IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2004 MTWCC 72

WCC No. 2004-1017

CURT BROWN

Petitioner

vs.

MONTANA CONTRACTOR COMPENSATION FUND

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: The claimant injured his low back at work on September 5, 2000. On January 1, 2001, he reported to his treating physician that he felt "pretty much normal," was declared at maximum medical improvement, and was released to his time-of-injury job as a heavy equipment operator. He looked for but could not find work during the spring and summer of 2001. Then, in early August 2001, he experienced a popping sensation in his back while working on construction of a pavilion for his church. Thereafter, he had continued back problems but seeks to attribute those problems to his industrial accident.

Held: The claimant suffered a subsequent, nonwork-related injury or aggravation which relieves the insurer of further liability with respect to the claimant's September 5, 2000 injury.

Topics:

> **Injury and Accident: Subsequent Injury.** Where a claimant suffered a work-related low-back injury but thereafter reached maximum medical improvement and suffered a new, material injury or aggravation, the insurer for the first injury is relieved from further liability for the claimant's back condition.

¶1 The trial in this matter was held in Kalispell, Montana, on August 24, 2004. Petitioner, Curt Brown, was present and represented by Mr. Kenneth S. Thomas. Respondent, Montana Contractor Compensation Fund, was represented by Mr. Bradley J. Luck.

¶2 Exhibits: Exhibits 1 through 7, being all of the exhibits offered, were admitted without objection.

¶3 Witnesses and Depositions: The petitioner, his wife, Cindy L. Brown, and his son, Josh Brown, testified. In addition, the parties submitted the depositions of the petitioner and of Drs. J. Mark McGlothlin and Lawrence J. Iwersen for the Court's consideration.

¶4 Issues Presented: As framed by the parties in the Pretrial Order, the issues in this case are:

> ¶4a Whether Petitioner's current medical condition and disability are caused by his industrial injury of September 5, 2000, and Respondent remains liable for payment of disability and medical benefits or whether his current condition was caused by a non-work related event to the same part of the body subsequent to September 5, 2000, and Respondent is not liable for such payments pursuant to §39-71-407(5) MCA, or other Montana law.
>
> ¶4b Whether Petitioner is temporarily and totally disabled and entitled to retroactive and ongoing temporary total disability benefits until he reaches maximum healing pursuant to §39-71-701, MCA.

(Pretrial Order at 4.)

¶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 The petitioner in this case is Curt Brown (claimant). He is 47 years old and has worked for twenty-five years as a heavy equipment operator. He lives in the Kalispell, Montana, area.

¶7 On September 5, 2000, while working for A-1 Paving, the claimant injured his low back when he slipped and fell.

¶8 At the time of the accident, A-1 Paving was insured by the respondent, Montana Contractor Compensation Fund (MCCF). The claimant submitted a written claim with respect to his accident (First Report of Injury and Occupational Disease, Ex. 1.) and MCCF accepted liability for his claim.

¶9 The claimant sought medical treatment for his industrial injury. He first sought treatment on the same day as his accident - September 5, 2000 - at the emergency room of the Kalispell Regional Medical Center. The emergency room records indicate that he was complaining of right low-back pain radiating into his leg. (Ex. 3 at 1.) Lumbar x-rays were unremarkable. He was discharged with a prescription for narcotic pain medication and Ibuprofen and referred to Dr. Lawrence Iwersen for followup care. (*Id.* at 6-7.)

¶10 Dr. Iwersen is a board certified orthopedic surgeon. The claimant was initially seen on September 11, 2000, by Dr. Iwersen's physician's assistant, Steven Trimble, who recorded:

> [A]s he [claimant] was coming down off a piece of heavy machinery he slipped and fell. When he fell he came down on his L [left] knee but as he landed on his L knee he fell back against the machinery, hitting the R [right] side of his lower back and buttock. He initially thought that he had probably injured his knee, however, when he got up and started walking around his knee felt fine and he never did have any pain, swelling or ecchymosis around his knee. However, he immediately began to experience difficulty moving and ambulating along the R side of his lower back and buttock and then started developing some radiating pain down the lateral side of his R leg to his ankle. This seemed to get worse and worse, and he was taken to the ER . . . .

(Ex. 3 at 13.) Dr. Iwersen reviewed and approved Mr. Trimble's note.

¶11 Mr. Trimble took the claimant off work on September 11, 2000. (*Id*. at 14.)

¶12 The claimant thereafter continued to see Dr. Iwersen and his staff. His back and leg pain improved. (Ex. 3 at 16, 18, 20, 23, and 25.) By January 3, 2001, the claimant was "pretty much back to normal." Dr. Iwersen's office note of his exam on that date records:

> Curt [claimant] was in today and Curt says that he has gotten much better. He's done with therapy and feels like he is pretty much back to normal. He can sit for long periods of time, he can walk and feels that he could do his job.
> On exam, he forward flexes, he says, as far as he ever has. Can almost touch his toes, but clearly gets very close to 90 d and that doesn't cause him any pain. . . . He can return to work, I guess he's MMI. I don'thave a request from work comp in there [sic], I don't know what they want me to do. We did give him a return to work status.

(*Id*. at 25.)

¶13 On January 3, 2001, Dr. Iwersen released the claimant to full-duty work without restrictions. (*Id*. at 28.) In his deposition, Dr. Iwersen testified that it was his opinion at that time that the claimant had fully healed and was capable of returning to work as a heavy equipment operator. (Iwersen Dep. at 16.)

¶14 The claimant thereafter sought work as a heavy equipment operator. When unable to find employment he sought unemployment benefits, indicating he was able to work. (Sworn Statement of Curt W. Brown at 9-10.)

¶15 The claimant sought and received no medical care with respect to his back until August 20, 2001, when he returned to Dr. Iwersen. Dr. Iwersen's office note for that date reflects:

> 8-20-01 Curt Brown was in today and continues to have significant problems with his lumbar spine and low back and even radiating to his anterior thigh, but it doesn't ever radiate to his foot. He can't sit or stand for long periods of time and when he drives he has to get out of the car about every hour and a half. He has trouble sleeping with this also. He has tried Advil and that used to help, but it does not anymore. He has not been able to return to work because of this.
> On exam, he has negative straight leg raising, no route irritation signs. The sensation into his feet with light touch was symmetric and he has some pain with R Faber testing, hip range of motion seemed to be unaffected and did not aggravate it. Adduction did not aggravate it, it was mostly external rotation and flexion and yet he was still able to get all of the way down, it did hurt him. He is tender mostly at L4-5, S1, and less so toward the sacroiliac joint and out lateral.
> X-RAYS show no sign of acute fracture.
> PLAN: I think that he needs a bone scan followed by either a CAT scan or and [sic] MRI depending on what the bone scan shows. I will then have him see Dr. McGlothlin, who can help him with this hopefully. Lawrence J. Iwersen, M.D./sc

(Ex. 3 at 32.)

¶16 In subsequent statements and testimony the claimant asserts that after his release to return to work in January 2001 he continued to have occasional pain in his low back and leg and that in July 2001 his back condition worsened significantly on a drive to and from Arizona. (Sworn Statement of Curt W. Brown at 39-40.) Dr. Iwersen's report for August 20, 2001, does not reflect that history. Nor does Dr. Iwersen's August 20, 2001 history reflect an incident occurring shortly before August 20th which occurred while the claimant was assisting with the building of an outdoor pavilion at his church.

¶17 The incident at the church is first mentioned in the medical records of Dr. Mark McGlothlin. As set out in the Dr. Iwersen's PLAN (Ex. 3 at 32), Dr. Iwersen referred the claimant to Dr. McGlothlin on August 20, 2001. Dr. McGlothlin specializes in physical and rehabilitation medicine (physiatry).

¶18 The claimant saw Dr. McGlothlin on October 10, 2001. At that time, Dr. McGlothlin recorded the following information:

> The pt. was unable to return to the physical rigors of heavy equipment operation, and in fact was essentially declared at MMI given failure to progress by Dr. Iwersen, even though Dr. Iwersen had discussed with the pt. a CT scan/MRI to further work up the pts. spinal access.
>
> Approximately 1 mo. ago the pt. was assisting several people working on a construction project at his church, when he was doing some very light shoveling and

> noted a loud pop in his R distal lumbar column and severe pelvic pain, so severe that the pt. was almost unable to return to work.

(Ex. 3 at 33). Dr. McGlothlin indicated that the claimant used the word "loud" as that is not a descriptive term he would normally utilize. (McGlothlin Dep. at 20, 38.)

¶19 At trial the claimant testified that the incident at the church occurred after his trip to Arizona but prior to his August 20, 2001 visit to Dr. Iwersen. He claimed that he had made the August 20, 2001 appointment with Dr. Iwersen prior to the incident. He further testified that his participation in the church project, which involved pouring concrete, was limited to watching others work while he stood by and held onto some shovels. According to the claimant, he felt a sharp pain in his back when he twisted to hand a shovel to his son.

¶20 I am unable to reconcile the claimant's testimony with the medical records and his own conduct. I find it unlikely that either Dr. Iwersen or Dr. McGlothlin misreported the history the claimant provided them on August 20 and October 10, 2001. The history that the claimant provided is noteworthy in several respects and is inconsistent with his testimony in the Sworn Statement he gave on May 7, 2002, and at trial. First, it is noteworthy that on August 20th, the claimant did not report that he experienced a significant increase in his back pain while traveling to Arizona in July. Indeed, he did not mention the trip. Second, in the history he gave Dr. McGlothlin, he reported that he had been "unable to return to the physical rigors of heavy equipment operation, and in fact was essentially declared at MMI given failure to progress by Dr. Iwersen . . . ." (Ex. 3 at 33.) Neither statement was true. In fact Dr. Iwersen had declared the claimant at MMI after reporting that he had essentially returned to normal; the claimant thereafter sought but had been unable to obtain employment as a heavy equipment operator. Third, the claimant reported to Dr. McGlothlin that he had been shoveling and that he had "noted a loud pop" in his back. Dr. McGlothlin's office note is very specific, going so far as to note that the claimant reported the location of the pop.

¶21 Despite the testimonial support offered by the claimant's wife and son at trial, I am unconvinced that the claimant experienced any significant back pain from January through July of 2001, or that he suffered a significant increase in symptoms on a trip to Arizona in July. Further, I am convinced that he was at MMI on January 3, 2001, and that he subsequently experienced a significant "pop" in his back in August 2001 while doing shoveling (light or otherwise) on a church pavilion project, and that the pop was followed by the immediate onset of back pain that impelled the claimant to again seek medical care. Credibility issues are resolved in accordance with this finding.

¶22 MCCF has also pointed to a September 2001 bear hunting trip as another possible cause of the claimant's back problems. However, I am persuaded that the claimant's participation in the hunt was essentially as an observer and that he did not participate in

dragging the bear out of the woods. Rather, the back pain he experienced after the hunting trip was a continuation of the pain he had suffered since the August 2001 church incident.

¶23 Both Dr. Iwersen and Dr. McGlothlin testified, and I find, that the church incident constituted a new injury. (Iwersen Dep. at 18; McGlothlin Dep. at 64.) Dr. Iwersen further testified, and I find, that the claimant's condition in August 2001 was "significantly different" from his condition on January 3, 2001. (Iwersen Dep. at 19.) Dr. McGlothlin testified that based on the facts found above, it was more probable than not that the claimant's back condition in October 2001 was not causally related to his 2000 industrial injury. (McGlothlin Dep. at 54, 64.)

¶24 In summary, I find that by January 3, 2001, the claimant had reached MMI with respect to his September 5, 2000 industrial back injury. I further find that in early August 2001 he suffered a new back injury or material aggravation.

CONCLUSIONS OF LAW

¶25 This case is governed by the 1999 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 Hosp.,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶26 It is undisputed that on September 5, 2000, the claimant suffered an industrial injury to his low back and that MCCF is liable for the injury. However, section 39-71-407(5), MCA (1999), provides:

> (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.

An injury is defined as "an unexpected traumatic incident or unusual strain." § 39-71-119(2)(a), MCA (1999). Injuries encompass events which materially and permanently aggravate or worsen preexisting physical conditions. § 39-71-407(2)(a)(ii), MCA (1999).

¶27 The facts in this case affirmatively establish that by January 3, 2001, the claimant had reached MMI with respect to his industrial injury. They further establish that he suffered a new injury or material aggravation to his back in early August 2001 in a nonwork-related accident. Under the plain terms of section 39-71-407(5), MCA (1999), MCCF is not liable for that injury or aggravation or for the claimant's low-back condition after the August 2001 incident. *Lockwood v. Liberty Northwest Ins. Co.*, 2004 MTWCC 21, ¶ 43-45. Accordingly, the claimant is not entitled to medical or compensation benefits for his low back after January 3, 2001.

JUDGMENT

¶28 The claimant is not entitled to further medical, indemnity, or other workers' compensation benefits. His petition is dismissed with prejudice.

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

¶30 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 3rd day of November, 2004.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Kenneth S. Thomas
Mr. Bradley J. Luck
Submitted: August 24, 2004