

**IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA**

**1999 MTWCC 37**

**WCC No. 9808-8046**

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**CARL ALOCCO**

**Petitioner**

**vs.**

**CIGNA INSURANCE**

**Respondent/Insurer for**

**MONTANA REFINING COMPANY**

**Employer.**

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**FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT**

**Summary:** During 1995, claimant suffered a low-back strain while working as a mechanic and machinist. A herniated disk requiring surgery was discovered in April 1997. Claimant argued the surgery and related medical treatment was compensable based on the 1995 injury. The insurer argued to the contrary, among other things pointing to evidence of a 1997 rototilling incident which it argued caused claimant's need for surgery.

**Held:** On the standard of more probably than not, i.e. 51%, the Court is persuaded that claimant's herniated disk was caused by the 1995 industrial injury. Factors considered by the Court included claimant's credible testimony that his pain following the 1995 injury continued, notes in a medical record that he tried to "baby" his pain following the initial incident, and chiropractic records suggesting a continuing condition. On the more likely than not standard, the Court found the rototilling incident was not a new injury, as claimant's radicular symptoms had already been present, and that the exacerbated symptoms following rototilling represented a progression and worsening of existing symptoms, leaving the insurer liable for subsequent medical treatment.

**Topics:**

**Benefits: Medical Benefits: Surgery.** On the standard of more probably than not, i.e. 51%, the Court is persuaded that claimant's 1997 herniated disk was caused by a compensable 1995 industrial injury, making the insurer liable for medical treatment and surgery relating to the hernation. Factors considered by the Court included claimant's credible testimony

that his pain following the 1995 injury continued, notes in a medical record that he tried to "baby" his pain following the initial incident, and chiropractic records suggesting a continuing condition. On the more likely than not standard, the Court found a rototilling incident emphasized by the insurer was not a new injury, as claimant's radicular symptoms had already been present, and that the exacerbated symptoms following rototilling represented a progression and worsening of existing symptoms, leaving the insurer liable for subsequent medical treatment.

**Injury and Accident: Aggravation: Generally.** On the standard of more probably than not, i.e. 51%, the Court is persuaded that claimant's 1997 herniated disk was caused by a compensable 1995 industrial injury, making the insurer liable for medical treatment and surgery relating to the hernation. Factors considered by the Court included claimant's credible testimony that his pain following the 1995 injury continued, notes in a medical record that he tried to "baby" his pain following the initial incident, and chiropractic records suggesting a continuing condition. On the more likely than not standard, the Court found a rototilling incident emphasized by the insurer was not a new injury, as claimant's radicular symptoms had already been present, and that the exacerbated symptoms following rototilling represented a progression and worsening of existing symptoms, leaving the insurer liable for subsequent medical treatment.

1 The trial in this matter was held on January 12, 1999, in Great Falls, Montana. Petitioner, Carl Alocco (claimant), was present and represented by Mr. Cameron Ferguson. Respondent, CIGNA Insurance (CIGNA), was represented by Mr. G. Andrew Adamek.

2 After a short colloquy, the Court and counsel agreed that the testimony of Keeley Wrzesinski, D.C., Melchisedek L. Margaris, M.D., and Paul L. Gorsuch, Jr., M.D. should be taken at a later time. The Court then proceeded to hear the testimony of lay witnesses. The medical testimony was taken during the week of March 29<sup>th</sup>, 1999.

3 The testimony taken on January 12<sup>th</sup> has not been transcribed. The medical testimony has been transcribed.

4 Exhibits: Exhibits 1 through 11 were admitted at trial without objection. Exhibits 12 through 14 were admitted later during the medical testimony with the proviso that they are not considered for the truth of their contents.

5 Witnesses and Depositions: Carl Alocco, Helen Alocco, Mark Johnson, Raymond Eugene Peters, Rudell Robinson, Glen Nadeau, and Bill Hinrichs were sworn and testified at trial on January 12<sup>th</sup>. The testimony of Drs. Wrzesinski, Margaris, and Gorsuch was taken during the week of March 29<sup>th</sup>.

6 Issues Presented: The following issues, as restated by the Court, are presented for decision:

1. Is claimant's surgery of May 1997, and all medical treatment related to that surgery, a result of his industrial injury of July 24, 1995?

2. Is claimant entitled to additional temporary total disability benefits, and if so in what amount?

7 Having considered the pre-trial order, the testimony presented at trial, and the medical testimony taken post-trial, the demeanor and credibility of the witnesses, the depositions and exhibits, and the arguments of the parties, the Court makes the following:

#### FINDINGS OF FACT

8 The issue in this case is whether a herniated disk which presented in March 1997 is related to a July 24, 1995 low-back strain claimant suffered at work.

9 At the time of the July 24, 1995 industrial injury claimant was 44 years of age.

10 Claimant's time-of-injury job was as a mechanic and machinist with Montana Refining Company (Refinery). His job involved heavy labor. In the past he has worked as a millwright, which involves mechanical work, a welder, and a mechanic.

11 On July 24, 1995, the claimant was injured in the course and scope of his employment. (Uncontested Fact 1.) He was using a ratchet wrench to loosen a bolt on a pump. The bolt snapped, causing him to fall sideways and backwards. He felt immediate pain in the small of his back and in his right hip and heel.

12 There is no dispute regarding the injury. Claimant timely filed a claim for compensation and it was accepted by CIGNA, which insured Refinery.

#### Medical Treatment from July 25 to August 18, 1995

13 Claimant sought treatment the day after his injury. On July 25, 1995, he was examined by Dr. Melchisedek L. Margaris, who is board certified in family practice. Dr. Margaris noted that claimant was "very uncomfortable and reports that he cannot sit, stand, or lay down for very long because of his pain." (Ex. 3 at 7.) The doctor diagnosed an "[a]cute right-sided sacroiliac strain with lumbosacral strain" and prescribed pain medication and a muscle relaxant. (*Id.*) He also referred claimant to physical therapy and took him off work. (*Id.*)

14 Dr. Margaris testified that, in his medical opinion, on July 25, 1995, the claimant was suffering from sacroiliac (SI) joint strain and a strain of the muscles in the low back. He found no evidence of a herniated disk or disk injury. On the other hand, Dr. Margaris could not say with medical certainty that claimant had not suffered a disk herniation on July 24, 1995. He testified that it was possible that the industrial accident could have been a contributing factor to the claimant eventually developing disk disease which led to surgery in 1997.

15 Between July 26, 1995 and August 18, 1995, claimant participated in physical therapy. His condition improved significantly over that period. (Ex. 4.)

16 Claimant returned to Dr. Margaris on August 15, 1995, for a follow-up visit. The doctor's office notes record that claimant was "feeling much better" and "now he feels as he is able to go back to full-time work." (Ex. 3 at 6.) Dr. Margaris prescribed another two weeks of physical therapy and released claimant to "full-time, regular-duty work" effective August 16, 1995. (*Id.*)

17 On August 16, 1995, the physical therapist noted that claimant "feels like he can do anything" and on August 18<sup>th</sup> said he felt "he could run a race." (Ex. 4.)

18 Dr. Margaris found claimant at maximum medical improvement (MMI) in August of 1995 and determined that he did not have any permanent impairment. (Ex. 3 at 1; Trial Test.)

19 The claimant in fact returned to his time-of-injury job following this release.

20 Claimant testified that upon returning to work he still had low-back pain, especially when moving heavy objects, but that his pain was never so severe that he reported it to his supervisor or sought medical care. He further testified that he began to be more careful in his work: For example he used a stool, sitting more, he did not lift objects of more than 25 pounds without using the equipment provided by his employer for lifting and he worked more slowly. But, he continued doing his job and also doing regular chores at home.

21 After returning to full-duty work in August 1995, claimant continued to suffer flare-ups of back pain for which he sought medical care from his chiropractor, Keeley Wrzesinski, D. C. Treatment records and Dr. Wrzesinski's testimony document the following history of low-back pain:

- On April 24, 1996, claimant sought chiropractic treatment for neck, upper back, and lower back pain. In a questionnaire filled out at the time of the visit, the claimant wrote that he was hurting in "**Lower Back, Neck & Shoulders, Between Shoulder Blades.**" (Ex. 5 at 4, emphasis added.)
- On July 21, 1996, claimant returned to Dr. Wrzesinski, who recorded that claimant had LBP (low-back pain). (*Id.* at 3; Wrzesinski Trial Test.)
- On January 20, 1997, claimant sought chiropractic care, complaining of right hip SI (pain). (*Id.*)
- On January 22, 1997, two days later, claimant again returned to Dr. Wrzesinski. This time the doctor recorded that claimant had "hint IVD." (Ex. 5 at 3.) The doctor explained his note in his testimony. "IVD" means "intervertebral disk" and the "hint IVD" meant that the symptoms claimant reported at the time suggested a herniated disk. He testified that the symptoms typically present when he notes "IVD" are pain,

paresthesia, numbness, and tingling down a leg. He wrote "hint" because the symptoms he saw were not enough to make a definitive diagnosis.

- Dr. Wrzesinski again saw claimant on January 24, 1997, but his note only indicates that claimant was better. (*Id.*; Wrzesinski Trial Test.)
- Claimant's next visit with Dr. Wrzesinski was on March 26, 1997, at which time claimant was complaining of low-back pain with pain down his right leg, which the doctor characterized as "sciatic" symptoms. (*Id.*)

22 On March 27, 1997, claimant suffered an acute episode of back and leg pain. He returned to Dr. Wrzesinski, who noted that claimant had rototilled his yard the evening before and had awakened during the night with back pain. His symptoms on the 27<sup>th</sup> included "paresthesia pins/needles in right leg/foot." (Ex. 5 at 2.)

23 Claimant's acute pain and leg symptoms did not subside, and on April 16, 1997, claimant sought care from his family physician, Dr. Margaris. At that time he reported that he had pain and numbness in his right lower extremity of three weeks duration. He further reported that he thought his hip was out and had gone to his chiropractor for a manipulation. Dr. Margaris noted that claimant was "dead set against surgery" and referred him to Dr. Terry Jackson for an epidural steroid injection. He also ordered an MRI. (Ex. 3 at 4; Margaris Trial Test.)

24 Claimant's resolve against surgery did not last long. He saw Dr. Jackson on April 17, 1997, and had an epidural steroid injection but it did not relieve numbness and weakness in his right foot. (Ex. 2 at 15.) Dr. Jackson referred claimant to Dr. Paul L. Gorsuch, a neurosurgeon, who examined claimant on April 18, 1997. An MRI was done on the same day and showed a disk protrusion at the L4-L5 level. (*Id.* at 17.) Dr. Gorsuch recommended surgery but claimant demurred, indicating he wanted "to give himself a 3 week trial." (*Id.*) On May 6, 1997, Dr. Gorsuch again saw claimant. (Ex. 2 at 14.) Claimant reported power loss (presumably in his leg) and his straight leg raising test was positive. (*Id.*) The doctor again urged surgery. (*Id.*) This time claimant agreed. On May 9, 1997, Dr. Gorsuch performed a right L4-5 discectomy and removed an extruded disk fragment. (Ex. 6 at 15.)

25 The question presented for the Court's decision is whether the herniated disk discovered in the April 1997 MRI was causally related to his 1995 industrial accident. At the time of trial, the parties proffered the issue based upon medical records and with no medical testimony by way of deposition or at trial. Having reviewed the medical records

and opinions contained therein, I was uncomfortable making a decision based on the records alone.

- Dr. Margaris wrote a letter on November 18, 1997, opining that claimant reached MMI in August 1995 and "did not appear to have a permanent impairment." (Ex. 3 at 1.) His opinions on MMI and permanent impairment, however, did not answer the question which is presented here since the opinions are not necessarily incompatible with a finding that the herniated disk is related to the 1995 injury. Moreover, Dr. Margaris noted, "To my knowledge, Mr. Alocco was asymptomatic in regards to his back until I saw him in April, 1997 . . ." (*Id.*)
- Dr. Gorsuch addressed the issue in a December 17, 1997 letter, writing:

You ask, "Is the condition for which you began treating him on 4/18/97 consistent with an injury that could have occurred on July 24, 1995". I think that if he had symptoms off and on during that interval, the answer would be "yes". If, however, his symptoms more or less resolved completely and he had no interval flare-ups until March or April of 1997, then I think it is unlikely. In that scenario, it would be more likely that moving the pump around as he described to me in his first office visit, is more likely what resulted in the disc protrusion.

(Ex. 2 at page 11.) Dr. Gorsuch did not address what he meant by "more or less" or by "interval flare-ups."

- On February 23, 1998, Dr. Wrzesinski weighed in with an opinion that claimant's symptoms during 1996 and 1997 were "consistent with the injury in 1995." (Ex. 5 at 1.) Besides the problem of semantics (consistency versus causation may be a substantive distinction), Dr. Wrzesinski's letter indicates that at the first April 24, 1996 visit "an IVD in the lumbar spine was contributing to his symptoms in the low back." (*Id.*) His office notes, however, do not support his statement. There is no mention of IVD (intervertebral disk) in his treatment record for that date. (Ex. 5 at 5.) The first mention of "hint IVD" was on January 22, 1997 (*id.* at 3), more than a year after claimant's return to work. Moreover, diagnosis and treatment of a herniated disk is not within a chiropractor's expertise or licensure.

How could I decide the case based on this record?

26 At the commencement of trial I apprized counsel of my dilemma and suggested that justice would be better served by obtaining the three doctors' testimony based on the specific facts of this case. This was not a matter of the Court bailing out one party or the other, it was simply a matter that the record did not afford a good basis for decision one way or the other. Counsel agreed. All three doctors testified, with the Court present, during the week of March 29, 1999. Although their testimony does not make the resolution of the causation issue free from doubt, their testimony was helpful and provides a sufficient basis for me to decide the case.

27 One of the major disputes in this case is whether, following his return to work, the claimant continued to suffer from back pain. If claimant was symptom free for a significant period of time following his return to work, then it is less likely that his 1995 injury is the cause of a herniated disk which presented in March of 1997.

28 As stated earlier (20), claimant testified that he continued to have pain after his return to work. CIGNA questioned his testimony, calling claimant's supervisors and co-workers to testify that they did not hear claimant complain or see a difference in his work following his return to work. I found their testimony credible. But, despite claimant's lack of complaints to coworkers and supervisors, and his continued work without observable diminishment in performance, I find his testimony of continued back pain credible. In making this finding, I have taken into consideration not only my own perception of his credibility but also two significant facts which support a finding that he worked in pain.

29 The first fact is that even after he began experiencing severe radicular pain in March and April 1997, and was diagnosed as suffering a herniated disk, claimant continued working until May 6, 1997. On April 16, 1997, Dr. Margaris made the following note when examining claimant:

He's tried to baby things along for the past three weeks but he works at the refinery and he has been putting in 12-hour shifts and he is on concrete all the time.

(Ex. 3 at 4.) Dr. Gorsuch made a similar note on April 18, 1997:

He's currently working 10 hours a day, several days a week.

(Ex. 2 at 17.)

30 The second fact is that claimant's chiropractic treatments provide significant evidence that he was suffering some degree of low-back pain between August 1995 and March 1997. Claimant's low-back pain complaints to his chiropractor are summarized in paragraph 21.

31 In their testimony, Drs. Margaris and Gorsuch were asked whether the claimant's herniated disk was related to his 1995 injury. They were also asked whether rototilling on March 26, 1997, or some other incident caused the herniation. Claimant did rototilling on the afternoon or evening of March 26<sup>th</sup>. He awoke that night with severe pain and new symptoms of numbness in his right leg and foot, symptoms not recorded before. CIGNA suggests that the rototilling the evening before, not the 1995 injury, caused his herniated disk.

32 In his testimony, Dr. Margaris reaffirmed his opinion that the 1995 injury was to soft tissue. He found it unlikely that claimant herniated a disk in 1995 and opined that the herniation was more likely the result of some acute incident in 1997. But his further testimony illustrates the difficulty in harmonizing legal standards with medical testimony. On the one hand, he testified that it was unlikely that operating a rototiller would cause an

acute disk herniation. On the other hand, he testified that rototilling could have exacerbated underlying pathology, i.e., it could have triggered a herniated disk if the disk was already weakened. In his opinion, if claimant experienced paresthesia (numbness) after the rototilling, the rototilling may have lit up the underlying condition, i.e., caused an already weakened disk to herniate.

33 Dr. Margaris was specifically questioned about claimant's rototilling his yard prior to an appointment with his chiropractor.

A. I think, again, I would, my impression would be that there was something that was existing that the roto tiller exacerbated, not necessarily caused the herniation, but perhaps there was underlying pathology that it exacerbated. But, again, see, since neither you nor I were there to watch how he roto tilled the garden and what exactly he did, it makes it impossible for us to really give an opinion as to if that was a precipitating activity, because none of us was a witness to see what exactly he did.

THE COURT: Let me make sure I understand your answer on that part. Is what you're saying is it's possible that the roto tilling exacerbated it, but it's not your medical opinion that it did so?

A. If he can say the patient roto tilled his garden and then the symptoms of sciatic and paresthesia and numbness and tingling came on, my impression would be then he did an activity which flared up his back or there was underlying pathology and this stirred the pot, so to speak.

THE COURT: So it lit up the condition?

A. It may have been like the last straw.

THE COURT: And that would be an opinion based on more probable than not?

A Yes.

(Margaris Dep. at 33.)

34 But Dr. Margaris was unable to identify the 1995 injury as the specific cause of the underlying condition. He testified that it was highly likely that claimant's work at the refinery contributed to the underlying disk disease and predisposed the claimant to the disk herniation, and that the 1995 injury could have contributed to his underlying disease. Ultimately, Dr. Margaris, a family physician, acknowledged that Dr. Gorsuch, a neurosurgeon is more qualified to speak to the causation issue and said that he would defer to Dr. Gorsuch's opinion.

35 So, the parties and the Court sought Dr. Gorsuch's opinions. Dr. Gorsuch testified that in his medical judgment it was more probable than not that the claimant's condition in 1995 led to the 1997 herniated disk.

THE COURT: Based on your review of those records, the history that you took from Mr. Alocco and your observation and treatment of him, do you have a medical opinion as to whether or not what you saw in 1997 and operated on him for in 1997 is related to that 1995 accident?

A I think it was an extension of that accident.

(Gorsuch Dep. at 12-13.)

THE COURT: Let me follow-up here because we've sort of got two things going here. And I understand that you have an opinion that it's an extension of the 1995 injury. When I ask you that question, I ask it based on your review of the medical records and the treatment. And Cameron has asked it by adding some additional information that Mr. Alocco has testified to about what he felt when he was working and went back to work. And I guess my question to you is does that additional information about his having some leg pain after he went back to work in 1995, is that critical to your opinion or would your opinion be the same even without that information?

A. If you eliminated that information and didn't have any contradictory information, and I was just basing it on the medical record, **the opinion would be the same.** Because we see him describing the pain the same all the time, my hip popped out. Even though that was not accurate, it was the same pain to him. He felt it. The pain was similar in character. Plus we have from the medical record that he finally went back to work by August of '95. And then by next spring he was back in the chiropractor's office with basically similar symptoms. So we have an interval there where he wasn't, we don't have a record of him actually being in treatment, but just from experience, I'd almost guaranty that he's having some symptoms during that interval, but just not having to go to somebody about it. (Emphasis added.)

(*Id.* at 14-15.) The doctor described the 1995 injury as being "more probable than not . . . the initiating event." (*Id.* at 14.) He also explained how the 1995 injury could have led to the 1997 condition.

Q. Can a person sustain a back injury at one point in time, which leads to a large disk herniation discovered at a later point in time?

A. I think you could say that somebody had injured the disk or cracked it and then at a later point it extrudes. I mean an injury to the disk isn't an all or none phenomenon. So the short answer is yes.

Q. So it can go over a significant period of time?

A. Yes.

(*Id.* at 8.)

A. I don't think he had the size of disk extrusion during that whole interval, the size of disk extrusion between the time of, what, 1995 and the time I saw him. I mean his pain was worse. That's what led him to come here. And it was not responding to conservative therapy. Could he have had a small disk protrusion or crack in July of '95 and then that worsened over time and got to be a bigger disk extrusion so that he couldn't compensate for it and wound up being sort of drive to surgery, yes.

(*Id.* at 11.) Cross-examination of Dr. Gorsuch shows that the relationship between the 1995 accident and claimant's 1997 herniated disk is not certain, but certainly is not required. All that is required is that claimant establishes a relationship on a more probable than not basis. Dr. Gorsuch, who has the most expertise of the three doctors, provided that connection.

36 The contention that claimant's rototilling on the evening of March 26, 1997, was a new injury is answered by his medical history, especially his complaints on March 26<sup>th</sup> prior to his rototilling. Dr. Wrzesinski's records reflect radicular type complaints as early as July 21, 1996. On March 26, 1997, prior to rototilling, claimant was complaining of low-back pain with pain down his right leg, which Dr. Wrzesinski characterized as "sciatic" symptoms. (Ex. 5 at 3.) Following the rototilling, claimant plainly experienced a significant increase in symptoms, but the basic symptoms indicating a herniated disk were already present.

37 While the evidence does not leave the Court with a firm and abiding conviction that the claimant's 1995 injury caused his 1997 herniated disk, the proof required is only a preponderance of evidence, i.e., more likely than not, or 51%. On that basis, I am persuaded that the claimant's herniated disk was caused by his 1995 industrial injury.

38 Dr. Gorsuch testified that claimant has reached MMI but may need additional surgery in the future. His opinion is uncontroverted and adopted by the Court.

#### CONCLUSIONS OF LAW

39 The claimant was injured on July 24, 1995, therefore the 1995 version of the Workers' Compensation Act applies. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

40 The issue before the Court is whether the claimant's herniated disk, discovered in 1997, was caused by his July 24, 1995 industrial injury. As pertains to that issue, the 1995 Workers' Compensation Act provides in relevant part:

**39-71-407. Liability of insurers - limitations.** (1) Each insurer is liable for the payment of compensation, in the manner and to the extent provided in this section, to an employee of an employer that it insures who receives an injury arising out of and in the course of his employment or, in the case of death from the injury, to the employee's beneficiaries, if any.

....

(5) If a claimant who has reached maximum healing suffers a subsequent nonwork-related injury to the same part of the body, the workers' compensation insurer is not liable for any compensation or medical benefits caused by the subsequent nonwork-related injury.

(6) An employee is not eligible for benefits payable under this chapter unless the entitlement to benefits is established by objective medical findings that contain sufficient factual and historical information concerning the relationship of the worker's condition to the original injury.

41 In this case, there is no question that claimant suffered a low-back injury in 1995, rather the issue presented for decision is whether it proximately caused a herniated disc which surfaced in 1997. Claimant must establish the "causal connection between his work accident and his current condition." *Walker v. United Parcel Service*, 262 Mont. 450, 454, 865 P.2d 1113, 1116 (1993). He must do so by a preponderance of the evidence. *Hall v. CITNA Ins. Co.*, 248 Mont. 484, 487, 812 P.2d 1262, 1264 (1991); *Frost v. Anaconda Co.*, 216 Mont. 387, 390, 701 P.2d 987, 989 (1985).

42 In the context of claimant's 1995 industrial injury, there are three possible explanations for his 1997 herniated disk. First, the 1997 condition could be wholly unrelated to the 1995 injury. *Wilson v. Liberty Mutual Fire Ins.*, 273 Mont. 313, 903 P.2d 785 (1995). It could be the result of either a new, unrelated injury, or the consequence of some other unrelated process not amounting to an injury. Second, the condition could be due to a subsequent injury which aggravated an underlying back condition caused by the 1995 injury. *Lee v. Group W Cable TCI of Montana*, 245 Mont. 292, 800 P.2d 702 (1990). Third, his 1997 condition could be a natural progression or consequence of his 1995 injury. *Harmon v. Harmon*, 249 Mont. 387, 816 P.2d 1032 (1991).

43 As set forth in the findings of fact, I am **un**persuaded that claimant's 1997 condition was the result of a new injury within the meaning of section 39-71-119, MCA (1995). While the claimant suffered a significant increase and expansion of his symptoms following rototilling on March 26, 1997, his radicular symptoms were already present. There is no evidence of any acute event during rototilling. Claimant was fine until he awoke during the night following rototilling. His symptoms upon awaking represented a progression and worsening of his existing radicular symptoms, not a new symptom complex.

44 Thus, resolution of the petition turns upon whether the claimant's 1997 herniated disk was attributable to his 1995 injury or to some unrelated process or event not amounting to an injury. Claimant, of course, bears the burden of proving the former, but that burden is by a mere preponderance of evidence. He need not establish his case to a certainty, or leave the Court without doubt as to the cause.

45 Dr. Gorsuch had the most expertise to evaluate the causal issue. Dr. Margaris indicated that he would defer to Dr. Gorsuch's opinion and Dr. Wrzesinski's expertise does not extend

to treatment and repair of herniated disks. Dr. Gorsuch testified on a more probable than not basis that claimant's 1997 herniated disk was an "extension" of his 1995 accident and was probably the "initiating event," probably by cracking or weakening of the disk. I found his opinion persuasive. It is sufficient to establish a causal connection between the 1995 industrial accident and claimant's current condition.

46 Claimant is therefore entitled to medical benefits for chiropractic and medical treatment of his low-back complaints since 1995. Section 39-71-704 (1)(a), MCA (1995), provides that the insurer shall pay for "reasonable primary medical services for conditions resulting from the injury for those periods as the nature of the injury or the process of recovery provides." "Primary medical services is defined in section 39-71-116(25), MCA (1995):

(25) "Primary medical services" means treatment prescribed by a treating physician, for conditions resulting from the injury, necessary for achieving medical stability.

While medical and other evidence available in August 1995 indicated that claimant had reached medical stability with regard to his 1995 injury, his subsequent medical history shows that he had not. While Dr. Gorsuch testified that he has now reached MMI following his 1997 surgery, he also indicated that further surgery may be required, so even now any finding of MMI is subject to revision.

47 In any event, claimant is entitled to additional temporary total disability benefits from the date of his surgery on May 9, 1997, until he reached maximum medical improvement. 39-71-703, MCA (1995). The date he reached MMI is not in evidence. Dr. Gorsuch merely testified that he is presently at MMI but did not indicate when he reached that state. I leave it to the parties to ascertain the date of MMI and determine the amount of benefits due claimant. The Court reserves continuing jurisdiction to determine those matters if they cannot agree.

## JUDGMENT

48 1. Petitioner is entitled to medical benefits for the surgery of May 9, 1997, and all medical treatments as a result of his injury and surgery, including chiropractic treatments in 1996 and 1997 for his low back and Dr. Margaris' April 1997 examination.

49 2. Claimant is entitled to temporary total disability benefits beginning on May 9, 1997, until such time as he reached maximum medical improvement or was not suffering a total loss of wages. The Court is unable to make a determination as to the amounts due since the parties have not presented sufficient evidence for a decision; however, it reserves continuing jurisdiction to determine the amounts if the parties are unable to agree.

50 3. The claimant is entitled to his costs, 39-71-611, MCA, in an amount to be determined by the Court. He shall submit a memorandum of costs within 10 days following this

decision. CIGNA Insurance shall thereafter have 10 days in which to file its objections, if any, to the enumerated costs.

51 4. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.

52 5. 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 2<sup>nd</sup> day of June, 1999.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. Cameron Ferguson

Mr. G. Andrew Adamek

Date Submitted: April 1, 1999