

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1998 MTWCC 11

WCC No. 9701-7682

GUY WALL

Petitioner

vs.

NATIONAL UNION FIRE INSURANCE COMPANY

Respondent/Insurer for

BARRETTS MINERALS, INCORPORATED

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: 40 year old mill worker with history of left knee problems felt excruciating knee pain upon dismounting a rail car ladder 12-18 inches off the ground. Although continuing that shift, he sought medical treatment from his treating physician, who diagnosed a medial meniscal tear with ongoing patellar tendinitis of the left knee. The treating physician, a board certified orthopedic surgeon with a one-year fellowship in arthroscopy and sports medicine, treats 400-500 knee conditions annually. Claimant continued to work until he experienced increased left knee pain while shoveling snow approximately five weeks later. His treating physician took him off work and recommended prompt arthroscopic surgery. Claimant filed two claims, one relating to the ladder dismounting and the second relating to shovelling. He had also filed an occupational disease claim the prior year relating to his left knee problem. The insurer denied all claims, relying on an IME opinion from an orthopedic surgeon whose credentials regarding knee conditions, if any, were not established and not inquired into by the insurer. In addition, although the IME physician believed claimant suffered from a knee condition which was 50% occupationally related, the insurer denied the OD claim in its entirety. Even after the treating physician challenged the insurer's position and recommended another IME with an expert in knee conditions and arthroscopic surgery, the insurer maintained its denial of all claims and did nothing further to investigate. The insurer also disregarded a warning from an RN case manager that if claimant "doesn't receive treatment, I worry that he may not be able to do the lightest duty alternative job."

Held: The claims are compensable and claimant is entitled to a penalty and attorneys fees. The insurer's arguments that no accident or injury occurred have no merit. Claimant experienced a significant traumatic event when stepping off the rail car ladder. Medical evidence indicated his prior knee problems had resolved and the condition following the incident was different. Claimant was a credible witness with a long, steady work history. His claims were supported by testimony of his treating physician, whose opinions are entitled to special weight since he knew claimant's condition both prior to and following the industrial incidents. Moreover, the treating physician's expertise in the specific condition was proven. Even if the dismounting incident were not considered a traumatic incident in the strict sense, a compensable injury can be proven with evidence of "an unusual result from a work-related strain" where internal or external harm is established by objective medical findings. Penalty and attorneys fees are warranted based on the insurer's unreasonable denial of the claim, reflected in its failure to ascertain the IME physician's qualifications for the condition at issue, denial of the OD claim despite the IME physician's opinion 50% of the condition was occupational, and disregard for some facts and for the opinions of the nurse manager and treating physician. TTD and medical benefits awarded, with penalty on both.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code annotated: section 39-71-119, MCA (1995). Where claimant credibly testified to stepping 12-18 inches from a rail car ladder to the ground, and falling to the ground in severe left knee pain, he established an accident and injury within section 39-71-119, MCA (1995). Even if the dismounting incident were not considered a traumatic incident in the strict sense, a compensable injury can be proven with evidence of "an unusual result from a work-related strain" where internal or external harm is established by objective medical findings. Credible medical evidence from claimant's treating physician, an expert in sports medicine and knee conditions who treated claimant's knee condition both before and after the incident, established that following the dismounting incident claimant's condition was different, with a different diagnosis and requiring different treatment.

Constitutions, Statutes, Regulations and Rules: Montana Code annotated: section 39-71-612, MCA (1995). Penalty and attorneys fees are warranted based on the insurer's unreasonable denial of the claim, reflected in its failure to ascertain the IME physician's qualifications for the condition at issue, continued reliance on the IME physician's opinions despite information suggesting the treating physician was more qualified, denial of an OD claim in its entirety despite the IME physician's opinion 50% of the condition was occupational, and disregard for some facts and for the opinions of the nurse manager and treating physician.

Constitutions, Statutes, Regulations and Rules: Montana Code annotated: section 39-71-2907, MCA (1995). Penalty and attorneys fees are warranted based on the insurer's unreasonable denial of the claim, reflected in its failure to ascertain the IME physician's qualifications for the condition at issue, continued reliance on the IME physician's opinions despite information suggesting the treating physician was more qualified, denial of an OD claim in its entirety despite the IME physician's opinion 50% of the condition was occupational, and disregard for some facts and for the opinions of the nurse manager and treating physician.

Constitutions, Statutes, Regulations and Rules: Workers' Compensation Court Rules: ARM 24.5.318. Where counsel failed to note objections to exhibits in Pretrial Order as required by ARM 24.5.318, exhibits admitted despite objections voiced at trial.

Attorneys Fees: Cases Awarded. Penalty and attorneys fees are warranted based on the insurer's unreasonable denial of the claim, reflected in its failure to ascertain the IME physician's qualifications for the condition at issue, continued reliance on the IME physician's opinions despite information suggesting the treating physician was more qualified, denial of an OD claim in its entirety despite the IME physician's opinion 50% of the condition was occupational, and disregard for some facts and for the opinions of the nurse manager and treating physician.

Attorneys Fees: Unreasonable Denial or Delay of Payment. Penalty and attorneys fees are warranted based on the insurer's unreasonable denial of the claim, reflected in its failure to ascertain the IME physician's qualifications for the condition at issue, continued reliance on the IME physician's opinions despite information suggesting the treating physician was more qualified, denial of an OD claim in its entirety despite the IME physician's opinion 50% of the condition was occupational, and disregard for some facts and for the opinions of the nurse manager and treating physician.

Evidence: Exhibits: Objection in Pretrial Order. Where counsel failed to note objections to exhibits in Pretrial Order as required by ARM 24.5.318, exhibits admitted despite objections voiced at trial.

Evidence: Expert Testimony: Physicians. As a general rule, the testimony of a treating physician is entitled to greater evidentiary weight, although it is not conclusive. At minimum, the treating physician is the tie breaker where there is evenly balanced, conflicting medical testimony. In this particular case, not only did the treating physician have experience with claimant's condition both pre- and post-injury, he had the greater medical expertise with respect to claimant's knee condition.

Injury and Accident: Accident. Where claimant credibly testified to stepping 12-18 inches from a rail car ladder to the ground, and falling to the ground in severe left knee pain, he established an accident and injury within section 39-71-119, MCA (1995). Even if the dismounting incident were not considered a traumatic incident in the strict sense, a compensable injury can be proven with evidence of "an unusual result from a work-related strain" where internal or external harm is established by objective medical findings. Credible medical evidence from claimant's treating physician, an expert in sports medicine and knee conditions, established that following the dismounting incident claimant's condition was different, with a different diagnosis and requiring different treatment.

Injury and Accident: Objective Medical Evidence of. Where claimant credibly testified to stepping 12-18 inches from a rail car ladder to the ground, and falling to the ground in severe left knee pain, he established an accident and injury within section 39-71-119, MCA (1995). Even if the dismounting incident were not considered a traumatic incident in the strict sense, a compensable injury can be proven with evidence of "an unusual result from a work-related strain" where internal or external harm is established by objective medical findings. Credible medical evidence from claimant's treating physician established that following the dismounting incident claimant's condition was different, with a different diagnosis and requiring different treatment.

Injury and Accident: Unexpected Strain or Injury. Where claimant credibly testified to stepping 12-18 inches from a rail car ladder to the ground, and falling to the ground in severe left knee pain, he established an accident and injury within section 39-71-119, MCA (1995). Even if the dismounting incident were not considered a traumatic incident in the strict sense, a compensable injury can be proven with evidence of "an unusual result from a work-related strain" where internal or external harm is established by objective medical findings. Credible medical evidence from claimant's treating physician, an expert in sports medicine and knee conditions, who treated claimant's knee condition both before and after the incident, established that following the dismounting incident claimant's condition was different, with a different diagnosis and requiring different treatment.

Medical Conditions: Depression. Where psychologist opined that claimant's depression was in response to the life adjustments necessitated by his injury and to the frustrations resulting from the continuing court processes that have been necessary to redress his injury, and insurer's conduct in adjusting the case was not reasonable, the depression was related to his injury and its treatment compensable. Penalties: Insurers. Penalty and attorneys fees are warranted based on the insurer's unreasonable denial of the claim, reflected in its failure to ascertain the IME physician's qualifications for the condition at issue, continued reliance on the IME

physician's opinions despite information suggesting the treating physician was more qualified, denial of an OD claim in its entirety despite the IME physician's opinion 50% of the condition was occupational, and disregard for some facts and for the opinions of the nurse manager and treating physician.

Physicians: Treating Physician: Weight of Opinions. As a general rule, the testimony of a treating physician is entitled to greater evidentiary weight, although it is not conclusive. At minimum, the treating physician is the tie breaker where there is evenly balanced, conflicting medical testimony. In this particular case, not only did the treating physician have experience with claimant's condition both pre- and post-injury, he had the greater medical expertise with respect to claimant's knee condition.

Procedure: Pretrial Order. Where counsel failed to note objections to exhibits in Pretrial Order as required by ARM 24.5.318, exhibits admitted despite objections voiced at trial.

Proof: Conflicting Evidence: Medical. As a general rule, the testimony of a treating physician is entitled to greater evidentiary weight, although it is not conclusive. At minimum, the treating physician is the tie breaker where there is evenly balanced, conflicting medical testimony. In this particular case, not only did the treating physician have experience with claimant's condition both pre- and post-injury, he had the greater medical expertise with respect to claimant's knee condition.

Unreasonable Conduct by Insurers. Penalty and attorneys fees are warranted based on the insurer's unreasonable denial of the claim, reflected in its failure to ascertain the IME physician's qualifications for the condition at issue, continued reliance on the IME physician's opinions despite information suggesting the treating physician was more qualified, denial of an OD claim in its entirety despite the IME physician's opinion 50% of the condition was occupational, and disregard for some facts and for the opinions of the nurse manager and treating physician.

¶1 The trial in this matter was held on November 14, 1997, in Helena, Montana. Petitioner, Guy Wall (claimant), was present and represented by Mr. Richard J. Pyfer. Respondent, National Union Fire Insurance Company (National Union), was represented by Mr. Donald R. Herndon.

¶2 Exhibits: In November 7, 1997 correspondence with the Court's Hearing Examiner, National Union stated that it had no foundation objections to the exhibits listed by claimant but said, "All other objections are reserved depending upon the manner and purpose for which these exhibits may be offered at trial." (November 7, 1997 Herndon letter to Ms. Clarice Beck, Court File.) At trial the Court held that National Union cannot reserve objections until trial. Rule 24.5.318 of this Court provides that the pretrial order must set

out any objections a party may have to the adverse party's exhibits. In relevant part, it states that the pretrial order must contain:

(g) a list of all exhibits to be offered by each party, including the grounds of any objections an adverse party may have to the admission of particular exhibits;

ARM 24.5.318(5)(g). Neither National Union nor claimant set forth any objections to the exhibits listed in the Pretrial Order. Exhibits 1 through 35 were therefore admitted.

¶13 Witnesses and Depositions: The only witnesses testifying at trial were the claimant and David Odermann, the claims adjuster in charge of adjusting the claim. The depositions of claimant, his wife (Sandra Wall), Daniel J. Downey, M.D., and James T. Lovitt, M.D., were submitted to the Court for its consideration.

¶14 Issues: The parties have stated the issues as follows:

1. Whether Petitioner suffered compensable industrial "accidents" on February 19, 1996 and/or March 23, 1996 within the meaning of § 39-71-119, MCA.
2. Whether Petitioner suffered an "injury" proximately caused by either or both of the industrial accidents alleged to have occurred on February 19, 1996, and March 23, 1996, within the meaning of § 39-71-119, MCA.
3. Whether Petitioner's claims should be processed and adjusted as an occupational disease claim pursuant to Chapter 72, Title 39, MCA.
4. Whether Respondent/Insurer unreasonably refused to pay benefits to Petitioner entitling Petitioner to an increase of an award of twenty percent (20%).
5. Whether the Respondent/Insurer and Employer shall be required to pay reasonable costs and attorney's fees to Petitioner.

(Pretrial Order at 2.)

* * * * *

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

FINDINGS OF FACT

¶16 Claimant is 40 years of age. In 1984 he began working at a talc mill operated by Pfizer Company in Dillon, Montana. He worked at the mill continuously until March 23, 1996. In 1990 Barretts Minerals bought the mill and claimant became an employee of that company.

¶17 Claimant initially operated a forklift and bagged and moved talc. Over the years he was advanced to other positions, including compactor operator, boiler operator trainee, equipment operator, relief supervisor and mill operator.

¶18 In February and March 1996, claimant was a relief supervisor and mill operator.

¶19 In the late 1980s the claimant suffered an injury to his right knee in a water skiing incident.

¶10 In the Spring of 1995, the claimant began experiencing pain in his left knee. The onset of pain occurred in conjunction with increased stair climbing at work.

¶11 On June 27, 1995, claimant sought medical treatment for his left knee from Dr. Daniel J. Downey. Dr. Downey's medical history for the initial visit noted that claimant had a painful knee for approximately two months due to stair climbing at work. (Ex. 1; Downey Dep. at 10.) He diagnosed patellar tendinitis of the left knee, noting that patellar tendinitis is typically due to overuse. (Downey Dep. at 11.) He prescribed muscle strengthening using an exercise bicycle and physical therapy. (Exs. 1, 23 and 25.)

¶12 Claimant continued working, albeit with pain. He was not taken off work.

¶13 Claimant completed physical therapy in July 1995. (Ex. 23 at 63.) His left knee pain resolved by September or October 1995, and he was thereafter able to work without difficulty.

¶14 On February 19, 1996, between 11:00 a.m. and noon, claimant was helping move rail cars used to haul talc. During the move claimant mounted a ladder on a rail car. As he stepped off the ladder onto the ground, he felt excruciating pain in his left knee and collapsed to the ground.

¶15 The distance between the bottom step of the ladder to the ground was twelve to eighteen inches.

¶16 Claimant lay on the ground for several minutes before getting up. He then continued working and completed his shift at approximately 7:00 p.m. His knee continued to hurt during the remainder of his work shift.

¶17 February 19, 1996, was a holiday - Presidents' Day - and claimant was the supervisor in charge of the mill.

¶18 Claimant's next day of work was February 22, 1996. On that date he reported the incident of February 19 to his supervisor. A written report of the incident was prepared. (Ex. 3.)

¶19 Claimant contacted Dr. Downey's office for an appointment on February 20 or 21, but was unable to obtain an appointment with the doctor until March 4, 1996.

¶20 Claimant continued working but had significant pain in his left knee.

¶21 Dr. Downey examined claimant on March 4. His office note for that date reported that claimant had been doing well with respect to his left knee since "last fall" until the February 19 rail car incident. (Ex. 27 at 76.) He noted that claimant suffered "increased pain since that time [February 19] with catching at the medial jointline." (Ex. 27 at 75.) Upon examination, he found a "positive McMurray's sign" and diagnosed a medial meniscal tear with ongoing patellar tendinitis of the left knee. (*Id.*) He prescribed physical therapy and noted that if the physical therapy was not successful then arthroscopic surgery should be considered. (*Id.*)

¶22 Claimant continued to work. He worked the graveyard shift on March 22-23, 1996. It snowed that day, and in the early morning hours of March 23 he experienced increased left knee pain while shoveling snow. He was unable to continue work and left work early. He never returned to his job with Barretts Minerals.

¶23 Claimant saw Dr. Downey two days later, on March 25, 1996. Dr. Downey noted that claimant experienced increased pain while shoveling snow. (Ex. 27 at 75.) Upon examination, he again found a positive McMurray's sign. He scheduled arthroscopic surgery for April 16, 1996 (*id.*) and took claimant off work (Downey Dep. at 67).

¶24 McMurray's sign involves the physician flexing the patient's knee and applying varus and valgus stresses on the knee in an attempt to evoke pain. (Downey Dep. at 14.) While there is some subjectivity in the test vis-a-vis the patient's perception of pain, the test is at least partially objective and is the best indicator of a torn meniscus. Along with history and the clinical examination, it is a more reliable indicator of a meniscal tear and the need for arthroscopic surgery than MRI or other imaging. (*Id.* at 14-15)

¶25 Dr. Downey is a board certified orthopedic surgeon. (Ex. 27 at 174; Downey Dep. at 3.) Following completion of his orthopedic residency in 1992, he did a one-year fellowship in arthroscopy and sports medicine. (Ex. 27 at 174; Downey Dep. at 34.) Seventy percent (70%) of his fellowship was devoted to knee conditions. (Downey Dep. at 52.) During his one-year fellowship, he examined and/or treated approximately 2,000 knee conditions. (*Id.*) Following his fellowship, Dr. Downey began an orthopedic practice in Dillon, Montana. Since then he has, on the average, treated 400-500 knee conditions annually. (*Id.*)

¶26 On July 27, 1996, claimant completed and filed a written claim for compensation with respect to the February 19 incident. (Ex. 8 at 15 and Ex. 33.) On July 29, 1996, he completed and filed a claim with respect to the March 23 snow shoveling incident. (Ex. 8 at 16 and Ex. 34.)

¶27 However, correspondence from National Union's adjuster shows that National Union was aware of the February 19 and March 23 incidents, and the scheduled arthroscopic

surgery, at least as early as March 25, 1996, and was adjusting the claim as of that time. (Ex. 6.)

¶28 The claim was adjusted by AIG Claim Services, Inc. (AIG). On March 26, David Odermann, a claims adjuster for AIG, wrote a letter to claimant. In the letter, he stated that he had received a call from Dr. Downey's office asking for authorization for the scheduled, April 16 arthroscopic surgery. The letter declined to authorize the surgery and asked for additional information. The full text of the letter is as follows:

I received a phone call on Monday, 3/25/96 from Dr. Downey's office, informing me that they were considering doing orthoscopic surgery on your left knee. This was apparently scheduled for 4/16/96.

Prior to authorizing any such surgery, I am going to need your entire medical records relating to injuries and medical treatments for your knees. With the limited information that you had previously provided, I sent a letter to Dr. Downey and obtained very limited information. There was really nothing that assisted us in setting forth a history of previous problems or treatments.

At this time, I am asking that you please contact all of your previous medical providers who treated you for any type of leg or knee ailments, especially those related to your previous knee surgery. Please provide a copy of the name of the treating physician or physicians, their phone number and addresses. When you do contact these medical providers, please ask them to contact me so that I can be certain that we're going to be able to arrange to obtain those medical records.

We'll look forward to hearing from those medical providers in the very near future, so as to be able to expedite this matter. Again, we can not authorize any further medical treatments until we have received that information.

Sincerely,

\s\ David L. Odermann

(Ex. 6.)

¶29 AIG then set up an independent medical examination by Dr. James T. Lovitt, who examined claimant on April 24, 1996. At that time he found no McMurray's sign and no evidence of patellar tendinitis. (Lovitt Dep. at 12.) He diagnosed claimant with a degenerative medial meniscus, which he opined had developed over a long period of time. (*Id.* at 15-17; Ex. 29 at 179.) He attributed the condition 50% to occupational factors and 50% to non-occupational factors. (Ex. 29 at 179; Lovitt Dep. at 24.) He found claimant to be at maximum medical healing. (Ex. 29 at 179.) Although claimant told Dr. Lovitt of the rail car incident, the doctor nonetheless opined that the event was meaningless and did not

constitute an injury to claimant's knee. (Lovitt Dep. at 9-10.) He did recommend a MRI, which he felt would show the condition of the meniscus. (*Id.* at 14, 20; Ex. 29 at 179.)

¶30 AIG set up Dr. Lovitt's IME examination through VRI, which is a private managed care company. Following Dr. Lovitt's report, the registered nurse coordinating the IME and inquiry into claimant's medical history sent a FAX to Odermann in which the RN said:

Even though Mr. Wall is at "maximum medical healing" per Dr. Lovitt, he continues to have symptoms - Should I initiate treatment?

If he doesn't receive treatment, I worry that he may not be able to do the lightest duty alternative job. Please let me know.

(Ex. 26, emphasis added.)

¶31 Neither AIG nor VRI set up a MRI for claimant's knee, as Dr. Lovitt had recommended.

¶32 Based on Dr. Lovitt's opinions, the insurer, through AIG, denied, and has continued to deny to this time, the February 19 and March 23, 1996 claims. It has also persisted in its refusal to authorize arthroscopic surgery.

¶33 Meanwhile, the April date originally scheduled for arthroscopic surgery came and passed. No surgery was performed as scheduled because of the failure of the insurer to authorize it. Despite the insurer's continuing refusal to authorize the surgery, it was finally done on December 31, 1996.

¶34 Dr. Lovitt is a board certified orthopedic surgeon. The evidence in this case does not show in what area of orthopedics he specializes. No information was presented about his practice. Dr. Downey understood that Dr. Lovitt is a spine surgeon (Downey Dep. at 30), but there was no direct evidence to support his understanding. More importantly, no evidence presented indicates that Dr. Lovitt ever had a fellowship in arthroscopic or knee surgery or that he performs arthroscopic knee surgery or sees patients with knee problems.

¶35 On August 12, 1996, Dr. Downey wrote to Shelly Bradley (Bradley), who is Odermann's supervisor. (Ex. 7.) The letter followed another examination of claimant on the day of the letter. Dr. Downey apprised Bradley of claimant's continuing knee difficulties, including "very sharp pain in the medial aspect of the knee" and occasional buckling of the knee. He provided her with his unequivocal opinion that the claimant suffered a "medial meniscal tear in his left knee," noting that the other possibility was "a lesion of the articular cartilage on the femoral condyle which can mimic a meniscal tear but also can be treated with arthroscopic surgery." Dr. Downey stated in unequivocal language that claimant's knee condition precluded his return to work.

¶36 The letter was lengthy and Dr. Downey went on to state his disagreement with Dr. Lovitt's opinions. He wrote:

I do not agree with Dr. Lovitt's opinion in his independent medical evaluation in that :

1. He recommends an MRI which is not the diagnostic imaging study of choice by most people who have done fellowship training in sports medicine and arthroscopy. This is supported in the recent literature. Careful examination and history gives information that is as accurate as an MRI according to one recent study.

2. Guy Wall's injury occurred on the job February 19, 1996 when he stepped off a railway car. It is not common for people that are 39 to spontaneously have meniscal cartilage tears and I completely disagree with Dr. Lovitt's opinion that his injury is 50% due to age. I think it is 100% work related.

(Ex. 7 at 13.)

¶137 Downey testified that a "degenerative meniscal tear," as diagnosed by Dr. Lovitt, was unlikely. "I don't think that a degenerative meniscal tear is, is likely in a 38-year-old patient at all, particularly with the history of trauma." (Downey Dep. at 33.)

¶138 In a final paragraph of his letter to Bradley, Dr. Downey pointed to his own experience as a specialist in arthroscopic surgery and suggested that if the insurer wanted to rely on an IME, then another IME should be performed by someone specializing in arthroscopic surgery. He wrote:

In conclusion, I would recommend that if you wish him to have another independent medical evaluation that you have a doctor who is fellowship trained in arthroscopic surgery, such as myself, evaluate him. Personally, I don't think this is necessary as this is not a hazy case and in my opinion is very straight forward. Cases such as this make up a large percentage of my practice.

(Ex. 7 at 14.)

¶139 Dave Odermann received a copy of the Downey letter, although it is not clear when exactly he received it. He certainly had it prior to the time of the trial.

¶140 Although Bradley was Odermann's supervisor, Odermann continued to have responsibility for the claim.

¶141 Despite Downey's letter, and his admonition that the insurer should obtain an independent medical opinion from a physician specializing in arthroscopic surgery, Odermann did not schedule another IME or make any further inquiry concerning Dr. Lovitt's specific expertise in knee conditions or arthroscopic surgery. At trial, Odermann testified that there was no need to further inquire into Dr. Lovitt's experience. For him, and the insurer, it was sufficient that Dr. Lovitt was a board certified orthopedic surgeon.

¶142 On September 24, 1996, more than a month after the Downey letter, Mr. Donald R. Herndon, an attorney for the insurer wrote to the attorney for claimant. (Ex. 5.) In his letter

he noted the claimant had filed three claims, one on July 6, 1996, for occupational disease, one for the February 19 incident, and one for the March 23 snow shoveling incident. The letter went on to state that the occupational disease claim had been denied and referred to an occupational disease panel. It then went on and gave notice that the other two claims were being denied because the reported incidents "are not accidents within the meaning of Section 39-71-119, MCA" and because the left knee problems "appear to be essentially indistinguishable from those found by Dr. Downey on 6/27/95, which predates all three claims."

¶43 The reference in Herndon's letter to a July 6, 1996 occupational disease (OD) claim was erroneous. The OD claim was filed on July 6, 1995 (Ex. 28), a fact that is apparent from the last paragraph of Herndon's letter.⁽¹⁾

¶44 Herndon's letter gave notice that the insurer was denying **every** claim filed by claimant and doing so **despite** the facts that Dr. Lovitt had attributed 50% of claimant's knee condition to occupational factors and that **no** physician had provided an opinion disputing that claimant was suffering from a real medical condition involving his knee which was in part attributable to his job.

¶45 At trial, Odermann acknowledged his awareness of the treating physician rule, which provides that the testimony of the treating physician, although not conclusive, is entitled to great weight. *EBI/Orion Group v. Blythe*, 931 P.2d 38, 42 (Mont. 1997).

¶46 The insurer's denial of all claims was unreasonable. Despite the fact that the information available to the insurer shows that Dr. Downey has more expertise in knee conditions and arthroscopic surgery than Dr. Lovitt, and the fact that Dr. Downey is the claimant's treating physician, the insurer has persisted in deferring to Dr. Lovitt. The adjuster did not care one whit whether Dr. Downey had more expertise than Dr. Lovitt. He was interested only that Dr. Lovitt opposed surgery and felt that the incidents of February 19 and March 23 did not amount to injuries. The adjuster also disregarded the May 15, 1996 warning of a RN reviewer from VRI, that if claimant "doesn't receive treatment, I worry that he may not be able to the lightest duty alternative job." (Ex. 26.)

¶47 Claimant continued to have knee problems. Dr. Downey saw him again on November 5, 1996. At that time, claimant was continuing to have pain. Upon examination, the McMurray sign was negative; however, the physical examination showed "mild posterolateral tenderness." (Ex. 27 at 148.) Suspecting a "chronic pain problem in his left knee with probable healing of his meniscal tear," Dr. Downey referred claimant to Dr. Aaron Sable, who specializes in physical medicine. (*Id.*)

¶48 Dr. Sable examined claimant on November 15, 1996. At the time of the examination, the McMurray's maneuver produced discomfort. (Ex. 2 at 5.) Dr. Sable concluded that

claimant had "[l]eft knee pain with possible medial meniscus tear, potentially in the posterior horn." (*Id.*) He recommended arthroscopic evaluation. (*Id.*)

¶49 After examining claimant once more on December 27, 1996, Dr. Downey decided to proceed with arthroscopic surgery. During the December 27 examination of claimant, Dr. Downey found a positive McMurray's sign and concluded, "MY IMPRESSION IS THAT HE MAY HAVE A MENISCAL CARTILAGE TEAR OR ARTICULAR CARTILAGE TEAR." (Ex. 27 at 73; Capitalization in original.)

¶50 Dr. Downey performed arthroscopic surgery on December 31, 1996. The arthroscopic surgery failed to verify a medial meniscus tear. Dr. Downey did find other minor abnormalities in the knee and corrected them.⁽²⁾ (Downey Dep. at 49; Ex. 26 at 77.)

¶51 Claimant's knee pain has not improved since his surgery. Dr. Downey pronounced claimant at maximum healing on February 19, 1997. (Ex. 27 at 72.)

¶52 Post-surgery Dr. Downey offered his opinions concerning claimant's injury. He testified that the claimant may very well have suffered a tear of the medial meniscus which could have healed in the intervening months. (Downey Dep. at 45.) He testified, "We didn't look inside his knee at that time, and the meniscal cartilage tear may have healed, so we'll never really know about that diagnosis." (*Id.*)

¶53 Dr. Downey conceded that the February 19 event did not fully explain claimant's continuing symptoms. He opined that claimant was predisposed to "functional somatic [pain] syndrome" but noted that claimant had been able to do his job until March 1996. He further opined, "And my opinion is that he wouldn't be in the situation he's in now if he hadn't been injured at work." (Downey Dep. at 47.) He elaborated on the role of the accident in comparison with claimant's predisposition, testifying as follows:

As for, you know, should I say he's faking his pain, no, I don't think he's faking his pain. I think he has a lot of pain and I think he's disabled by his pain. I think he has a real problem. But I think part of it is a functional somatic syndrome. And you need to review the literature on that subject, because it's a fascinating area of medicine. It's an area where people suffer from pain that we can't explain. And they suffer from pain that we can't help them with, too.

Q. Is his condition industrially caused?

A. Yes.

Q. Was it in this case, in your opinion?

A. I think it's 50 percent, as I previously stated. I think that another person that had that injury may well have recovered from it completely and that part of his problem is that he has a predisposition to that type of trouble.

Q. Do you disagree with Dr. Lovitt's opinion that this was a condition in Guy Wall's left knee that was caused by degeneration over a long period of time from both working and non-working causes?

A. Yes.

Q. And your belief is that it was caused by an injury?

A. Yes.

Q. And the injury was stepping off the rail car?

A. What do mean by it?

Q. Your diagnosis.

Let's go back. You have pain that's caused by an industrial accident that you find in Mr. Wall; is that correct?

A. Yes.

Q. And that pain is caused at least 50 percent by him stepping off the rail car; is that correct?

A. I didn't say at least; I said 50 percent. I mean, that's my best estimate.

Q. And 50 percent for other causes?

A. Yes.

(Downey Dep. 50:2-25, 51:1-10.)

¶54 Dr. Downey's final opinion concerning the rail car incident of February 19, 1996, was, "[H]e had either a meniscal cartilage tear or a sprain, which would be a tear of the capsule of the knee. And I think these things set off his, his pain syndrome." (Downey Dep. at 47-48.)

¶55 Dr. Lovitt was deposed and disagreed with Downey. He acknowledged his initial diagnosis of medial meniscus degeneration but testified that the December 31, 1996 surgery failed to substantiate the diagnosis. (Lovitt Dep. at 26-27.)

¶56 After considering all of the evidence in this case, I find that claimant suffered an industrial injury on February 19, 1996. I base my finding on the following:

- Claimant experienced a significant event on February 19, 1996, when he stepped down from the rail car, a distance of 12 - 18 inches, and experienced excruciating pain in his left knee. He fell and was unable to get up for several minutes. The insurer has mustered no evidence rebutting his description of the event.

- Claimant's prior left knee problems were unrelated to the February 19, 1996 incident. His patellar tendinitis symptoms had essentially resolved several months prior to the February 19 incident. Moreover, his symptoms following the February 19 incident were different than what he suffered prior to that date. In particular, many, although not all, of the medical examinations after the incident revealed a positive McMurray's test.
- Claimant has a long, steady work history. He worked continually for the talc plant for over 12 years. Despite the onset of patellar tendinitis in the spring of 1995, he continued working without interruption until snow shoveling incident in March amplified his symptoms. There is no evidence for any assertion of malingering or deliberate exaggeration on the part of the claimant.
- Dr. Downey was claimant's treating physician. Putting aside all other factors, his opinions as claimant's treating physician are entitled to special weight since he treated claimant both before and after the February 19 and March 23 incidents, and was therefore familiar with the claimant's knee condition both before and after the events.
- Dr. Downey specializes in arthroscopic surgery and knee injuries. He has specific training in those areas and they are a regular part of his practice. He testified in his deposition that claimant presented a "fairly classic [case] for a meniscal cartilage tear. And I don't think that there would be a great amount of disagreement about the diagnosis amongst fellowship trained knee surgeons." (Downey Dep. at 32.) In contrast, the Court is unable to determine what special experience and expertise Dr. Lovitt has in knee injuries and arthroscopic surgery. I must therefore find that Dr. Downey has the greater expertise in the treatment of knee injuries.
- Dr. Lovitt's April 1996 IME supports a finding that claimant suffered some sort of tear of the medial meniscus.
- The eight month delay in arthroscopic surgery precludes any definitive determination as to the nature of the claimant's February 19 injury.

¶157 Since his injury, claimant has experienced major depression. He is being treated by a psychologist, who attributes claimant's depression to a "response to the life adjustments necessitated by his injury and to the frustrations that are a result of the continuing court processes that have been necessary to redress his injury." (Ex. 27 at 95.) The depression is therefore related to his injury and is compensable.

¶158 The insurer's denial of liability, and its refusal to authorize arthroscopic surgery, were unreasonable. The reasons for my finding are set forth in previous findings regarding the insurer's conduct.

CONCLUSIONS OF LAW

I. Applicable Law

¶159 Claimant seeks benefits with respect to alleged injuries occurring on February 19 and March 23, 1996. His claims are governed by the 1995 version of the Workers' Compensation Act (WCA.) *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

II. Burden of Proof

¶160 Claimant must prove, by a preponderance of the evidence, that he suffered an industrial injury. *Ricks v. Teslow Consolidated*, 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wicken Bros. Construction Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

III. Industrial Accident and Injury

¶161 Under the 1995 WCA, a compensable industrial injury requires both an "accident" and an "injury." Section 39-71-119, MCA (1995), 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.

...

Claimant has satisfied his burden of proof with respect to each of the elements above.

¶162 The insurer's contention that the event of February 19 did not constitute an accident has no merit whatsoever. Subsections (b), (c) and (d) of section 39-71-119(2), MCA, are plainly satisfied and require no further discussion. As to subsection (a), which requires "an

unexpected traumatic incident or unusual strain," that requirement is clearly met. Dr. Downey characterized the incident as traumatic. (Downey Dep. at 18.) Anyone who has missed a stair and jammed a knee knows that the event described by claimant may be traumatic. Stairs are typically between 7 and 8 inches in height. Claimant stepped off from a height of 12 to 18 inches, the equivalent of missing at least one step on a staircase.

¶163 Even if the event on February 19 is not considered a traumatic incident in the strict sense, subsection (2)(a) also covers an "unusual strain." The unusual strain doctrine was recognized in *Robins v. Ogle*, 157 Mont. 328, 485 P.2d 692 (1971). In that case the claimant suffered a herniated disc when lifting a pail of water at work. The Supreme Court acknowledged that the strain was not unusual from the standpoint of the general nature of the claimant's work; however, it held that the critical fact was the particular manner in which she picked up the bucket on that occasion and the unusual result flowing from that incident. *Id.*, 157 Mont. at 332, 485 P.2d 694. The Court went on to say:

A tangible happening of an unexpected nature from an unusual strain qualifies, *irrespective of whether the strain is 'unusual' from the standpoint of cause or effect*. While it may be arguable in the instant case whether the strain was unusual from the standpoint of cause, it is clear that the effect here was unusual-herniation of an intervertebral disc resulting from picking up the bucket in the wrong manner and turning to pick up the mop. **An unusual result from a work-related strain qualifies as 'an unusual strain' under section 92-418, R.C.M. 1947.** Consequently the district court was correct in holding this was a compensable industrial accident.

Id., 157 Mont. at 333, 485 P.2d at 695 (italics and emphasis added).

¶164 The rule that "[a]n unusual result from a work-related strain qualifies" as an industrial accident has not changed in the twenty-seven intervening years since *Robins*. *Cf. Marcott v. Louisiana Pacific Corp.*, 275 Mont. 197, 208, 911 P.2d 1129, 1136 (1996). The statutory reference to "unusual strain" remains in the Workers' Compensation Act to this day and was applied by this Court in the recent case of *Lisa B. Larsen-English v. Lumbermens Mutual Casualty Co.*, WCC No. 9512-7465 (June 14, 1996.)

¶165 The "unusual result" part of the *Robins* test of compensability is encompassed within the current statutory requirement that the unusual strain result in "internal or external physical harm to the body that is established by objective medical findings." § 39-71-119(1)(a), MCA (1995). That requirement is met. Dr. Downey initially diagnosed a new and different condition from the patellar tendinitis claimant had suffered several months previous. He diagnosed a meniscal tear and specifically related it to the February 19 incident. His diagnosis was based on an objective medical test -- McMurray's sign -- involving the physician flexing the patient's knee and applying varus and valgus stresses on the knee in an attempt to evoke pain. While there is some subjectivity in the test vis-a-vis the patient's perception of pain, the test is at least partially objective and is the best

indicator of a torn meniscus. Along with history and the remaining clinical examination, it is as reliable an indicator of a meniscal tear as MRI or other imaging. (Downey Dep. at 25-26.)

¶166 The fact that arthroscopic surgery, performed eight and a half months after originally scheduled, did not find a torn meniscus does **not** establish that claimant did not suffer an injury on February 19. Dr. Downey testified that a tear may have been present and healed during the intervening months and that if claimant's injury was not a meniscal tear then claimant suffered "a sprain which would be a tear of the capsule of the knee." (Downey Dep. at 47.) Dr. Downey was steadfast in his opinion that claimant suffered an injury on February 19.

¶167 As set out in my findings, I found Dr. Downey's opinions more persuasive than those of Dr. Lovitt, and I have adopted Dr. Downey's opinions in the findings. Dr. Downey was the treating physician. As such, his opinions are entitled to special weight. "As a general rule . . . the testimony of a treating physician is entitled to greater evidentiary weight." although it is not conclusive. *Kloepfer v. Lumbermen's Mut. Cas. Co.*, 276 Mont. 495, 498, 916 P.2d 1310, 1312 (1996). At minimum, the treating physician is the tie breaker where there is evenly balanced, conflicting medical testimony. In this case, not only was Dr. Downey the treating physician, he had the greater medical expertise with respect to claimant's knee condition. The insurer provided no basis for the Court to prefer Dr. Lovitt's opinions.

IV. Attorney Fees and Penalty

¶168 Claimant is entitled to attorney fees and to a penalty. Both require proof that the insurer acted unreasonably, § 39-71-611 and -2907, MCA, 1995, and that proof has been provided.

¶169 Dr. Downey aptly described the insurer's conduct in his August 12, 1996 letter to the insurer, when he said:

I think that Guy Wall has been left out "hanging to dry" and there has been little effort to expedite treatment for his condition.

(Ex. 7 at 14.) The insurer's attitude towards the claim is reflected by its failure to ascertain Dr. Lovitt's specific qualifications in arthroscopic surgery and knee injuries. The adjuster and insurer simply didn't care whether Dr. Lovitt was as qualified as Dr. Downey. They had Dr. Lovitt's opinions and were determined to ride with those opinions no matter what.

¶170 As evidenced by Mr. Herndon's September 24, 1996 letter, the insurer had no regard for the actual facts of the case or for the claimant's plight. While relying on Dr. Lovitt's opinions, which included an opinion that claimant was suffering from an occupational disease, Herndon notified claimant that every one of his claims, including the occupational disease claim, was denied. Herndon further stated that claimant's knee symptoms following the February 19 incident "appears to be essentially indistinguishable from those

found by Dr. Downey on 6/27/95" (Ex. 5 at 10.) That statement had no basis in fact. Even Dr. Lovitt found that the patellar tendinitis, for which claimant had been treated on June 27, 1995, had resolved and opined that claimant's knee problem arose from his meniscus.

V. Costs

¶71 Since claimant has prevailed, he is entitled to his costs.

JUDGMENT

¶72 On February 19, 1996, the claimant suffered a compensable industrial injury to his knee.

¶73 National Union Fire Insurance Company is liable for the cost of all medical care for claimant's knee which has been rendered since February 19, 1996, including the December 31, 1996 arthroscopic surgery and the psychological care provided on account of claimant's ensuing depressive disorder. The parties have not asked the Court to determine the amounts due. However, the Court retains continuing jurisdiction over medical benefits in the event they are unable to agree on the amounts.

¶74 National Union Fire Insurance Company is liable for and shall pay claimant temporary total disability benefits from March 25, 1996, when claimant was taken off work, through February 19, 1997, the date on which Dr. Downey found claimant to be at maximum medical improvement. The benefits are subject to the six-day waiting period prescribed by section 39-71-736, MCA (1995). The Court was not requested to calculate the benefits and has not done so. However, it retains continuing jurisdiction to decide the amount in the event the parties are unable to agree on the benefits due.

¶75 As a penalty, National Union Fire Insurance Company shall pay claimant an additional sum of 20% of all benefits, including medical benefits, which are presently due and which may become due in the future.

¶76 National Union Fire Insurance Company shall pay claimant his reasonable attorney fees in an amount to be determined at a later date. ARM 24.5.343.

¶77 National Union Fire Insurance Company shall pay claimant his costs of this action. Within 10 days of this judgment, claimant shall submit an itemized memorandum of costs. Within 10 days thereafter, National Union shall submit its objections, if any, to the submitted costs. Claimant may reply to any objections within 10 days thereafter.

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

¶79 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 24th day of February, 1998.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. Richard J. Pyfer

Mr. Donald R. Herndon

Submitted: November 14, 1997

1. The last full paragraph of Herndon's September 24, 1996 letter, reads as follows:

The insurer takes note of your letter to Barb Gullickson of the Employment Relations division dated September 5, 1996, which includes the following:

After discussing the matter with Mr. Wall, he is prepared to withdraw his ODA claim which was filed in June of 1995 when he was experiencing a condition which his physician referred to as patellar tendinitis. . . .

This is an expression of a future intention to withdraw the occupational disease claim and is not a specific direction to the Employment Relations Division to consider that claim withdrawn. Since the occupational disease claim appears to be the only potentially viable claim, it is the opinion of the insurer that the panel examination previously set for September 16, 1996, should be rescheduled and completed with the full cooperation of Mr. Wall. If Mr. Wall did keep the September 16, 1996, appointment with Dr. Charles Canty, we'd appreciate being advised of that fact.

(Ex. 5 at 11.)

2. The operative note, Exhibit 27 at 77, indicates that inspection was "remarkable for some Grade I cartilage degeneration at the posterior aspect of the medial tibial plateau." Dr. Downey performed some minor trimming and shaving of the synovium, of a small spur at the medial edge of the patella, and of the most lateral edge of the anterior cruciate ligament. (Ex. 27 at 78.)