IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2001 MTWCC 9

WCC No. 9811-8105

RONNIE STACKS,

Petitioner,

vs.

TRAVELERS PROPERTY CASUALTY

and STATE COMPENSATION INSURANCE FUND,

Respondents/Insurers for

WESTERN STAFF SERVICES and SHARBONO CONSTRUCTION COMPANY,

Employers.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary of Case: Ronnie Stacks (Stacks) has a long history of back problems, including numerous aggravations following falls and other mishaps. During 1991 and 1993, he was injured while working for employers insured by the State Fund. The 1991 claim was settled, with medical benefits reserved to Stacks. The 1993 claim was accepted and eventually settled after the petition for hearing in this case was filed, again with medical benefits reserved to Stacks. On May 10, 1997, Stacks began working for an employer insured by Travelers and fell at work. Initially, his primary complaints involved his low back, but severe symptoms soon developed in his neck and arms, implicating his cervical spine. Stacks filed claims for workers' compensation against both Travelers and State Fund, followed by a petition for hearing in this Court against both insurers asking that the Court sort out liability for his low-back and neck conditions. Prior to trial, both insurers settled with Stacks, however, Travelers reserved a claim against the State Fund for indemnification. Trial proceeded on the dispute between the insurers, with Travelers seeking indemnification for amounts paid to Stacks, and each insurer seeking to hold the other liable for claimant's future medical benefits.

Held: (1) Under *Belton v. Carlton Transport*, 202 Mont. 384, 658 P.2d 405 (1983), and subsequent cases, including *Perry v. Tomahawk Transp.*, 226 Mont. 318, 735 P.2d 308 (1987), Travelers was the insurer at risk at the time of the May 10, 1997 incident and bears the burden of proving facts which would shift liability back to State Fund. (2) The Court

rejects Travelers' argument that no accident or injury occurred on May 10th because Stacks' leg "gave way" due to his preexisting condition. The credible evidence does not demonstrate that Stacks' leg gave way, rather he fell and slid down an embankment. (3) Based on the record as a whole, including the testimony of Dr. Paul Gorsuch, Jr., a neurosurgeon and Stacks' treating physician, the Court finds Travelers has proved claimant's 1997 fall caused only a temporary aggravation of Stacks' lumbar spine condition and that the aggravation ran its course within 12 weeks. After that 12 week period, the State Fund was liable for any compensation and medical benefits attributable to the low- back condition. (4) Travelers has not proven, however, that claimant's neck condition was only temporarily aggravated by the May 10th fall. In this unusual case, the Court finds as a matter of fact that the evidence neither preponderates in favor of a finding that claimant's preexisting condition was permanently aggravated, nor against that finding. Because Travelers bore the burden of proof on that issue, liability for compensation and medical benefits attributable to claimant's neck condition after the May 1997 fall, including all temporary total disability benefits paid since the injury, remains with Travelers. (5) Although State Fund failed to comply with the technical requirements of *Coles v. 7 Eleven Stores*, 217 Mont. 343, 704 P.2d 1048 (1985), after Stacks reached MMI with respect to his 1993 injury, that failure does not make State Fund liable for temporary total disability benefits after Stacks began working for Travelers' insured. *See Larsen v. CIGNA Ins. Co.*, 276 Mont. 283, 915 P.2d 863 (1996).

Topics:

Benefits: Termination of Benefits: *Coles*. Although the insurer conceded it failed to obtain the physician's determination required by *Coles* following an earlier injury, that insurer was not liable for temporary total disability benefits after claimant returned to work. See *Larsen v. Cigna Insurance Co.,* 276 Mont. 283, 294, 915 P.2d 863, 870 (1996).

Benefits: Termination of Benefits: Return to Work. Although the insurer conceded it failed to obtain the physician's determination required by *Coles v. 7 Eleven Stores,* Docket No. 2000, decided November 20, 1984, embraced by the Supreme Court in *Wood v. Consolidated Freightways, Inc.,* 248 Mont. 26, 30, 808 P.2d 502, 505 (1991), after claimant's earlier injury, that insurer was not liable for temporary total disability benefits after claimant returned to work. See *Larsen v. Cigna Insurance Co.,* 276 Mont. 283, 294, 915 P.2d 863, 870 (1996).

Causation: Medical Condition. Where claimant had a long history of back and neck problems, including prior workers' compensation claims, insurer at risk at time of workplace fall aggravating claimant's neck and back carried its burden of proving the fall caused only a temporary aggravation of claimant's lumbar spine condition, but failed to prove the aggravation to claimant's neck was only temporary.

Employment: Course and Scope. Insurer's argument that it was not liable for claimant's fall at work because claimant's leg "gave out" as the result of a preexisting condition is rejected where evidence indicated claimant in fact slipped and fell.

Injury and Accident: Aggravation: Generally. Under *Belton v. Carlton Transport*, 202 Mont. 384, 658 P.2d 405 (1983), and subsequent cases, including *Perry v. Tomahawk Transp.*, 226 Mont. 318, 735 P.2d 308 (1987), where a worker suffers two sequential industrial injuries affecting the same part of the body, the insurer for the second injury is initially liable for benefits and bears the burden of proof when seeking to shift liability back to the prior insurer. When a subsequent injury has arguably aggravated a preexisting condition, the second insurer avoids liability for that condition only upon proving the claimant had not reached maximum medical healing with respect to his prior workers' compensation injury or that the second injury did not in fact permanently aggravate the underlying condition. The second insurer carried its burden of proving that claimant's back condition was only temporarily aggravated, but failed to prove that the neck condition was only temporarily aggravated.

Injury and Accident: Aggravation: Temporary Aggravations. Under *Belton v. Carlton Transport*, 202 Mont. 384, 658 P.2d 405 (1983), and subsequent cases, including *Perry v. Tomahawk Transp.*, 226 Mont. 318, 735 P.2d 308 (1987), when a subsequent injury has arguably aggravated a preexisting condition, the second insurer avoids liability for the aggravated condition only upon proving the claimant had not reached maximum medical healing with respect to his prior workers' compensation injury or that the second injury did not in fact permanently aggravate the underlying condition. The second insurer carried its burden of proving that claimant's back condition was only temporarily aggravated, but failed to prove that the neck condition was only temporarily aggravated.

Injury and Accident: Subsequent Injury. Under *Belton v. Carlton Transport*, 202 Mont. 384, 658 P.2d 405 (1983), and subsequent cases, including *Perry v. Tomahawk Transp.*, 226 Mont. 318, 735 P.2d 308 (1987), when a subsequent injury has arguably aggravated a preexisting condition, the second insurer avoids liability for the aggravated condition only upon proving the claimant had not reached maximum medical healing with respect to his prior workers' compensation injury or that the second injury did not in fact permanently aggravate the underlying condition. The second insurer carried its burden of proving that claimant's back condition was only temporarily aggravated, but failed to prove that the neck condition was only temporarily aggravated.

Proof: Burden of Proof: Between Insurers. Under *Belton v. Carlson Transport*, 202 Mont. 384, 658 P.2d 405 (1983), and its progeny, including *Perry v. Tomahawk Transp.*, 226 Mont. 318, 735 P.2d 308 (1987), the insurer at risk at the time of the new injury or aggravation bears burden of proving facts that warrant shifting liability for subsequent medical and indemnity benefits back to the prior insurer.

Witnesses: Credibility. Claimant's conflicting testimony and proven poor recollection are grounds to discount his testimony when determining causation of the workplace fall.

¶1 Claimant, Ronnie Stacks (Stacks), filed a petition for hearing against both Travelers Property Casualty (Travelers) and the State Compensation Insurance Fund following a fall at work on May 10, 1997. Claimant had previously suffered work-related injuries in 1991 and 1993. The State Fund was liable for both of the prior injuries and had settled the 1991 claim on a full and final compromise basis, however, it remained liable for the 1993 injury. The claimant's petition requested the Court to sort out liability between Travelers and the State Fund.

¶2 Subsequent to the filing of the petition, both Travelers and the State Fund settled with claimant.

¶3 State Fund's settlement of the 1993 claim was approved by the Department of Labor and Industry (Department) on December 22, 1999. (Ex. 76 at 1.) Terms of the settlement included payment of $80,000 to Stacks. Medical benefits were reserved (*id*.), thus, the settlement did not cut off the State Fund's liability for medical treatment attributable to the 1993 industrial accident.

¶4 Traveler's settlement with the claimant was approved by the Department on April 11, 2000. Pursuant to the settlement, Travelers paid $12,500 to Stacks. (Ex. 75 at 1.) As with the State Fund settlement, medical benefits were reserved, thus Travelers continues to be liable with respect to future medical expenses payable on account of claimant's 1997 injury. The settlement also preserved Travelers' claims for indemnification from the State Fund for any of the benefits it had paid or would pay to Stacks in the future.

¶5 The parties notified the Court of the settlements. The issues remaining following the settlements concern liability between the two insurers.

¶6 A trial concerning the remaining issues was held May 9, 2000, in Helena, Montana. Travelers was represented by Ms. Sara R. Sexe. State Fund was represented by Mr. Greg E. Overturf. Ronnie Stacks participated only as a subpoenaed witness. A trial transcript has not been prepared.

¶7 Exhibits: Exhibits 1 through 46, and 50 through 81, were admitted without objection. Exhibits 47 through 49 were withdrawn.

¶8 Witnesses and Depositions: Ronnie Stacks, Denise Stacks, and Edward R. Tinker, Jr. testified at trial. The parties agreed that the depositions of claimant, Denise Stacks, Dr. Paul Gorsuch, Dr. Allen Weinert, and Dr. Jorge I. Ramirez, would be considered part of the record. The Court was present at the depositions of Dr. Paul Gorsuch and Dr. Allen Weinert.

¶9 Issues: Based on the issues set out in the pretrial order, and the arguments of the parties in connection with the issues, the Court restates the issues as follows:

1. Whether claimant's May 10, 1997 fall was caused by a preexisting medical condition for which the State Fund is liable, more specifically, whether his pre-existing condition caused his leg to give way, thereby causing him to fall?

2. If so, whether the State Fund, rather than Travelers, is liable for all injuries and aggravations ensuing from the fall?

3. If the State Fund is not responsible for or liable on account of the claimant's 1997 fall, did his 1997 fall aggravate either or both of claimant's preexisting neck and low-back conditions?

4. If the 1997 fall aggravated either or both conditions, were the aggravations permanent and material?

5. Based upon the answers to the foregoing issues, is Travelers entitled to indemnification for any of the benefits it has paid claimant and which insurer is responsible for future medicals expenses?

¶10 Having considered the pretrial order, the testimony presented at trial, the demeanor and credibility of the witnesses, the exhibits, depositions, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

¶11 Ronnie Stacks is currently 48 years old. (R. Stacks Dep. at 9, 44.) He did not graduate from high school and has worked primarily in construction. (*Id*. at 11.)

¶12 Stacks has a long history of falls and injuries dating back to the late 1970s. In 1977, he fell off a roof. In 1981, and again in 1982, he dislocated his left shoulder. (Ex. 51 at 261.) In 1983, he had a low-back injury. He was hospitalized in late 1983 for lumbar strain associated with bilateral leg discomfort. (*Id.* at 278.) When he left the hospital in 1983, he "slipped and landed on his right gluteal area." (*Id.* at 272.) During January 1984, he was carrying his daughter "when his right leg suddenly became numb and gave way on him, causing him to fall." (*Id.* at 269.) On October 31, 1984, Stacks visited an emergency room for low-back pain radiating into his right leg and reported that his "right leg goes out." (*Id.* at 154.) On July 12, 1985, he again strained his low back while at work and reported radicular pain and muscle spasms. (*Id.* at 40-43.) On November 23, 1985, Dr. Donald J. Paluska, an

orthopedic surgeon, diagnosed chronic ligamentous strain of the cervical and lumbar spine with mild functional overlay. (*Id*. at 56.)

1991 Injury

¶13 Stacks was next injured on September 30, 1991. He was working for Omo Construction Company which was insured by the State Fund. According to emergency room records, Stacks reported he was "lifting a heavy anchor rale [sic]" and "felt a snap and sudden pain in the lumbar area." (Ex. 34 at 1.) In a later statement, he also described a "popping sensation" in his neck. (Ex. 52 at 10-11.) A diagnostic imaging report from the day after the accident states:

> 1. There is anterior compression of T-11.
>
> 2. Grade One spondylolisthesis at L4-5 with a spondylolysis at L-5 on the right and possibly on the left also.
>
> 3. Secondary degenerative changes with osteophyte formation, sclerosis of the facets, and a mild scoliosis.

(Ex. 32 at 1, capitalized in original.)

¶14 Over the next several months, Stacks experienced soreness in his lower back and neck, muscle spasms, and numbness in his left hand. (Exs. 25 at 3-8, 52 at 20.) A CT scan taken during March 1992, indicated minimal cervical disk degeneration with bulging at C4-5, C5-6, and C6-7. (Ex. 27 at 3.) A scan of the lumbar spine showed "a disc herniation which could be coming from L4-5 extending inferiorly or from L5-S1 extending superiorly in the midline." (*Id*.) There was also "a diffuse disc bulge at the L5-S1 and slightly more prominent on the right side than on the left side." (*Id.*)

¶15 The State Fund accepted liability for Stacks'1991 injuries but in November of 1992 entered into a full and final compromise settlement agreement with him. (Ex. 52 at 40.) Only medical benefits were reserved.

¶16 Following settlement of the 1991 claim, Stacks continued to have back and neck pain. On December 15, 1992, he began treating with Dr. Allen M. Weinert, a board certified specialist in physical and rehabilitation medicine. (Weinert Dep. at 6.) During the initial examination, Stacks told Dr. Weinert he had **not** had previous low-back problems. (*Id.* at 8.) His statement, of course, was not true.[(1)]

¶17 In his deposition, Dr. Weinert summarized Stacks' medical conditions at the time. First, he noted "listhesis, lysis, at the L5 level, and some early degenerative changes." (*Id*. at 18.) Second, he noted "degenerative change in the cervical spine," including a "loss of vertebral height, which almost sounds like there's been an axial loading type of trauma to his C6 vertebrae." (*Id*.) He commented that prior reports made it "sound . . . like a compression

fracture there." (*Id*.) He also noted "degenerative discs at C4-5 andC5-6." (*Id*. at 22.) Third, he noted that thoracic spine imaging showed "considerable degenerative change with spurring at multiple levels." (*Id*. at 19.)

¶18 During 1993 Stacks' continued to have back and neck pain. On April 13, 1993, Dr. Weinert recorded: "This weekend he helped his son put in 70 feet of fence and following that he had a severe exacerbation of his neck pain and both of his hands swelled." (Ex 8 at 13.) During June 1993, Stacks went "to the Emergency Room with exacerbation of low back pain following lifting a 75 to 100# tool chest out of the bed of his pickup this morning." Stacks reported "severe low back pain and spasm since that time," as well as "some radiation of pain into the right lower extremity." (*Id*. at 19.) The following month, Stacks "tried to do some body work on his car . . . but experienced a severe increase in low back and right lower extremity pain after approximately 30 minutes." (*Id*. at 22.) During September 1993, Stacks visited Dr. Weinert for "an exacerbation of neck pain." (*Id*. at 30.) Dr. Weinert recorded:

> Ron returned to work as a painter at ASARCO a little over one month ago. He has noted significant improvement in low back pain, however, over the last week he has had progressive pain and stiffness in the neck. He cannot relate this to any specific incident or trauma.

(*Id*.)

1993 Injury and Subsequent Treatment

¶19 On October 8, 1993, Stacks was injured while working for Sharbono Construction Company (Sharbono) in Townsend, Montana. Sharbono was also insured by the State Fund, which accepted liability for the incident.

¶20 At deposition, Stacks described the incident as follows: "I was sliding [lumber] through my legs . . . I slipped and fell and broke my tailbone and jammed everything, all the way up." (R. Stacks Dep. at 24.)

¶21 Stacks was hospitalized for two days in Townsend. Several days after the injury he saw Dr. Weinert and reported he had "severe buttock and low back pain" and "intermittent numbness in the right big toe." (Ex. 8 at 32.) At the time of the appointment, Stacks was limping. Dr. Weinert's impression, as related to the buttock and low-back pain, was:

> 1. History of L5-S1 spondylolysis with grade I spondylolisthesis with recent exacerbation.
>
> 2. Possible recent sacral fracture.

(*Id*.)

¶22 On November 11, 1993, Stacks returned to Dr. Weinert, who wrote:

> Lumbar spine films from 10-18-93 including flexion/extension views failed to demonstrate any instability or acute changes. Spondylolysis at the L5 level with Grade I spondylolisthesis persists as noted in previous films. Partial compression fractures of the T11 and T12 levels were also evident as previously noted.

(*Id.* at 35.) Dr. Weinert recommended physical therapy for reconditioning. (*Id.* at 36.)

¶23 In December 1993, Stacks returned to Dr. Weinert, reporting low-back pain, and numbness and tingling in his thighs, as well as neck stiffness and headaches. (*Id.* at 38.) Dr. Weinert commented that "virtually nothing has happened since Ron's last appointment." (*Id.*) He advised Stacks to lose weight and stop smoking. (*Id.* at 39.)

¶24 On February 7, 1994, Stacks was treated at St. Peter's Hospital/Helena Family Physicians Clinic for a fall the previous day. According to the medical record: "He said he was walking along and his right leg gave out on him. He fell on his buttocks area. He is having some discomfort [in the] sacrococcygeal area and also going down his right hip and leg." (Ex. 26 at 3.)

¶25 On April 14, 1994, Stacks was examined by Dr. Ronald K. Hull on referral from Dr. Weinert. (Ex. 11 at 4.) Stacks reported constant pain in his low back, right buttocks, and right leg since the October 1993 fall. He claimed his symptoms had grown worse over time and now included headaches.

¶26 On June 1, 1994, Dr. Weinert placed Stacks at maximum medical improvement (MMI) for the 1993 injury and released him to light-duty work. (Weinert Dep. at 34; Ex. 8 at 63.) In his office note for that date, Dr. Weinert noted that claimant had some pain behavior and symptom amplification and had not complied with treatment recommendations. (Ex. 8 at 63.) He wrote:

> RECOMMENDATIONS: I reviewed again with Ron his current medical diagnoses. I cannot see any objective evidence of any change in his examination even back from 12-15-92 when he was first seen in consultation for a previous Work Comp injury. As therapy is not proven to be effective, nor has Ron followed through with recommendations, I can't see that further conservative measures can be recommended. In addition, I don't feel that Ron is a good surgical candidate as I am very skeptical that he will achieve any true functional benefit from surgical intervention despite the fact that he has known spondylolysis with Grade I spondylolisthesis.
>
> Therefore, I do feel Ron has reached maximum medical improvement. In my opinion he can return to work at the light physical demand level limiting lifting to 25 pounds on an occasional basis.

(*Id*.) He saw "no evidence of additional or new impairment," (*id*. at 64), and considered the October 1993 back injury "an exacerbation of a pre-existing condition." (*Id.;* Weinert Dep. at 34-35.) Dr. Weinert last examined Stacks on July 13, 1994. (Weinert Dep. at 70; Ex. 8 at 72-73.)

¶27 After Dr. Weinert released him to work, Stacks did "some" work on his own as a mechanic, working out of his brother's shop. (R. Stacks Dep. at 34.) Then on June 29, 1995, he applied for Social Security Disability Benefits. (Ex. 54 at 13.) His application was denied on November 15, 1996. (*Id*. at 22.)

¶28 Meanwhile, claimant continued to experience minor falls and injuries, as well as continued back and neck pain.

¶29 On March 10, 1995, Stacks began treating with Dr. James W. Crichton, who noted Stacks was a mechanic with "a lot of neck pain now. He has had two or three minor injuries. He banged his head into a fender on a car sliding on a mechanic's chair. Then he slipped on some ice." (Ex. 26 at 9.)

¶30 On July 24, 1995, Stacks saw Dr. Crichton because his right knee "gave out" when he got up during the night. He also reported back pain and told the doctor his business failed "mostly because he couldn't do the work." (Ex. 26 at 10.)

¶31 Stacks returned to Dr. Crichton on September 8, 1995. Dr. Crichton recorded:

> S: He says that he fell three days ago and now his neck and back hurt. He says "right leg gives out". It is hard to say what he means by right leg giving out. It doesn't sound like he has quadriceps weakness.
>
> O: With his pants off he walks somewhat uncomfortably but heel-and-toe walking, deep tendon reflexes equal, active, and symmetrical. Straight leg raising is unremarkable. Forward flexing is done with difficulty. Hands a foot from the floor.
>
> A: Low back muscle spasm. Palpable spasm especially in the mid lumbar area.
>
> P: Not a great deal to do here. I have explained to him before the exercises that he needs to do but it seems that he really doesn't do any of these and I did give him a prescription for some Soma but no other pain medicines. He did not ask for any.

(*Id*. at 11.)

¶32 Stacks returned to Dr. Crichton on December 21, 1995, complaining of neck and back pain. (*Id*.)

¶33 On June 12, 1996, Stacks saw Dr. Brooke Hunter, an orthopedic surgeon. He reported neck pain with numbness down into his right arm. Dr. Hunter noted:

> On exam he has normal ROM. Still a fair amount of pain behavior. Negative Lhermittes and negative Sperlings. No atrophy or fasiculations in the arm. He remains quite heavily muscled. He has a positive Tinels at the ulnar nerve at the elbow. Reports light touch sensation in ulnar distribution. No weakness to manual resistance testing. Deep tendon reflexes, brachial radialis biceps, triceps, pectoral are unremarkable. X-rays show significant C5-C6 and C6-C7 degenerative changes.

(Ex. 7 at 8.) Treatment wise, Dr. Hunter thought physical therapy and anti-inflammatory medication would be "a reasonable start." (*Id.)*

¶34 Stacks returned to Dr. Crichton the following month. Dr. Crichton recorded that claimant had been "camping a few days ago, loading some garbage cans and so forth and got a lot more pain in his neck." (Ex. 26 at 13.) The doctor observed "tremor in his right upper extremity." (*Id.*)

¶35 On August 27, 1996, Stacks returned to the emergency room at St. Peter's Hospital, reporting he "was at work yesterday when he slipped on a concrete floor, fell and struck the back of his head." (Ex. 34 at 2.) Stacks had vertigo, persistent headache, and a sense of unsteadiness. Dr. D.L. Kuntzweiler ordered spine films, which he read as follows:

> On my viewing of these it shows marked degenerative changes really from C3 on down. There is quite a bit of lipping. The spine is straight with loss of the normal lordosis. I don't see any acute fractures, no soft tissue swelling, no obvious fracture or dislocation. On the oblique films he does have some foraminal narrowing particularly distally.

(Ex. 34 at 3.)

¶36 On December 12, 1996, claimant saw Dr. Crichton for continuing back pain. Dr. Crichton noted:

> S: He says that he has grown tired of lying around and getting Social Security so he is returning to work in a body shop. He seems to have quite a lot of trouble with back discomfort still. For the most part he does the work he says but lately he has developed what his wife calls a knot in his back and also neck and low back pain.
>
> O: He walks somewhat stooped over. There is palpable back muscle spasm. There is a small area at about L1 or L2 right side where there is some palpable spasm. Otherwise no changes in lower extremity strength, deep tendon reflexes or gait.
>
> A: Low back pain.
>
> P: What he wanted was some Soma 350 mgs. And some Darvocet N 100. I gave him a prescription for 30 each with one refill on each.

(Ex. 26 at 17.)

¶37 Dr. Jorge I. Ramirez then treated claimant. He first saw claimant on January 3, 1997 for complaints of back pain. (Ex. 26 at 17.) He found tenderness in paraspinal muscles and "no real other abnormalities." (*Id.*) On January 20, 1997, Dr. Ramirez referred Stacks to physical therapy for "chronic back pain." (*Id.* at 18.) On January 27, 1997, Dr. Ramirez ordered a functional capacity evaluation (FCE). (*Id.*)

¶38 A FCE was performed on February 11, 1997. (Ex. 28 at 39-48.) The exam was deemed valid with "minimal symptom exaggeration." (*Id.* at 40-41.) The evaluator concluded that Stacks was qualified for "Light/Medium work" and recommended a work hardening program. (*Id.* at 48.)

May 10, 1997 Injury

¶39 On May 10, 1997, Stacks went to work for Western Staff Services (Western), which provides temporary workers to other employers. He was assigned to a temporary job at the Lewis and Clark County landfill. (R. Stacks Dep. at 39.) This was the first time Stacks had worked for anyone other than himself since his 1993 injury at Sharbono. (*Id.*)

¶40 While working at the landfill that day, Stacks fell.

¶41 Later that day, Stacks went to the emergency room at St. Peter's Hospital. An ER nurse wrote:

> 11:35. Pt. enters per w/c Pt. c/o lower back pain **states he fell at wk and slid down embankment**. Scratches noted on [illegible] back, pt. unable to move on own states extreme pain.

(Ex. 34 at 6, emphasis added.) A handwritten note by the physician who examined claimant says, "**Fell at work slid down bank, flat on back**." (*Id.*, emphasis added.) In his dictated history, the examining physician wrote:

> Mr. Stacks relates that he was at work. He **slid down an embankment and fell pretty much flat on his back**. He's complaining of pain over the sacral area, lower lumbar area where he landed. He's got an abrasion there. He's had problems with his back and neck in the past which reportedly is degenerative in nature.

(*Id.* at 4, emphasis added.)

¶42 The following day, May 11, 1997, Stacks went to Benefis Healthcare Emergency Room in Great Falls. The ER record sets out the following history as reported by Stacks:

> The patient is a 45-year-old, white male with a six-year history of back pain who injured himself yesterday. Apparently the patient was working at a landfill and **stepped backwards and fell onto his back**. Apparently there was a small trench and the edge of the dirt gave way.

(Ex. 50 at 303, emphasis added.)

¶ 43 At the time of his fall, Western was insured by Travelers.

¶44 Stacks filed claims with both Travelers and State Fund. The Travelers claim, dated May 13, 1997, reads: "Caller states: Employee was picking up paper out of landfill, **slipped & fell, cutting his finger and injuring his lower back.**" (*Id.* at 8, capitalized in original.) The record does not indicate whether Stacks or an employer representative supplied this information. On May 15, 1997, Stacks' attorney filed a Claim for Compensation with the State Fund. That document contains the first mention of Stacks' leg "giving out." It reads:

> Picking up garbage with stick; went to pick up some near embankment; **right leg gave out**, causing me to fall down embankment, landing on butt and sliding and hurting my back, scabbing back and cut right ring finger.

(*Id.* at 11, emphasis added.)

¶45 On May 28, 1997, Travelers accepted the claim under a reservation of rights pursuant to section 39-71-608, MCA. (*Id.* at 12.)

¶46 On May 15th, Dr. Paul Gorsuch, Jr., a neurosurgeon in Great Falls, began treating Stacks. Dr. Gorsuch's office note for that visit does not record a specific description of the May 10th fall. (Gorsuch Dep. at 9-10.)

¶47 At a deposition taken April 29, 1999, nearly two years after the incident, Stacks testified that he fell on May 10, 1997, because his leg gave out. "I was picking up around the culvert, and I went over to pick up some out of the ditch and **my knee gave out, my leg gave out causing me to fall back.**" (R. Stacks Dep. at 14.) When asked for further explanation, Stacks testified:

> A. It just gave out. When I get - - My lower back gets these muscle knots in there and it causes my right leg - - these muscles just cramped up and gave out.
>
> Q. Gave out at the hip or at the knee?
>
> A. Knee and upper part of my thigh there.

(*Id.* at 16.)

¶ 48 When asked **at trial** what happened on May 10, 1997, Stacks first testified that "he fell." He then testified he was "skewering" garbage, walked out to pick up more, and "went down." When asked whether he "fell or went down," Stacks stated, "I'm trying to think." He said he remembered walking, coming to a culvert, "then bam, I was down." He was asked if he remembered testifying at deposition that his knee "gave out." He did not remember that testimony, but went on to testify that his leg "gave out" frequently following the 1993 injury,

"anytime, anyplace." (Trial Test.)

¶49 Stacks conceded having memory problems, which he attributed to his various medications and surgeries. He also acknowledged that while his leg has "given out" in recent years, he has also "slipped and fallen." (Trial Test.)

¶50 Edward Tinker, Jr. (Tinker), the foreman at the landfill, testified at trial. He described the area where Stacks was working on May 10, 1997. The area had a ditch. Tinker did not see Stacks fall, but recalled Stacks saying he had fallen along one of the slopes. He did not recall Stacks saying his leg gave out. On cross-examination, he acknowledged that he may have assumed Stacks was on a slope when he fell.

¶51 According to Denise Stacks, her husband told her his leg gave out and he slid down an embankment, landing on his leg and back. She described several prior instances in which Stacks' leg had given out causing him to fall. (D. Stacks Dep. at 10-12.)

Medical Condition Following the May 10, 1997 Incident

¶52 The immediate diagnoses of claimant's condition following his May 10th fall were unremarkable. At St. Peter's ER, lumbar spine films were taken, which disclosed previously diagnosis spondylolisthesis and degenerative changes of the lumbar spine. (Ex. 34 at 4.) The ER doctor's diagnostic impression was: "Fall with contusion of the low back." (*Id.*) The diagnosis the following day, at the Benefis Healthcare Emergency Room in Great Falls, was back pain and finger abrasion. (Ex. 50 at 304.)

¶53 Stacks' initial visit with Dr. Gorsuch on May 15th focused upon his low-back and leg complaints. (Gorsuch Dep. at 56.) The doctor explained:

> [I]n my first office note, neck and arm complaints were number three on his list. The thing that was really killing him was his back and legs. That's what he went to the ER for primarily, in my understanding, was for that, and that's why he was referred to me.
>
> Then when we went through and listed and prioritized all his pains, he said, "Yes, I have all this neck and arm stuff too, and it gets worse with the falls. The thing really killing me now is the low back."

(*Id.* at 56-57.)

¶54 Through review of 1994 x-rays, Dr. Gorsuch noted spondylolysis at L5-S1 and a mild listhesis or "slippage in the alignment of the vertebral bodies there between the L5 and the sacrum." (*Id.* at 11-12; Ex 2 at 1-E.) He further noted possible lumbar stenosis and significant cervical stenosis. (Gorsuch Dep. at 12.) He believed the cervical problem was "primarily at the disk spaces." (*Id.* at 13.)

¶55 From this initial evaluation, Dr. Gorsuch believed some form of decompression and fusion surgery was indicated for both the lumbar and cervical spine, but should not be undertaken until Stacks quit smoking. He delayed further imaging studies until Stacks quit smoking.

¶56 On June 3, 1997, Dr. Gorsuch informed Travelers that "the need for further treatment including possible surgery is due to the exacerbation which occurred 5/10/97. I believe this is an aggravation of her [sic] pre-existing condition. **Whether or not it is a temporary aggravation remains to be seen**." (Ex. 2 at 1A, emphasis added.)

¶57 On June 5, 1997, Stacks was admitted to Benefis Healthcare Hospital for pain control and new imaging studies. His primary complaints had shifted to his neck and arm. (Gorsuch Dep. at 18, 57.) A cervical myelogram and CT scan showed a C3-4 disk protrusion and significant stenosis bilaterally at C5-6, C6-7, and C7-T1. (*Id.* at 19.) Dr. Gorsuch testified these findings correlated with Stacks' complaints of arm pain. (*Id.;* Ex. 2 at 1.) Electrical studies suggested an acute C8 problem, implicating the C7-T1 level as well. (Gorsuch Dep. at 25-26.)

¶58 On July 17, 1997, Dr. Gorsuch performed an anterior C3-4 diskectomy and fusion, a C6 and C7 hinge-door laminaplasty, and bilateral foraminotomies at C5-6, C6-7 and C7-T1 levels. (Ex. 2 at 8; Gorsuch Dep. at 28-29.)

¶59 While Stacks' recovery went well initially, by November 1997 he was experiencing significant right arm pain and numbness. (*Id.* at 35; Ex. 2 at 10a, 11). An MRI and plain x-rays taken November 4, 1997, indicated spinal stenosis (narrowing of the spinal canal) at the C3-4 level "secondary to a central posterior fullness as well as a congenitally small canal," bilateral neural foraminal narrowing at the C5-7 levels, and degenerative disk narrowing at the C6-7 level among other things. (*Id.* at 11.)

¶60 On November 13, 1997, claimant was admitted to Benefis Healthcare Hospital following yet another fall. Dr. Gorsuch examined him. In his November 14th discharge summary, he noted a "recent exacerbation of right arm pain suggestive of C8 or T1 radiculopathy on the right side as well as increased right hand weakness and new pain 2nd and 3rd digits of the right arm." (*Id.* at 12.) A cervical myelogram and CT showed "fairly marked root asymmetry [at] C7-T1 on the right . . . and C5-6 on the left . . . [with] lesser degrees of root cut off at 5-6 and 6-7." (*Id.*) A new EMG demonstrated "chronic radiculopathies at 6, 7 and 8." (*Id.*)

¶61 On February 17, 1998, Stacks was treated after yet another fall. Dr. Gorsuch wrote: "He states the pain has been gradually worsening. He did have a fall which seemed to flare it up more than usual but he's no longer held on the Soma and the Darvocet. He's starting to look like he did: agitated, moving, unable to keep the right arm still due to the pain." (*Id.* at 13c.)

¶62 By March 10, 1998, Dr. Gorsuch noted the likelihood of a second surgery. (*Id.* at 15.)

¶63 After evaluations and consults by three other physicians - Drs. Terry Jackson, Mike Luckett, and Fred G. McMurray, (*id*. at 17; ex. 61), Dr. Gorsuch performed additional cervical surgery on July 2, 1998. Specifically, he did a "left anterior cervical discectomy at C5-6, C6-7, and a C7-T1 followed by fusion using right tricortical iliac crest." (Ex. 2 at 25; Gorsuch Dep. at 42.) Dr. Gorsuch opined that the second surgery was related to the first in that the first attempt at decompression may not have succeeded. (*Id*. at 43.)

¶64 On October 13, 1998, Dr. Gorsuch again examined Stacks, noting: "Overall, the patient's doing better. He's surviving his Morphine taper, looks refreshed, rested, well kept. He doesn't have the nervousness or the right arm tremor that he has when he's so uncomfortable." (*Id.* at 49.) By the end of October, however, Stacks' wife called Dr. Gorsuch's office to report "Ron is have [sic] a great deal of pain on the right side of his neck just like before the surgery." (*Id.* at 50.)

¶65 Stacks thereafter continued to complain of neck and back pain. On March 2, 1999, Stacks called Dr. Gorsuch to report back and leg pain after putting an alternator on his car. (*Id.* at 55.) Dr. Gorsuch noted: "I offered to see him and admit the patient tonight to the hospital but I did advise them that I would not give him any more narcotics and that I thought he needed to come off the Soma." (*Id.* at 55.) Dr. Gorsuch felt that Stacks was too dependent on narcotics. (*Id*.)

¶66 During his deposition, Dr. Gorsuch was asked for an explanation for Stacks' continuing complaints. He responded:

> Because his underlying pathology, multiple pain generators, his history of multiple injuries. He's basically a chronic pain patient, which means that a large part of his pain was no longer functional pain. I mean, it wasn't necessarily indicating new damage. The psychology that goes along with a chronic pain patient was already in place and active.
>
> . . . the suffering component of the pain is increased but also has to do with his view of himself as crippled or not crippled, his view of his self-worth, and whether or not the pain circuitry is now what we'd call centralized or learned.
>
> Certain types of pain, you could take away the cause, but the pain would still persist, because the neurocircuitry that carries the pain has learned that and just keeps going and going and going. By the psychological aspects, it's a lot more than just it's hurting than it has to do with the whole view of himself and the world.

(*Id*. at 36.)

¶67 Both Drs. Weinert and Gorsuch testified in this matter. The Court was present during their testimony, and their testimony is deemed part of the trial (although taken pursuant to notices of deposition).

Dr. Weinert's Opinions

¶68 As noted earlier, Dr. Weinert treated Stacks between December 15, 1992 and July 13, 1994. However, he was provided later medical records and asked for opinions relating to the issues presently before the Court.

¶69 Long before Dr. Weinert's testimony in the matter, Travelers supplied him with additional medical records and asked him for his opinions relating to its potential liability. Following claimant's July 17, 1997 surgery, Travelers provided Dr. Weinert with additional medical records and asked about the impact of the May 10th fall. On July 31, 1997, Dr. Weinert responded:

> QUESTION: Was the need for surgery that Mr. Stacks had in July of 1997 the result of a progression of his numerous spinal problems or the result of his alleged injury in May of 1997?
>
> ANSWER: Unfortunately, I do not have an operative report to know what procedures were performed in July of 1997. I have preoperative notes from Dr. Luckett and Dr. Gorsuch, along with preoperative studies, which indicate spinal stenosis due to a right paracentral disk herniation at C3-4, as well as moderate stenosis at C4-5, C5-6 and C6-7 levels. **From review of prior records, it would appear that the C3-4 disk protrusion is a new phenomenon and may be due to the alleged injury of May of 1997, as there is no prior record of pathology at that level.** The foraminotomies that were discussed at C5-6 and C6-7 levels would be due to old degen-erative changes related to pathology prior to his May 1997 injury.
>
> QUESTION: Do you believe the fall that Mr. Stacks allegedly had in May of 1997 was the result of his pre-existing lumbar problems which caused previous falls, muscle spasms and numbness in his right foot and leg?
>
> ANSWER: I don't believe this question is answerable on a medically more-probable-than-not basis due to its circumstantiality. Mr. Stacks certainly has a history of multiple falls in the past. Prior neurodiagnostic tests of the lower extremities failed to demonstrate lumbosacral radiculopathy that would be causative for muscle weakness or give-way. Again, I don't believe I can answer this question.
>
> QUESTION: If Mr. Stacks did suffer an injury in May of 1997, did it cause a temporary or permanent aggravation of his pre-existing problems? If it was temporary, how long would it be until Mr. Stacks would have reached maximum healing and a medically stable condition as a result of the May 1997 incident?

ANSWER: **As discussed above, it would appear that the C3-4 right paracentral disk herniation may be a new injury suffered with the alleged fall of May of 1997.** Therefore, this new injury required definitive treatment. **Regarding Mr. Stacks' pre-existent problems in the lower cervical spine and lumbar spine, one would assume that without a new pathology in these levels, his condition would stabilize over a time course of six weeks to remotely twelve weeks. This would be, again, assuming no new or significant pathology occurred.**

(Ex. 8 at 75, emphasis added.)

¶70 On August 18, 1997, Dr. Weinert answered additional questions as follows:

QUESTION: Mr. Stacks' surgeon has indicated that he will likely need lumbar surgery in the future. Is the need for this surgery the result of a progression of his numerous spinal problems or the result of his alleged injury of May of 1997?

ANSWER: **The medical evidence would suggest that future surgery addressing the lumbar spine would be related to Mr. Stacks' pre-existent spinal problems rather than a direct relation to the May 1997 injury.**

QUESTION: Was the need for surgery that Mr. Stacks had in July of 1997 the result of a progression of numerous spinal problems or the result of his alleged injury in May of 1997?

ANSWER: **In reviewing the operative report of 07/17/97, the anterior C3-4 diskectomy and interbody fusion with tricortical iliac crest graft would be related to the more recent identified C3-4 right paracentral disk herniation, which may be due to the alleged injury of May of 1997.** The C6 and C7 hinge door laminoplasties performed on the left side with bilateral foraminotomies at C5-6, C6-7 and C7-T1 would be related to progression of his longstanding significant degenerative changes at those levels and unrelated specifically to the May 1997 injury.

QUESTION: If Mr. Stacks did suffer an injury in May of 1997, did it cause temporary or permanent aggravation of pre-existing problems?

ANSWER: **As per the 08/31/97 [sic] response, the right C3-4 paracentral disk herniation would be considered a permanent aggravation.** The lower cervical spine and lumbar spine pathology would be aggravated on a temporary basis, with expected resolution to baseline status in six to twelve weeks.

(Ex. 8 at 77-78, emphasis added.)

¶71 During April of 1998, Dr. Weinert was again asked by Travelers about ongoing treatment and whether a contemplated **second** surgery was related to the May 10, 1997 injury. After

referencing the developments of late 1997 and early 1998, as well as recent imaging studies, Dr. Weinert concluded:

> [I]t is evident that Mr. Stacks' ongoing symptoms are related to chronic degenerative changes of the cervical spine and some additional irritation noted at the left C5-6 level which would be a postoperative result of prior laminotomy foraminotomies which were performed due to chronic degenerative changes with narrowing of the neuroforamina due to bony spurring. **Again, it can be stated on a medically more probable basis that the anticipated surgery is being performed for chronic degenerative changes of the cervical spine and not due to the alleged injury of 5-10-97.**

(Ex. 8 at 80, emphasis added.)

¶72 Dr. Weinert's written opinions in response to Traveler's questions, can be summarized as follows:

- The 1997 fall permanently aggravated Stacks' cervical condition but only at the C3-4 level.
- The 1997 fall only temporarily aggravated Stacks' low-back condition.

¶73 During his deposition testimony before the Court, Dr. Weinert retreated from his opinion that only the C3-4 level surgery in July 1997 was due to the 1997 fall. His testimony was as follows:

> Q. (By Mr. Overturf) If I could just ask you that question as it was written. "Do you have an opinion as to whether the surgery done in July of 1997 was the result of the alleged injury in 1997, or due to the previous changes in Mr. Stacks' spine?"
>
> A. Well, again, I never did receive an operative report. I received the pre-operative notes which indicated that Drs. Gorsich [sic] and Luckett were planning to proceed with a discectomy fusion at the C3-4 level for right paracentral disc herniation at C3-4. That as I've stated is a new phenomenon or new injury, and would be unrelated to the 1991 or 1993 injuries. **That's all I can state.**
>
> Q. **And in addition, he had, I believe it was foraminotomies at several levels in the cervical spine, too. Do you have an opinion of whether those were related more recently to the 1997 fall, or were those due to previous degenerative conditions?**
>
> A. **I don't think I can answer. I can answer that I didn't think they were indicated at the time that I saw him - - from 1993 through 1994, they were not indicated; but whether his condition changed after that date, I can't answer that.**

(Weinert Dep. at 38, emphasis added.)

¶74 When asked a more general question as to whether the 1997 fall led to a temporary or permanent aggravation of Stacks' condition, Dr. Weinert responded:

> I guess when you say that he would resume his normal status, Ron's normal state has been pretty much chronic pain. He's been in and out of the various doctors' offices since the 1980s. And I guess number one, I would stand by my statement that unless new pathology was identified, I don't believe it was a permanent change in his status. And so unless someone can show that [sic] me that there's new pathology there, I feel that the slip and fall would have only caused a temporary aggravation. It shouldn't have caused a permanent change.

(*Id*. at 41.) Dr. Weinert conceded he lacked sufficient information to make a medical determination whether or not there was new pathology as the result of the 1997 fall. (*Id*. at 42, 44.)

¶75 Regarding Stacks' back problems, Dr. Weinert found it impossible to causatively distinguish among Stacks' many falls and injuries: "Where one injury ends and another injury starts is almost impossible to delineate." (Weinert Dep. at 23.)

¶76 Dr. Weinert was asked about the cause of Stacks' repeated falls over the years. He responded that he could only speculate on a cause, going on to say: "It can be anything from medications, to pain behaviors, to psychologic state, to objective medical problems with his back; and to date, no one has identified any of those as being the cause." (Weinert Dep. at 69.)

Dr. Gorsuch's Opinions

¶77 Dr. Gorsuch's testimony addressed both the neck and back conditions. With respect to the Stacks' low-back condition, he concurred with Dr. Weinert, opining that Stacks' fall on May 10, 1997, caused at most a temporary aggravation of his low-back condition. (Gorsuch Dep. at 27.) He testified that Stacks' low-back complaints after the 1997 incident were consistent with his pre-1997 x-rays and were a continuation of his preexistent condition. (*Id*. at 24, 47.)

¶78 Dr. Gorsuch had much greater difficulty in sorting out the causes of Stacks' neck condition.

¶79 He did not agree with Dr. Weinert's initial assessment that the disk protrusion at the C3-4 level represented new pathology not present before the May 1997 fall. He did agree with Dr. Weinert that pre-June 1997 imaging studies disclosed no evidence of disk protrusion. (*Id*. at 64-65.) He believed he would have noted prior evidence of a disk protrusion if such existed, testifying: "My guess is that either it wasn't there on previous ones or those studies just weren't done. But I don't remember." (*Id*. at 65.)

¶80 However, based on his observations of the C3-4 disk during surgery, Dr. Gorsuch suspected the C3-4 condition had been present for more than a couple of months, which means it predated Stacks' May 1997 fall. He testified that the dura appeared very toughened, suggesting chronic irritation and compression. (*Id.* at 30-31.) In the doctor's experience, the appearance of the disk indicated a problem of more than two months duration, which in turn suggested the May 10th fall did not cause the condition. But, on a more probable-than-not basis, Dr. Gorsuch could **not** say that the disk condition antedated the May fall. (*Id.* at 31-34.)

¶81 Dr. Gorsuch testified that it was difficult to determine causation or aggravation with respect to Stacks' other cervical abnormalities:

> Q. You've testified that the foramenon (phonetic) performed on Mr. Stacks' cervical spine, you believe those were due to - - rather than the May 10th fall, that's due to preexisting degenerative problems rather than the May 10th, '97 fall itself?
>
> A. The radiologic changes I would not attribute to the May 10th, '97 fall. The exacerbation of symptoms is a different issue. He says he was worse after the fall; therefore, I think he was exacerbated. It was a later exacerbation that precipitated the move to surgery. I don't know if that later exacerbation, when the left arm started going worse, was related to the fall or not.
>
> THE COURT: I'm totally confused here. Is there something that occurred between May 10th of 1997 and June 5 of 1997 that I'm not aware of?
>
> THE WITNESS: As far as an injury, I'm not aware of anything. His symptoms changed.
>
> THE COURT: Between May 10th and June 5?
>
> THE WITNESS: Yes, his spine was changed.
>
> THE COURT: And that's all you mean when you talk about exacerbation?
>
> THE WITNESS: **Yes. This guy's spine is like a house of cards. You might be able to take one card out and the house will still stand, but it's impossible to know which card. These injuries are like taking a particular card out. I don't know how on earth to apportion causality in him.**

(*Id.* at 78-80, emphasis added.)

¶82 Because Dr. Gorsuch's testimony did not neatly fit into legal criteria governing injuries and aggravations, with the consent of counsel, I attempted to determine how his opinions fit the legal criteria, asking whether the May 1997 accident caused a permanent worsening of Stacks' neck condition or hastened the need for new or additional treatment. The following testimony is the result of my attempt to pin these matters down:

BY THE COURT: Q. Let's ask the pathological problem or the physiological. Do you have an opinion as to whether or not the May 10th, 1997 fall materially worsened Mr. Stacks' physical condition vis-a-vis his cervical spine

A. No.

Q. You have no opinion on that?

A. Correct.

Q. Do you have an opinion as to whether or not it materially worsened his condition vis-a-vis symptoms or acceleration of required treatment? Let's just talk about symptoms.

A. For the neck?

Q. Yes.

A. No. Let me back up. Yes, I do have an opinion.

Q. What is that opinion?

A. That it increased his symptomatology.

Q. On a permanent basis?

A. I don't have an opinion about that.

Q. Okay.

A. We weren't thinking about the neck then [at the initial visit], so we didn't talk about it. As far as I know, his neck pain got better after the initial flare-up before it got worse again. I don't know. It was his back we were looking at. The neck was - - All of a sudden the neck was worse. I knew that occurred. As far as I know, his neck was worse from day one and stayed worse, but he didn't notice it because he was dominated by the low back pain. I never asked him those questions, so I don't know.

Q. The don't-know answer extends, based on everything that you know sitting here today?

A. Right.

Q. I just want to make sure that we're on the same page. The last question I'll ask you, and maybe Counsel want to try to refine this after I do this, is: Do you have an opinion, again, as to whether or not the May 10th fall accelerated his need for treatment of his neck?

A. No.

Q. No opinion?

A. Correct.

(*Id*. at 89-91.)

¶83 When asked whether the problems leading to the **second** surgery were the result of previous pathology as opposed to what happened in May 1997 and later, Dr. Gorsuch testified:

> Definitely related to the previous pathology and may have been exacerbated by subsequent events. That's going to be true for any problem in the cervical spine from now on, barring a very discrete fracture or something concrete like that.

(*Id*. at 43.) As I read his testimony, lacking some "concrete" injury, the natural progression of Stacks' pre-1997 cervical condition is responsible for his later cervical problems.

¶84 Dr. Gorsuch made three other points in his testimony which must be considered in resolving the issues before the Court. First, he testified that all of Stacks' cervical problems are interrelated: **"I don't think you could take any level of his cervical spine and say it's not related to what was going on at the other levels. They're all linked."** (*Id*. at 85-86.) This testimony is at odds with Dr. Weinert's testimony separating causation of the C3-4 disk surgery from other surgery which he later recanted. Second, Dr. Gorsuch testified that degenerative changes are sometimes, but not always, permanently aggravated by trauma. (*Id*. at 80.)

¶85 Finally, Dr. Gorsuch testified that Stacks' current disability is greater than his disability as measured by the February 1997 FCE. (*Id*. at 77-78 and *see* ¶ 38.) However, he could not assign the increased disability to the 1997 fall.[(2)] (Gorsuch Dep. at 77-78.)

Stacks' Testimony Regarding Impact of the May 1997 Fall

¶86 Stacks was asked how his condition after the May 1997 fall was different than before the fall. During his deposition, he testified:

Q. . . . After the May incident, how was your condition different?

A. My neck.

Q. That was primarily the problem, the main thing that was bothering you?

A. When I got hurt?

Q. Yes.

A. No, my lower back and my leg.

Q. Were your lower back and leg problems any different than they had been prior to the Sharbono - - excuse me, prior to the landfill accident?

A. Yes.

Q. The same type of pain, but greater?

A. Yes, ma'am.

Q. Has that pain gotten any better?

A. Since the operations?

Q. Yes.

A. The lower back and leg pain?

A. No, my neck still hurts, but my lower back is where my problem is now, and my right leg.

Q. Is your neck better, but it still hurts some?

A. Well, yes, it is a little.

MR. DOUBEK [claimant's counsel]: Is your neck a little better?

THE WITNESS: Yeah, a little bit.

Q. (By Ms. Sexe) Okay. It's still not what you want it to be, but it's a little better than it was?

A. Yes.

Q. Does it feel about how it did before the landfill incident?

A. Does it feel the same or worse?

Q. Yes, that's what I'm asking. How does it feel in comparison to how it felt before the landfill incident, right now?

A. About the same.

MR. DOUBEK: You understand, he's got a fused neck, so it's going to feel different.

MS. SEXE: Right.

Q. (By Ms. Sexe) In terms of the pain, I'm trying to find out what kind of pain you're having, if it's the same type of pain you were having before the landfill incident or not.

A. Yeah, yes.

(R. Stacks Dep. at 57-59.)

¶87 At the trial held during May 2000, Stacks testified that his neck was "fixed" by Dr. Gorsuch. In general, he "still has some pain" but his situation after the surgeries is "better than it was."

Denise Stacks' Testimony Regarding Stacks' Condition

¶88 Denise Stacks testified at trial and by deposition. She testified that all three injuries -- referring to the 1991, 1993, and 1997 workplace injuries -- caused "big problems" and were significant in the deterioration of her husband's physical condition. According to Denise, her husband had back and neck problems after the 1991 injury, but after the 1993 injury he "started having more complaints of his neck and his shoulders and his arms hurting, his lower back hurting, his legs giving out, watching him not physically be able to do anything that he used to be able to do." (D. Stacks Dep. at 7.)

¶89 Denise testified her husband's condition further deteriorated after the May 1997 incident:

> I've watched his right arm deteriorate down to just a very little bit of muscle mass in his arm. His arm shakes all the time. I've watched him try to get himself off the couch, and he can't pull himself up because his back is locked in a position to where he needs help to get up. I've watched him fall, just literally get up and fall because his right leg gives out. I've watched his left arm go through a complete spasm until they did the first surgery on it.

(D. Stacks Dep. at 9.)

Resolution

I. Cause of the May 10, 1997 Fall

¶90 Travelers argues that Stacks' preexisting conditions, for which the State Fund is responsible, caused his leg to give out and thereby caused him to fall on May 10, 1997. Irrespective of the legal issues raised by the contention, the Court must first determine whether in fact the contention is true.

¶91 After sifting the evidence, I am unpersuaded that Stacks' fall on May 10, 1997 was caused by his leg giving way on account of any preexisting condition for which the State Fund was liable. Initially, I am unpersuaded that claimant fell because his leg gave way. His initial reports to a coworker and to ER personnel were that he fell, not that his leg gave way. (¶¶ 41-42, 50.) Only after five days had elapsed did he contend that his leg gave way. (¶ 44.) Moreover, Stacks' testimony regarding his fall was conflicting and unreliable. (FN 1.)

¶92 Finally, Stacks' history of falls goes back more than 30 years, long prior to his 1991 and 1993 injuries. Medical testimony failed to provide any medical explanation relating his falls to his back or neck condition.

II. May 10, 1997 Fall as Cause of Temporary Total Disability

¶93 I am persuaded that the May 10, 1997 fall caused at least a temporary aggravation of Stacks' preexisting neck and back conditions, and prevented him at least temporarily, from working. In February 1997, Stacks underwent a FCE which found him capable of "Light/Medium work." (Ex. 28 at 40-41.) Though he was employed only briefly on the landfill job, he was functioning on that job until he fell. After the fall, he sought emergency treatment on account of "extreme pain." (Ex. 34 at 6.) Both Dr. Gorsuch and Dr. Weinert opined that the fall, at minimum, caused a temporary aggravation of Stacks' underlying, preexisting neck and low-back conditions. Neither insurer has contended that Stacks was able to work after the May 10th incident.

III. Permanent Aggravation

¶94 The more difficult question in this case is whether the aggravation was temporary and, therefore, immaterial to the Stacks' subsequent surgeries and disability. That question must in turn be divided into two parts. The first part concerns Stacks' low-back condition; the second, his neck or cervical condition.

¶95 With respect to Stacks' low-back condition, both Drs. Weinert and Gorsuch opined that the fall only temporarily aggravated claimant's low-back condition. Dr. Weinert indicated that Stacks' low-back should have stabilized within 6 to 12 weeks, and I adopt the 12 weeks as the outside limit for disability due to the temporary aggravation. Of course, by that end of that 12 week time, Stacks' primary problem was his neck.

¶96 In assessing the medical opinions regarding Stacks' neck, I give more weight to Dr. Gorsuch's opinions. I do so for several reasons. Dr. Gorsuch has more specific expertise to Stacks' neck condition and in fact treated the condition. His treatment included two surgeries. Dr. Weinert, on the other hand, did not have first-hand knowledge of Stacks' condition after July 1994, when he last treated claimant. Moreover, while providing written answers to Travelers stating that the 1997 fall permanently aggravated Stacks' cervical condition at the C3-4 level, when questioned during his deposition he retreated from his opinion, indicating that he did not have the actual operative report or sufficient information. With respect to the C3-4 disk herniation, he offered that it was "a new phenomenon or new injury, and would be unrelated to the 1991 or 1993 injuries. **That's all I can state.**" (Weinert Dep. at 38.) When asked about whether the foraminotomies performed by Dr. Gorsuch at lower levels were the result of the 1997 fall, he offered, **"I don't think I can answer. I can answer that I didn't think they were indicated at the time that I saw him - - from 1993**

through 1994, they were not indicated; but whether his condition changed after that date, again I can't answer that." (*Id.*, emphasis added.)

¶97 As set forth in greater detail earlier in this decision, Dr. Gorsuch did opine on a more-probable-than-not basis that Stacks' preexisting neck pathology was responsible for the surgeries, but qualified that opinion by pointing out that the preexisting pathology may have been "exacerbated by subsequent event." (¶ 56.) However, he was unable to give an opinion one way or another whether Stacks' 1997 fall permanently aggravated his neck condition. While he did opine that it increased Stacks' neck symptomatology, at least temporarily, he was unable to say that the increased symptomatology shortly after his fall was permanent. He did not know whether Stacks' neck was "worse" from right after the incident, or if it "got better after the initial flare-up [sic] before it got worse," (Gorsuch Dep. at 90), or whether it hastened his need for surgery. (*Id*. at 90-91;¶ 82.)

¶98 Dr. Gorsuch's inability to determine whether Stacks suffered a temporary flareup or permanent aggravation as a result of the 1997 injury makes more sense when Stacks' history is considered. That history shows that even before the 1997 injury his neck related symptoms waxed and waned, often in response to his activity level or incidents. For example, on June 12, 1996, Stacks saw Dr. Hunter reporting pain with numbness down into his right arm. In July 1996, he sought medical care from Dr. Crichton after he had been "camping a few days ago, loading some garbage cans and so forth and got a lot more pain in his neck." (Ex. 26 at 13.) The doctor observed "tremor in his right upper extremity." (*Id.*) Yet, on other occasions in 1996, his complaints to his physicians concerned his low back.

¶99 Given Stacks' underlying, preexisting cervical condition, his history of waxing and waning of his symptoms, the long-term degenerative nature of his condition, and Dr. Gorsuch's testimony, I am unable to find on a more-probable-than-not basis that Stacks' 1997 fall caused a new medical condition or permanently accelerated or worsened his preexisting cervical condition or his need for surgery. To make such a finding, I would need better insight into the issue than Dr. Gorsuch or be aware of other facts which would put me in a better position to evaluate the issue. The medical history, as I have indicated, shows a long history of waxing and waning of both Stacks' low-back and cervical conditions, often in response to his particular activities. He suffered repeated falls. Spinal imaging supports Dr. Gorsuch's opinion that he had long-term degeneration of his spine. Stacks' own complaints immediately following the 1997 fall were of low-back pain, not neck pain.

¶100 On the other hand, the evidence fails to persuade me on a more-probable-than-not basis that the 1997 fall did not cause any new medical condition (C3-4 herniation) or permanently accelerate or worsen claimant's preexisting cervical condition.

¶101 Finally, I am persuaded that if the 1997 fall either caused a new C3-4 herniation or accelerated or worsened Stacks' preexisting neck condition, then his entire neck condition

-- at all levels -- was permanently, adversely affected. Dr. Gorsuch's testimony on this point was convincing: **"I don't think you could take any level of his cervical spine and say it's not related to what was going on at the other levels. They're all linked."** (Gorsuch Dep. at 85-86, emphasis added.)

CONCLUSIONS OF LAW

¶102 The 1995 version of the Workers' Compensation Act applies to Stacks' fall since that was the law in effect on the date of his alleged injury. *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶103 An injury which is compensable under the Workers' Compensation Act is defined by section 39-71-119, MCA (1995), which provides in relevant part:

> 39-71-119. Injury and accident defined. (1) "Injury" or "injured" means:
>
> (a) internal or external physical harm to the body that is established by objective medical findings;
>
> . . . .
>
> (2) An injury is caused by an accident. An accident is:
>
> (a) an unexpected traumatic incident or unusual strain;
>
> (b) identifiable by time and place of occurrence;
>
> (c) identifiable by member or part of the body affected; and
>
> (d) caused by a specific event on a single day or during a single work shift.

¶104 Section 39-71-407(2), MCA (1995), expressly provides that an aggravation of a preexisting injury constitutes an injury within the meaning of the Act, stating relevant part:

> (a) An insurer is liable for an injury, as defined in 39-71-119, if the injury is established by objective medical findings and if the claimant establishes that it is more probable than not that:
>
> (i) a claimed injury has occurred; or
>
> (ii) a claimed injury aggravated a preexisting condition.

The injury definition does not require that permanent harm flow from the injury, thus injury includes "temporary" aggravations of preexisting conditions, *see Allen v. Treasure State Plumbing,* 246 Mont. 105, 110, 803 P.2d 644, 647 (1990).

¶105 In this case, there is ample evidence that on May 10, 1997, the claimant suffered an injury within the meaning of section 39-71-407(2)(a)(ii), MCA. All four of the accident criteria specified in section 39-71-119(2), MCA, are met. Both Dr. Weinert and Dr. Gorsuch

agreed that Stacks' suffered at least a temporary aggravation of his preexisting low-back and neck conditions.

¶106 Travelers argues, however, that the May 10th incident was caused by Stacks' leg giving way, therefore, it is not liable for any benefits. Its logic is summarized in its proposed findings, as follows:

> The Montana Supreme Court has stated that "there must be some reasonable connection between the injury suffered and the employment or the condition under which it is pursued." *Penny v. Anaconda Company*, 194 Mont. 409, 632 P.2d 1114 (1981). Here, there is **no** relationship between Stacks' fall and the employment or working conditions. This is borne out by the facts that Stacks could have been anywhere and his knee would have given way, causing him to fall.

(Respondent Travelers Indemnity Company's Amended Proposed Findings of Fact, Conclusions of Law and Judgment at 29.) Travelers' argument is unpersuasive since I have found as fact that Stacks' fall on May 10th was not caused by his leg spontaneously giving way. Travelers is liable for the fall.

¶107 The next issue is whether Stacks' injuries were only temporary, thus ending Travelers' liability upon resolution of the temporary effects of the injuries. Under the rule of *Belton v. Carlson Transport,* 202 Mont. 384, 658 P.2d 405 (1983), Travelers was required to pay temporary total disability benefits during the period Stacks was disabled on account of any temporary aggravation, *Allen v. Treasure State Plumbing,* 246 Mont. 105, 110, 803 P.2d 644, 647 (1990), and by analogy, for medical expenses related to the temporary aggravation. But it is not required to pay compensation benefits for any permanent disability resulting from the original, underlying condition, or for medical expenses after Stacks' temporary aggravation fully healed.

¶108 *Belton* has further application to this case: Where a worker suffers two sequential industrial injuries affecting the same part of the body, the insurer for the second injury is initially liable for benefits and bears the burden of proof when seeking to shift liability back to the prior insurer. When a subsequent injury has arguably **aggravated** a preexisting condition, the second insurer avoids liability for that condition **only** upon proving the claimant had not reached maximum medical healing with respect to his prior workers' compensation injury **or** that the second injury did not in fact permanently aggravate the underlying condition for which the prior insurer was liable. This principle is spelled out in *Perry v. Tomahawk Transp.*, 226 Mont. 318, 735 P.2d 308 (1987), where the Supreme Court stated:

> To escape liability for the left arm injury, Rockwood [the second insurer] had to prove by a preponderance of the evidence that the second injury did not aggravate the preexisting left arm condition and/or that claimant's left arm had not reached a

medically stable condition prior to the second injury. *Belton v. Carlson Transport* (1983), 202 Mont. 384, 658 P.2d 405. Rockwood had the burden of proof under *Belton*, 658 P.2d at 409, 410, wherein we stated,

> [T]he burden of proof is properly placed on the insurance company which is on risk at the time of the accident in which a compensable injury is claimed.

Perry, 226 Mont. at 320, 735 P.2d at 310; *see also, Richter v. Simmons Drilling, Inc.*, 241 Mont. 518, 522, 788 P.2d 308, 310 (1990). At trial, Travelers agreed that under *Belton* and its progeny, it bears the burden of proof.

¶109 Travelers does not take issue with Dr. Weinert's determination that Stacks reached MMI on June 1, 1994 with respect to his 1993 injury (Weinert Dep. at 35; Ex. 8 at 63); therefore the only remaining issue is whether it has provided persuasive evidence that Stacks 1997 injuries were temporary rather than permanent.

¶110 Travelers proved by a preponderance that the 1997 fall aggravated Stacks' low-back condition only temporarily, and that the aggravation had run its course within 12 weeks of the fall. Accordingly, beyond that 12-week period, the State Fund is liable for any compensation or medical benefits attributable to Stacks' low-back condition.

¶111 Stacks' neck condition is a different matter. In this unusual case, I have found as a matter of fact that the evidence preponderates neither in favor of a finding that Stacks' preexisting condition was permanently aggravated by the May 1997 fall nor in favor of a finding that it was not permanently aggravated. Dr. Gorsuch's answer to those questions was simply that he did not know, and I have no greater insight into those issues than does Dr. Gorsuch. Travelers' contention is not disproved, but it is also not proved either.

¶112 I have previously found persuasive Dr. Gorsuch's testimony that it is impossible to separate an aggravation at one cervical level from Stacks' overall cervical condition. Since Travelers failed to carry its burden of proof, I conclude that it, not the State Fund, is liable for all compensation and medical benefits attributable to Stack's neck condition after his May 1997 fall at work, including all temporary total disability benefits paid since his injury.

¶113 The only remaining issue is the effect, if any, of State Fund's admitted failure to comply with the *Coles'* requirements for terminating temporary total disability benefits. The *Coles'* requirements were adopted by this Court in *Coles v. 7 Eleven Stores*, Docket No. 2000, decided November 20, 1984, and embraced by the Supreme Court in *Wood v. Consolidated Freightways, Inc.,* 248 Mont. 26, 30, 808 P.2d 502, 505 (1991). One of the *Coles'* requirements is that the insurer obtain "*a physician's determination*, based on his knowledge of the claimant's former employment duties, *that he can return to work*, with or without restrictions, *on the job on which he was injured or another job for which he is fitted by age, education, work experience, and physical condition*." *Wood,* 248 Mont. at 30, 808 P.2d at 505 (italics in original). The State Fund agrees that the *Coles*' criteria applied at the

time it terminated Stacks' benefits following his 1993 injury. It also agrees that it failed to obtain the required physician's determination that Stacks could return to work and agrees it is liable for any temporary total disability benefits accruing between June of 1994 and May 10, 1997. (Ex. 78 at 1.)

¶114 Based on the State Fund's failure to follow *Coles*, Travelers argues that the State Fund is liable for temporary total disability benefits which Travelers paid to Stacks **after** May 10, 1997, which amounts to $9,133.18. (Ex. 80.) Its argument overlooks *Larsen v. Cigna Insurance Co.*, 276 Mont. 283, 294, 915 P.2d 863, 870 (1996), which held that the *Coles'* criteria are inapplicable once a claimant has returned to work. Here, Stacks returned to work on May 10, 1997, thus cutting off any of the State Fund's liability for continued temporary total disability benefits.

JUDGMENT

¶115 1. Travelers is liable for medical expenses relating to Stacks' low-back condition for the 12 weeks following his May 10, 1997 fall at the Lewis and Clark County Landfill. The State Fund is liable for any subsequent medical expenses for Stacks' low-back condition.

¶116 2. Travelers is liable for all temporary total disability benefits paid to Stacks following his May 10, 1997 fall at the Lewis and Clark County Landfill.

¶117 3. Travelers is liable for and shall pay for all medical expenses related to Stacks' cervical spine treatment incurred on and after May 10, 1997, including the 1997 and 1998 cervical surgeries.

¶118 4. Travelers is not entitled to indemnification for benefits it has paid Stacks.

¶119 5. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.

¶120 6. Any party to this dispute may have 20 days in which to request a rehearing from these findings of fact, conclusions of law and judgment.

DATED in Helena, Montana, this 1st day of March, 2001.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. John C. Doubek
Ms. Sara R. Sexe
Mr. Greg E. Overturf
Submitted: May 9, 2000

1. Stacks has made a number of conflicting statements regarding injuries and incidents. This statement is but one of them and I have concluded that he is not a reliable historian.

2. The increased disability might be the result of the natural progression of Stacks' preexisting conditions or because of wholly unrelated causes.