

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2003 MTWCC 45

WCC No. 2002-0682

JAMES R. ANDERSEN

Petitioner

vs.

ZURICH AMERICAN INSURANCE COMPANY

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Claimant seeks medical and compensation benefits for an acute herniated disk which was diagnosed and excised in late March 2002, alleging that it was caused by an industrial accident on August 1, 2001.

Held: While the claimant suffered a back injury at work on August 1, 2001, that injury is unrelated to his herniated disk. The disk was the result of a new non-work-related accident on March 16, 2002, at a ski area.

Topics:

Causation: Medical Condition. Insurer is liable only for a medical condition and disability arising as a result of an industrial injury. It is not liable for a new, unrelated condition caused by a subsequent non-work-related accident even though both injuries involved the back since they involved different parts of the back and were distinct injuries.

¶11 The trial in this matter was held on April 11, 2003, in Missoula, Montana. Petitioner, James R. Anderson (claimant), was present and represented by Mr. Howard Toole. Respondent, Zurich American Insurance Company (Zurich), was represented by Mr. James R. Hintz.

¶12 Exhibits: Exhibits 1 through 10 and 12 through 15 were admitted without objection. The statement of Thomas Murray in Exhibit 11 was admitted. The other statements in Exhibit 11 were refused and were not considered.

¶13 Witnesses and Depositions: James R. Anderson, Jeremy Moore, Dr. John Schumpert, and Thomas Murray testified at trial. In addition, the Court participated by telephone in the depositions of Dr. Kenneth C. Brewington, Dr. Mark G. Weston, Dr. Gregory H. Kazemi, and

Brett Hollis, nurse practitioner. Those depositions were transcribed, are part of the record, and are considered in reaching the decision in this case. The deposition of James R. Anderson was also submitted for the consideration of the Court.

¶4 Issues Presented: The issues as set forth in the Pretrial Order are:

¶4a Whether Petitioner suffered a compensable injury within the course and scope of employment at Roscoe Steel and Culvert on or about August 1, 2001;

¶4b Whether Petitioner reached MMI from that injury prior to March 17, 2003;

¶4c Whether Petitioner suffered an acute herniated disk at L4-5 with extruded disk material compressing the L5 nerve root on or about August 1, 2001 or in a non-work related accident at the Marshall Mountain ski area in mid March 2002;

¶4d Whether the surgery performed by Dr. Brewington on March 23, 2002 was related to the claimed injury of August 1, 2001; and

¶4e Whether Petitioner is entitled to compensation.

(Pretrial Order at 2.)

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

FINDINGS OF FACT

¶6 Claimant, who is presently twenty-four years old, was hired by Roscoe Steel and Culvert Company (hereafter, "Roscoe") of Missoula, Montana, on approximately July 1, 2001. He was hired as a welder. His work involved grinding and welding metal.

¶7 On or about August 1, 2001, claimant and a coworker were attempting to turn over a large piece of inch thick steel on which they were working. The steel piece rested on two saw horses. They were using a hoist to lift it, with claimant guiding the piece on one end and his coworker on the other. The steel piece became unbalanced, swung free of the saw horses, and tilted towards claimant. He attempted to hold onto it but the piece was too heavy. He let go of the steel and it fell to the floor.

¶8 Claimant testified that when he dropped the steel it felt like "somebody kicked me in the back." (Trial Test.)

¶9 The claimant reported the incident to his supervisor and indicated his "back hurt." (Anderson Dep. at 13.) No accident report was filled out at that time and although claimant testified that his supervisor later offered to have him fill one out he did not recall ever doing so. (*Id.* at 14-15.)

¶10 At that time of the incident, Roscoe was insured by Zurich.

¶11 A claim for compensation was completed by claimant on July 11, 2002, and submitted to Zurich. (Ex. 8 at 2-3.) Zurich has denied liability for the claim and has paid no benefits. (Pretrial Order, Uncontested Fact c at 2.) It's denial of liability is premised on its contention that the back condition for which claimant is seeking benefits was caused by a subsequent incident at a ski area on March 17, 2002.

¶12 It is clear that claimant hurt his back in some manner in the August 1, 2001 industrial accident. He experienced and reported immediate back pain.

¶13 Prior to his employment with Roscoe, the claimant had two prior experiences of back pain. The first appears insignificant and dates back to 1993 when claimant hurt his back while lifting weights. (See Ex. 10 at 1.) He was diagnosed as having "lumbar muscle sprain" (*id.*) and there is no indication that his injury was anything more than that. Significantly, there is no record of any further back complaints over the next five years.

¶14 The other instance of back pain occurred in October 1998, when claimant hurt his back while working for Glacier Tree Service. (Andersen Dep. at 21; Ex. 10.) He saw Dr. Reid E. Thompson, a chiropractor, on October 23, 1998, and reported an onset of low-back pain during the evening following his lifting and carrying a 100-120 pound log. He filed a workers' compensation claim, which was apparently accepted by the Montana State Fund. (Ex. 7 at 11-12.)

¶15 At the time of the October 23, 1998 examination by Dr. Thompson, claimant reported low-back and bilateral leg pain. (*Id.* at 11.) After x-raying claimant, Dr. Thompson reported, "The L4-L5 disc space appeared to be somewhat suspicious . . ." (*Id.*) He thought it likely that an MRI would be needed "to verify lumbar disc status" but noted that claimant planned to return to work immediately; Dr. Thompson questioned whether claimant would return for treatment. (*Id.* at 12.)

¶16 Indeed, claimant did return to work and did not follow up with Dr. Thompson. Thereafter, he continued working until March 2002 without medical treatment for back problems. He testified in deposition that he did not think his 1998 injury "was serious at all" and said it resolved in a couple days. (Andersen Dep. at 22.) In the history given Dr. John C. Shumpert, who conducted an independent medical examination (IME), he indicated that after 1998 he had "occasional flares of lumbosacral back pain." (Ex. 10 at 5.) At trial, he testified that he had a vague recollection of some leg pain after 1998. In any event, his reports and his medical history indicate that any residual pain he had following the 1998 injury was minor and intermittent. It did not require treatment.

¶17 Even after the Roscoe injury, the claimant did not seek medical care with respect to his back until February 8, 2002. On that date he saw physician assistant Linda Hanson (Hanson) for both back pain and a lesion on his face. (Andersen Dep. at 18-19; Brewington

Dep., Ex. 6.) Hanson's note records complaints of "low back ache on and off" and "[s]ometimes pain [down] leg. [D]enies any numbness." (Brewington Dep., Ex. 6.)

¶18 Jeremy Moore (Moore), a co-employee at Roscoe, testified that following the August 1, 2001 accident, the claimant continued to work and fully performed his job. He never saw any diminished performance but did say that claimant "now and then" mentioned that his back was "sore." Moore testified that claimant mentioned the soreness about every three to four weeks. His testimony was credible and indicates that while claimant suffered some back pain or soreness following the August 1, 2001 accident it did not significantly effect his ability to work and merited only occasional mention.

¶19 On March 16, 2002, the claimant was at the Marshall Mountain Ski Area near Missoula. He watched snowmobile races and did not ski. However, upon returning to the parking area, he slid down a short hill or slope into the parking area. According to claimant, he sat down and slid down the hill, which he characterized as a little embankment fifteen to twenty feet long with a forty-five degree slope. He testified that his slide down the hill was insignificant, in his words, "uneventful", and that following the slide he had his "usual back pain." However, the testimony of a co-employee and medical records, tell a different story.

¶20 Moore saw claimant seconds after the incident. According to Moore, claimant was standing up, brushing snow off his jacket, and was in obvious pain. He recalled claimant complaining of back pain an hour or two later while at dinner.

¶21 Tim Murray, the Missoula plant superintendent for Roscoe Steel, received a sick call from claimant shortly after the ski hill incident. Claimant told him he had hurt his back sliding down a hill.

¶22 The day after the ski hill incident, March 17, 2002, claimant went to the Emergency Room of St. Patrick Hospital in Missoula. The ER admission note recorded that claimant "slid down hillside (Marshall Mountain)" and noted that he had injured his back "5 mo. [months] ago lifting iron. The record goes on to elaborate as follows:

"Pt. [patient] re-injured lower back, slid down hill. Pain in (R) [right] lower back (L-spine) radiating down (R) [right] leg to foot.

(Kazemi Dep., Ex. 2.) Dr. Gregory H. Kazemi, who treated claimant at the ER, recorded that claimant had a "fall" and "slid down hill at Marshall," further noting that claimant had had some back pain the previous year "but not as bad." (Kazemi Dep., Ex. 3.) He testified that his recording of a "fall" was based on what claimant told him at the time. (Kazemi Dep. at 23-24.)

¶23 On March 19, 2002, three days after the ski hill incident, claimant saw Brett Hollis (Hollis), a nurse practitioner. Hollis recorded the following history:

Jim [claimant] was attempting, it sounds like, to slide down the main hill at Marshall Ski Area 2 nights ago when he got kind of out of control and ended up more falling and sort of jamming his back downhill. . . .

(Hollis Dep., Ex. 1.) During his deposition, Hollis said that claimant's description of the event was vague but his "recollection of it was the way he described it was that he got kind of out of control and jammed his feet into a hump in the snow or a depression or something." (Hollis Dep. at 11.) As in the ER, claimant mentioned that he had previously been having back pain as a result of an employment injury. (*Id.* at 12.) Claimant indicated his belief that the ski hill incident had aggravated that previous injury. (*Id.*)

¶24 On March 20, 2002, four days after the ski hill incident, claimant saw physician assistant Hanson in Cut Bank. She recorded:

Slipped [down] hill fell 4 da[ys] ago. previous 5 mo. ago lifting heavy objects @ work and [sic] back gave out. used Celebrex [with] much relief. Now pain is severe. [down] R [right] buttock and [down] back of leg.

(Ex. 3 at 1.) Hanson also mentioned that claimant was experiencing an occasional "loss of feeling" in his right leg. (*Id.*)

¶25 On March 22, 2002, claimant returned to the St. Patrick's Hospital ER and was seen by Dr. Mark G. Weston. (Weston Dep., Exs. 9 and 10.) The ER nurse's note described his past history as, "Hurt back Last Sat. at Marshall MT [Mountain]." (Weston Dep., Ex. 9.) In his notes, Dr. Weston recorded that claimant had been injured in a "fall" at Marshall. (Weston Dep. at 11 and Dep. Ex. 10.) Dr. Weston recalled that claimant reported that he fell:

As I recall, with Mr. Andersen, he had mentioned the Marshall fall as well, to me. And to tell you the truth, I can't tell you if I got that from the previous encounter [at the ER] and asked him, or if he had mentioned it. But we did discuss that, as pointed out in my notes there.

(Weston Dep. at 12.)

¶26 I am absolutely persuaded that the medical records more accurately reflect what occurred at the Marshall Mountain Ski Area than the claimant's testimony, which trivialized the incident. I did not find claimant credible and find that he suffered a significant fall at the ski area.

¶27 On March 22, 2002, six days after the incident at the Marshall Mountain Ski Area, claimant was suffering new, additional symptoms, namely foot drop and sensory loss in his lower right leg. (Weston Dep. at 12-13 and Dep. Ex. 10.) Those symptoms were emergent in nature. An MRI disclosed a "large disk herniation of the disk between lumbar vertebra 4 and 5, with actually some disk fragment pushing - - pressing and compressing the nerve root of the spinal cord." (Weston Dep. at 13.)

¶128 The next day, March 23, 2002, Dr. Kenneth C. Brewington, II, a neurosurgeon, performed a right L4 hemilaminectomy and right L4-5 microdiscectomy.

¶129 Dr. Shumpert, who is board certified in occupational medicine, opined that claimant suffered a new and distinct injury in the March 16, 2002 fall at the ski area. Dr. Shumpert, who regularly treats back injuries as a part of his occupational disease practice, reviewed claimant's medical records and history. He testified that the physical findings on the MRI and during surgery disclosed an acute, severe disk herniation with extruded disk fragments and cartilage material impinging upon the spinal cord and nerve root. He characterized it as an "acute injury" which would have produced significant symptoms within days. He further testified that a lifting injury of the sort claimant suffered on August 1, 2001, would not have caused the blow-out type herniation discovered in late March 2002. He said that the type of blow-out injury claimant had was more likely the result of claimant's falling on his buttocks forcefully. Based upon claimant's symptoms and his ability to continue working following his August 1, 2001 injury, Dr. Shumpert opined that the August 1st injury was probably a subluxation of the sacroiliac joint, which had reached maximum medical improvement (MMI) and was totally unrelated to the March 2002 disk herniation.

¶130 Dr. Kazemi, the ER physician who first saw claimant following the Marshall Mountain Ski Area incident, provided testimony that lends support to Dr. Shumpert's opinions. In opinion, on March 17, 2002, he was treating claimant for an injury that had occurred within three or four days. He testified that symptoms of a herniated disk usually surface within seven days. He opined that it was unlikely that claimant could have continued to do manual labor following a severe herniation. His opinions are fully consistent with claimant severely herniating a disk in the ski hill fall and indicate it was unlikely that claimant suffered a severe herniation as a result of the August 1, 2001 industrial accident.

¶131 Dr. Brewington, who operated on claimant, was asked his opinions concerning causation of claimant's herniated disk. However, he expressed no firm opinion relating the herniated disk to the August 1, 2001 industrial incident and conceded it was "unlikely" that the sort of massive herniation found at surgery occurred on August 1, 2001. (Brewington Dep. at 30.) He was unaware of claimant's fall at the ski hill.

¶132 I am persuaded by Dr. Shumpert's opinions. His explanations for his opinions were clear, cogent, and convincing.

¶133 I therefore find that while claimant suffered a back injury on August 1, 2001, he had reached MMI prior to the March 16, 2002 ski hill fall. I further find that the injury he suffered on August 1, 2001, was more probable than not an injury of the sacroiliac joint and was wholly unrelated to the herniated disk he suffered in March 2002. Finally, I find that the herniated disk diagnosed on March 22, 2002, and thereafter treated, was caused by a March 16, 2002 slip and fall at the Marshall Mountain Ski Area. It was a new and distinct injury unrelated to claimant's August 1, 2001 industrial injury.

CONCLUSIONS OF LAW

¶134 This case is governed by the 2001 version of the Montana Workers' Compensation Act since that was the law in effect at the time of the claimant's industrial accident. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶135 Claimant bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks. *Ricks v. Teslow Consolidated*, 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wicken Bros. Construction Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

¶136 Claimant has established by a preponderance of the evidence that he suffered an industrial injury on August 1, 2001. He has shown that he suffered (1) internal harm to his sacroiliac joint from an unexpected strain or incident. The incident is identifiable by time and place, consisted of a single event on a single day, and affected a specific, identifiable body part. Thus, the injury and accident criteria of section 39-71-119, MCA (2001), are satisfied. However, claimant failed to establish any entitlement to benefits on account of the injury and condition. He continued working without loss of time and did not seek medical treatment with the possible exception of his visit to a physician's assistant on February 8, 2002. That visit, however, was also for treatment of a lesion and there is no evidence of any further need for medical treatment other than the over-the-counter medication he was taking.

¶137 As to the herniated disk and treatment subsequent to March 16, 2002, claimant was required to show that his condition and treatment were caused by or related to his August 1, 2001 industrial accident. Section 39-71-704(1)(a), MCA (2001), requires the insurer to furnish medical care only for "conditions resulting from the injury." Compensation benefits are payable only for disability resulting from an industrial injury. §§ 30-71-701, -702, -703, MCA (2001).

¶138 Claimant has failed to prove his herniated disk was caused or related to his August 1, 2000 industrial accident. Rather, his herniated disk was the result of a new, non-work-related accident at the ski area. It was a new, separate, and distinct injury. Indeed, the injury was to a different part of his back. He is therefore not entitled to benefits for the herniated disk or for medical treatment and surgery after March 16, 2002.

JUDGMENT

¶139 While the claimant has established he suffered an industrial back injury on August 1, 2001, he has failed to establish that the medical condition (herniated disk) and disability from which he subsequently suffered are related to the industrial injury, therefore he is not entitled to benefits and his petition is **dismissed with prejudice**.

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

¶141 Any party to this dispute may have twenty days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 26th day of June, 2003.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Howard Toole

Mr. James R. Hintz

Submitted: April 11, 2003