narrowing on the left side" at the L2-3 level; degenerative facet disease at L4-5, along with neural foraminal narrowing on the left; and "severe degenerative dis[k] disease " at the L5-S1 level with a focal disc protrusion and foraminal narrowing." (Speth Ex. 2 at 95-96.)

¶15 Following the MRI, Dr. Speth recommended epidural injections and selective nerve blocks. (Speth Ex. 1 at 86.)

¶16 Epidural injections and nerve blocks were thereafter done by Dr. Duane Mohr. (Speth Ex. 5.) The first was done on June 30, 1999, and was a "[s]elective nerve root block of L2, on the left and epidural steroid injection." (*Id*. at 133.) Dr. Mohr subsequently did selective nerve blocks and epidurals on July 7 and 14, 1999.

¶17 On September 14, 1999, claimant was seen again by Dr. Speth. (Speth Ex. 1 at 83-84.) Claimant reported he was 75% better and still driving a truck but that his activities were severely limited. (*Id*. at 83.) He reported "persistent back pain," along with shooting pain down his left leg and some right leg pain. (*Id*.) Significantly, and prescience, Dr. Speth commented:

I have discussed with Ron the fact that the truck driving job with the associated vibrational stress and long sitting hours is not particularly helping his back condition. Unfortunately he has dyslexia and can't read or write and has found that truck driving is a suitable job for him. He will continue driving the truck at this time. . . .

(*Id*. at 84.) Dr. Speth recommended additional epidural injections and noted the possibility of surgery if his condition deteriorated. (*Id*.)

¶18 Claimant thereafter returned to Dr. Mohr for further epidural injections and nerve blocks. These were done September 16 and 23, 1999, November 23, 1999, and December 1, 1999. (Speth Exs. 5 at 124-131.) Following each of the procedures, Dr. Mohr noted improvement in claimant's complaints, and on December 1, 1999, he noted that he had "gotten total relief of his right leg pain. He has no pain at all. He is aware of groin pain on the left, which is the only pain left that bothers him now." (*Id*. at 124.) Dr. Mohr concluded, "There is no need for him to return." (*Id*.)

¶19 On December 14, 1999, Dr. Speth again saw claimant and noted:

Ron follows up. He has really done well. The selective nerve root blocks have completely relieved his radicular pain. He has tried to do low level exercises and has had some improvement with regard to back pain. He as returned to truck driving full time.

(Speth Ex. 1 at 79.) Dr. Speth declared claimant at MMI and referred him to Dr. John A. Vallin for an impairment rating. (*Id.*)

¶20 Dr. Vallin, who is a certified independent medical examiner, examined claimant on December 21, 1999. (Speth Ex. 3 at 65.) He agreed that claimant had reached MMI. He attributed claimant's lumbar radiculopathy to his December 8, 1998 industrial accident and rated claimant's impairment from the accident at 10%. (*Id*. at 65-66.) With regard to claimant's ability to work, he opined:

Ron is most likely capable of light to medium physical demand labor, though he has been given a 40 pound maximum weight lifting restriction which I would concur with. . . . He is currently driving a truck and is not experiencing any significant problems with prolonged sitting in this position. Therefore he is most likely capable of continuing on in his time-of-injury job given he his not required to load or unload.

(*Id*. at 66.)

¶21 Despite the findings of Drs. Mohr, Speth, and Vallin in December 1999, claimant continued to experience back and leg pain. In March 2000, the claimant returned to Dr. Mohr for treatment on account of pain. The first treatment was on March 17, 2000, at which time Dr. Mohr noted that even though claimant had done "very well" since his last [December 1999] epidural treatment, "He started to work three days ago, and has begun to have some pain in the last few days. This is a right sided, as well as left sided pain." (Speth Ex. 5 at 123.) Dr. Mohr proceeded with an epidural injection. (*Id*.)

¶22 On March 24, 2000, Dr. Mohr again treated claimant, noting that he was much improved from the prior epidural injections but was still experiencing "a little left groin pain, and I think that is coming from his L2 nerve root." (*Id*. at 122.) Dr. Mohr administered another epidural injection.

¶23 On March 29, 2000, claimant returned to Dr. Mohr, reporting that he was much improved and had "occasional groin pain on the left." (*Id*. at 121.) Dr. Mohr administered another epidural injection. (*Id.*)

¶24 Two weeks later, on April 12, 2000, claimant experienced increased back pain when he was jarred while driving his truck over a bump. The incident occurred at work. Claimant filed a claim for compensation and MCCF began paying compensation and medical benefits pursuant to a reservation of rights. (Petition for Hearing, ¶ 2, not contested by respondents.)

¶25 The increase in pain on April 12, 2000, caused claimant to seek treatment at the Emergency Room of the Bozeman Deaconess Hospital. The ER record provides the following information concerning the incident and claimant's history of ongoing back pain. Symbols and abbreviations have been spelled out.

50 year male with history [of] ongoing chronic lower back pain - with increased pain since this a.m. when he "jarred" back driving over a bump. Has typical pain radiating to left groin - **identical to past episodes**.

(Speth Ex. 4, emphasis added.)

¶26 Dr. Speth saw claimant briefly at the ER and recommended claimant return to Dr. Mohr for further epidural injections. (Speth Statement at 26; *and see* Speth Ex. 4.) Dr. Speth testified that claimant's complaints at the ER were consistent with his prior complaints. (Speth Statement at 26.)

¶27 Dr. Mohr thereafter did two epidural injections, one on April 12, 2000, and the second on May 4, 2000. (Speth Ex. 5 at 119-120.) On May 4th Dr. Mohr recorded that claimant "had almost total pain relief when he left." (*Id*. at 119.)

¶28 Dr. Speth saw claimant on May 30, 2000. At that time, he recorded claimant's continuing complaints of left groin and leg pain, along with back pain. Concerning the nerve root blocks and epidurals, he said:

Selective nerve root blocks at L2 as well as L4 have helped some and an epidural injection has perhaps helped more. **The benefits are only temporary.**

(Speth Ex. 1 at 72, emphasis added.) Dr. Speth recommended surgery, specifically, "a laminectomy at L2-3 with instrumented fusion at L2-3 and simultaneous bilateral L5-S1 neural foraminal decompression which could be accomplished through a central laminectomy." (*Id*.) At that time, claimant demurred regarding surgery, stating that he wanted "to wait given his improvement with the last epidural injection . . . ." (*Id*.)

¶29 Dr. Speth next saw claimant on July 6, 2000, at which time he recorded that claimant was doing fairly well. (Speth Ex. 1 at 70.) He noted that claimant "continues to enjoy significant relief from the epidural injection," although he also reported leg and back pain. (*Id*.) He opined that claimant was at MMI with respect to his April 12, 2000 "re-aggravation" and referred him to Dr. Vallin for "a closing examination and impairment rating." (*Id*.)

¶30 Dr. Vallin examined claimant on August 2, 2000. Dr. Vallin reviewed claimant's history and treatment. (Speth Ex. 3 at 63.) He recorded his complaints on August 2nd as "fairly constant LBP [low back pain]" with intermittent left and right leg pain. (*Id*.) He found no additional impairment from his last examination and opined that claimant's April 12, 2000 incident was "most likely temporary as he appears to have reached his baseline . . . ." (*Id*. at

64.) Finally, he indicated that claimant should be limited to light duty and should not be driving a truck. (*Id.*)

¶31 Claimant returned to Dr. Speth on August 24, 2000, reporting increased leg and back pain, especially leg pain. (Speth Ex. 1 at 68.) Regarding his history since his July 6, 2000 examination of claimant, Dr. Speth recorded:

Ron follows up. **He was last seen on 7/6 and declared MMI. He was doing well at that time post injection therapy.** He had subsequent impairment rating on 8/2 at which time he noted he had increased LBP [low back pain], left anterior thigh pain to the great toe and was managing effectively with anti-inflammatory medications. **Unfortunately in the interval he has significantly worsened and his leg pain is now greater than his back pain.** He has bilateral anterior thigh pain that extends to the knee and then on into the medial aspect of the great toe. Simultaneously has bilateral posterior calf pain worse with ambulation. His activities are significantly limited at this point and any physical activity aggravates his symptoms.

(*Id.*, emphasis added.) Dr. Speth recommended surgery. (*Id.*)

¶32 Ultimately, on January 14, 2002, the claimant had surgery. (Ex. B to Petitioner/Insurer's Motion for Summary Judgment, With Supporting Brief.)

¶33 Dr. Speth is the only physician who has testified in this matter. During his sworn testimony he stated unequivocally that the April 12, 2000 incident was only a temporary aggravation of the claimant's underlying condition and that claimant's current back condition is a continuation of his pre-April 12th back condition. (Speth Statement 20, 27-30.) He further testified that claimant has underlying back disease but that the disease was symptomatically lit up by his December 1998 injury. (*Id.* at 4, 12.) Finally, he testified that claimant's need for surgery was not a result of the April 2000 incident but rather the result of the natural progression of his condition following the December 1998 injury. (*Id.* at 32, 34.)

¶34 Dr. Speth was also asked whether the epidural injections in March 2000 indicated that claimant had not in fact reached MMI with respect to his original December 1998 injury. (*Id.* at 18.) The doctor indicated he was unable to express an opinion in that regard. (*Id.*)

Discussion

¶35 Liability, as between insurers, has been the grist of a number of decisions over the past few years. The rules are straightforward. If a claimant has reached MMI with respect to a first industrial injury and he thereafter suffers a work-related, permanent, and material aggravation of his medical condition, then the insurer at risk at the time of the aggravation is liable for compensation and medical benefits attributable to the condition. If, on the other hand, the subsequent aggravation is temporary or immaterial, and the disabling

condition results from a natural progression set in motion by the first injury, then the insurer for the original injury is liable for compensation and medical benefits for the condition. *Burglund v. Liberty Mutual Fire Ins. Co.*, 286 Mont. 134, 950 P.2d 1371 (1997).

¶36 The question the Court must answer in this case is whether there is conflicting evidence which entitles Liberty to an evidentiary trial. A disagreement over the "interpretation" of uncontested facts does not give rise to a material issue of fact preventing summary judgment. *Stanley v. Holms,* 1999 MT 41, ¶ 32, 293 Mont. 343, 975 P.2d 1242, 293 Mont. 343 (1999). The party opposing a motion for summary judgment is entitled to a trial only when minds can "reasonably differ" as to the facts essential to the resolution of the legal issues in the case. *Schmidt v. Washington Contractors Group, Inc.,* 1998 MT 194, ¶ 6, 290 Mont. 276, 964 P.2d 34, 290 Mont. 276 (1998).

¶37 In the present case, MCCF has presented the unrebutted opinions of two physicians that the April 12, 2000 incident was a temporary and immaterial aggravation of the claimant's back condition. Dr. Speth, who ultimately performed back surgery on claimant, opined that the April 12, 2000 incident was not the reason for the back surgery, rather the surgery was a consequence of claimant's preexisting, already symptomatic condition.

¶38 When I reviewed the initial briefs in this matter, I failed to discern any conflict in medical opinions. For that reason, I asked Liberty to specifically identify "any **medical testimony** which would support a finding that the subsequent incident at issue in this case was a material and permanent aggravation of his preexisting condition." See ¶ 5. I also asked Liberty to cite the testimony. In reply, Liberty argued that prior decisions of this Court make such testimony unnecessary and that I can find a permanent and material aggravation based on the claimant's testimony and medical reports concerning his condition. I am unpersuaded by Liberty's arguments.

¶39 While the claimant's history of pain and symptoms is certainly important in determining whether his April 12, 2000 aggravation was permanent and material, the issue of permanence and materiality are medical issues. In this case, both of the medical doctors who addressed the issue concluded that claimant's April 12th incident was a temporary and immaterial aggravation of his preexisting back condition. They further opined that following the incident the claimant returned to pre-incident baseline. **Liberty identified no contrary medical evidence which it might present at trial to raise a factual issue concerning medical causation.**

¶40 Claimant's prior medical history and his testimony are factors the Court must consider in the event of conflicting medical testimony. However, **none of the cases cited by Liberty** hold that the Court can disregard unrebutted medical testimony *when the opining physicians are aware of the claimant's history*. The Court cannot substitute its own *medical* judgment for the unrefuted medical judgments of medical practitioners. While it has been said that a finder of fact, including a judge sitting without a jury, is not

bound by the opinion of a particular expert, that holding has generally been made in cases where there is **conflicting** expert testimony. *E.g., Tefft v. State,* 271 Mont. 82, 94, 894 P.2d 317, 325 (1995).

¶41 There is case law holding that a court or jury may disregard even unrebutted expert testimony. In *Jangula v. U.S. Rubber Co.,* 147 Mont. 98, 108, 410 P.2d 462, 467 (1966), the Supreme Court said:

The rules relating to testimony of an expert witness have been set forth in Irion v. Hyde, 110 Mont. 570, 105 P.2d 666. The expert must first testify to the facts within his own knowledge or based upon his own observation upon which his opinion is based. He must have the training and experience to draw a correct inference from facts outside the range of ordinary human experience. The judgment of an expert will not support a verdict when opposed by undisputed facts and the dictates of common sense. Where, as here, the conclusions of the experts are based on facts which do not exist, or are the result of an inference, admission over objection is erroneous.

This is not one of those cases. The claimant's history was considered by Drs. Vallin and Speth. Dr. Speth was specifically cross-examined by counsel for Liberty. Liberty has not identified any more information it would present at trial which would provide a basis to disregard their opinions.

¶42 Moreover, the claimant's testimony and medical history are **not** inconsistent with the opinions of Drs. Vallin and Speth. Indeed, the claimant's medical history provides significant support for Drs. Vallin's and Speth's opinions. The nature of his complaints following the April 12, 2000 incident were not significantly different than before. Prior to April 12, 2000, claimant had undergone repeated epidural injections and nerve root blocks in an attempt to alleviate his continuing pain. He was better following each treatment, then would experience increasing pain which necessitated additional treatment. Indeed, even though he had been declared at MMI in December 1999, by March 2000 he required additional epidural treatments, the last of which was just two weeks prior to the April 12th aggravation. The pattern continued after April 12th following additional epidurals.

¶43 Moreover, prior to April 12th, the possible need for surgery was discussed. As set out in paragraph ¶ 17, on September 14, 1999, Dr. Speth expressly noted that conservative treatment might fail in the long run and that claimant's condition might deteriorate, thus requiring surgery. He also noted that claimant's continuing to drive a truck was ill-advised but probably necessary in light of his lack of education and other skills. His comments were prescient.

¶44 Liberty has presented no other information which would allow me to totally disregard the unrebutted medical opinions in this case. Therefore, MCCF is entitled to summary

judgment as to liability for compensation benefits after claimant was found to be at MMI from his April 12, 2000 temporary aggravation.

JUDGMENT

¶45 After July 6, 2000, Liberty is liable for compensation and medical benefits payable with respect to the claimant's back condition.

¶46 MCCF is entitled to reimbursement from Liberty for all benefits it has paid claimant since July 6, 2000, and with respect to medical expenses incurred since July 6, 2000.

¶47 MCCF is not entitled to costs or attorney fees.

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

¶49 Any party to this dispute may have twenty days in which to request a rehearing from this Summary Judgment.

DATED in Helena, Montana, this 19th day of February, 2003.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Bradley J. Luck
Mr. Larry W. Jones
Mr. Christopher R. Angel
Submitted: June 21, 2002

1. The exhibits to Dr. Speth's sworn statement are attached to Petitioners/Insurer's Motion for Summary Judgment, With Supporting Brief.