IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2004 MTWCC 74

WCC No. 2002-0632

DAVID LEGER

Petitioner

vs.

LIBERTY MUTUAL FIRE INSURANCE COMPANY

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: The claimant suffered a low-back injury at work in June 1995 and experienced some leg pain at the time. However, following physical therapy he returned to full-duty work at UPS after two months and continued working for UPS until 1998, when he was terminated. In 2000 he experienced low-back and leg pain like he had never before experienced; MRI imaging disclosed a herniated disk at the L5-S1 level which was impinging on nerve roots. In his petition to the Court, the claimant claims that his condition in 2000 was attributable to his 1995 industrial accident.

Held: The claimant suffered a subsequent, nonwork-related injury to his low back in early 2000. The nonwork-related injury materially and permanently aggravated his preexisting low-back condition. Pursuant to section 39-71-407(5), MCA (1993), the insurer at risk for the 1995 condition is relieved from further liability for the claimant's low-back condition.

Topics:

Injury and Accident: Subsequent Injury. Where a claimant suffers a subsequent nonwork-related injury to the same body part and the injury materially and permanently aggravates the preexisting condition involving that body part, the insurer liable for a prior injury to that same part is relieved from further liability for disability and treatment involving the body part. § 39-71-407(5), MCA (1993).

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: § 39-71-407(5), MCA (1993). Where a claimant suffers a subsequent nonwork-related injury to the same body part and the injury materially and permanently aggravates the preexisting condition involving that body part, the insurer liable for a prior injury

to that same part is relieved from further liability for disability and treatment involving the body part.

Injury and Accident: Subsequent Injury. Where a nonwork-related incident satisfies the injury and accident definitions of section 39-71-119, MCA (1993), the incident constitutes a subsequent nonwork-related injury for purposes of section 39-71-407(5), MCA (1993).

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: § 39-71-407(5), MCA (1993). Where a nonwork-related incident satisfies the injury and accident definitions of section 39-71-119, MCA (1993), the incident constitutes a subsequent nonwork-related injury for purposes of section 39-71-407(5), MCA (1993).

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: § 39-71-119, MCA (1993). Where a nonwork-related incident satisfies the injury and accident definitions of section 39-71-119, MCA (1993), the incident constitutes a subsequent nonwork-related injury for purposes of section 39-71-407(5), MCA (1993).

¶1 The trial in this matter was held in Kalispell, Montana, on August 24, 2004. The petitioner, David Leger, was present and represented by Mr. Darrell S. Worm. The respondent, Liberty Mutual Fire Insurance Company, was represented by Mr. Larry W. Jones.

¶2 Exhibits: Exhibits 1 through 12, being all of the exhibits offered, were admitted without objection.

¶3 Witnesses and Depositions: The petitioner was the sole witness at trial. However, the parties also submitted the depositions of David Leger, Jennifer Standley, Kathy Lawson, Dr. Bruce R. Belleville, Dr. Steven M. Martini, and Dr. Christopher H. Gill to the Court for its consideration.

¶4 Issues Presented: The sole issue presented for decision is whether the petitioner is entitled to additional temporary total disability and medical benefits with respect to a June 14, 1995 industrial injury.

¶5 Having considered the Pre Trial Order, the testimony presented at trial, the demeanor and credibility of the witness, 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 David Leger and I will refer to him hereinafter as "claimant."

¶7 The claimant was not a credible witness. I found his lack of memory of significant events, as reflected in both his deposition and his trial testimony, especially unconvincing. I was also unconvinced by his testimony that he suffered pain, which increased over time, after he returned to work following his 1995 injury.

¶8 On June 14, 1995, the claimant suffered a low-back injury while working for United Parcel Service (UPS). (Ex. 10.) According to the First Report of Injury or Illness, he stepped off the rear bumper of his delivery truck, hit a cart he had loaded, and twisted his lower back. (*Id*.)

¶9 The claimant was seen in the emergency room (ER) of the Kalispell Regional Medical Center on the same day as his injury, where he was diagnosed with "[l]ow back strain." (Ex. 4 at 21.) In the history taken in the ER, the claimant reported no prior back problems - which was not true. (*Id*.) He denied any radiating pain: "[p]atient denies radiation of pain stating it is right low back only." (*Id*.)

¶10 The claimant saw Dr. Douglas A. Nelson on June 19, 1995, and was thereafter treated by Dr. Loren Vranish, a family practitioner. (*See* Ex. 2 at 1-12.) Dr. Nelson's June 19th note indicates the claimant had "[p]ain localized to the right paraspinous muscles opposite approximately L3" with equivocal physical examination results for possible L5-S1 radiculopathy. (*Id*. at 12.) Lumbar x-rays showed mild degenerative changes at the L5-S1 disk. (*Id*.) Dr. Nelson's impression at that time was, "[a]cute low back strain with possibility of right L5 S1 radiculopathy." (*Id*.)

¶11 Dr. Vranish provided follow-up care over the next five weeks. His office notes indicate that claimant's primary complaint was back pain and spasm with minimal indication of any leg pain or radiculopathy. (*Id*. at 11.) His pain improved and on July 27, 1995, Dr. Vranish noted that he was back to work in a work-hardening plan with an expected release for full duty on August 15, 1995. (*Id*.)

¶12 The claimant in fact returned to full-duty work at UPS in August of 1995. (Trial Test.) He continued working for UPS until 1998, when he was terminated by UPS on disciplinary grounds.

¶13 Following his return to work at UPS in August 1995 until his termination of employment in 1998, the claimant underwent periodic physical examinations. The first physical was done April 30, 1996.[(1)] At the time of that physical, the claimant filled out a Medical History Form. (Gill Dep. Ex. 5.) On that form he reported that he had previously "Pulled Muscle in Back (side)" and that it had lasted two months. (*Id*.) He reported that his back was "semi sore just about all of the time" but that he could nonetheless perform his job without accommodation. (*Id*.) He was approved for full-duty work without restrictions. (Ex. 2 at 9.)

¶14 The next physical was on May 13, 1998. (Ex. 2 at 9 and Gill Dep. Ex. 6.) At that time, the claimant reported his prior "back strain" as lasting two months. (Gill Dep. Ex. 6.) However,

he also stated he had a "sore back" since 1993 or 1994. (*Id*.) But he also indicated that he could perform his job without restrictions. (*Id*.) Dr. Vranish, who did a physical examination at that time, reported:

> DOT [Department of Transportation] physical done for UPS. Has had some ongoing low back pain that originally started 4-5 years ago. Is seeing a chiropractor now. Use some Robaxin and Naprosyn.[(2)] Otherwise should pass the physical w/o [without] problems.

(Ex. 2 at 9.)

¶15 Between August 1995 and April 2000, the only treatment the claimant had for low-back pain was from a chiropractor in 1997. The chiropractic records are found at Exhibit 8. Of significance, they show that the claimant has a history of low-back pain going back to 1984. A chiropractic office note of February 18, 1997, states:

> DAVE [claimant] HAS BEEN A PATIENT SINCE 7/18/84. HE INITIALLY COMPLAINED OF RIGHT LOWER BACK PAIN AFTER FALLING OUT OF A TREE. MOST RECENTLY HE COMPLAINS OF LEFT NECK AND LEFT LOWER BACK PAIN.

(Ex. 8 at 5 (capitalization in original).) The records also show that the claimant sought chiropractic treatment for low-back pain in 1989, 1993, and 1994. (Ex. 8 at 7-13.)

¶16 The claimant was treated for his neck pain on February 18, 19, and 20, 1997. *(Id*. at 3-6.) He was thereafter treated on April 4 and 7, 1997, for both neck pain and "lower lumbar" pain bilaterally. (*Id*. 1-2.) That is the extent of his 1997 treatment and the only record of treatment for his lower back after August 1996 until April 2000.

¶17 Significantly, the claimant's low-back pain following his June 1995 industrial injury was on his **right side,** which is the same side as his pain in 1984, whereas the pain he initially reported to his chiropractor in 1997 was on his **left side**. (*Id*. 8 at 5.)

¶18 Following his termination of employment with UPS, the claimant lived off monies from a 401(k) retirement plan for approximately three years. (Trial Test. and Leger Dep. at 7.) During that time he hooked up with another individual to develop an RV park in Washington state. (Leger Dep. at 8.) According to the claimant, his activities in developing the park were limited to "[s]upervising." (*Id*. at 9.) However, his testimony concerning his work and role in the park was vague and did not provide a satisfactory picture of his activities from 1998 to 2000.

¶19 In early 2000 the claimant's back condition took a significant turn for the worse. On April 26, 2000, he sought medical care, apparently going first to an urgent care center and then to Dr. Vranish's office where he was seen by Julie E. Long, a certified nurse practitioner. Ms. Long's typewritten office note for that date records the following history:

> **4-26-00** David [claimant] presented to the Urgent Care with complaints of low back pain, pain radiating down his R leg. Denies any numbness and tingling in the lower extremity at this time, however is unable to walk straight, is having to limp. **He's had this pain for a couple of mos. [months] now but it has become much worse. He's taking about 30 Ibuprofen a day without any relief in symptoms. Hx. [history] of an old back injury back in 1977 and he has intermittent low back pain but "nothing like this".**

(Ex. 2 at 7 (emphasis added).) In her longhand note of that date, Ms. Long recorded:

> C/o [complaining of] low back pain & R [right] hip radiates down R [right] leg - had built a guard rail in rain 2 months ago; worse last few days.

(*Id*. at 8.) Together, Ms. Long's notes indicate that the claimant experienced a new and more serious onset of pain a couple of months earlier while building a guardrail. Significant to evaluating his history of back problems, the claimant mentioned a 1977 back injury but not the 1995 UPS injury. Of further significance, he indicated that his back pain since 1977 had been **intermittent**, a representation that is supported by the medical history provided to the Court, and was "**nothing like**" the pain he was experiencing on April 26, 2000.

¶20 In his trial testimony, the claimant sought to minimize any incident involving his work on a guardrail. He testified that the pain he was experiencing on April 26, 2000, came on suddenly the night before while he was in bed. He denied doing any labor in connection with a guardrail, which he claimed a neighbor was building, and further testified that any strain he experienced that day did not increase his back pain. His testimony is at odds with the medical notes for April 26, 2000. Moreover, his trial testimony was inconsistent with the history he reported to Dr. Robert F. Hollis on May 12, 2000. Dr. Hollis recorded the history as follows:

> He [claimant] reports four months ago he was helping a friend do a job when he twisted his back and started to have pain in the gluteal region. It expanded into bilateral gluteal pain and then eventually localized in the right gluteal region with radiation into the anterolateral shin and posterolateral thigh. He feels the bottom of his foot is numb also. This has progressively worsened over the last three or four months. He feels he has a charleyhorse in the gluteal region and the anterolateral shin.

(Ex. 5 at 7.) After observing the claimant at trial and considering his reports to Ms. Long and Dr. Hollis, I am convinced that the claimant is concealing further information about what occurred when he was working on the guardrail.

¶21 In view of the history he reported to his medical providers in April and May 2000, and based on my own assessment of his credibility at trial, I am persuaded that the claimant did indeed hurt his back a couple of months previous to April 26, 2000, in an event involving

the building of a guardrail and that the incident precipitated severe pain which increased to the point of requiring medical care by April 26th. As he reported on April 26th, his pain prior to 2000 was "nothing like" what he was experiencing on that date.

¶22 A lumbar MRI was done on May 11, 2000. The MRI disclosed multilevel degenerative disk changes and spinal stenosis. At the L5-S1 level, there was a large extruded disk fragment obscuring the right L5 nerve root, as well as severe right L5-S1 foraminal stenosis. (Ex. 4 at 18.)

¶23 On May 12, 2000, the claimant saw Dr. Hollis, who confirmed that the claimant suffered from severe degenerative disease with foraminal stenosis and from a "frank herniated disk at L5-S1 with clear-cut impingement on the L5 and S1 nerve roots." (Ex. 5 at 9.) Dr. Hollis prescribed an epidural steroid injection, which was done the same day. (*Id*.; Ex. 4 at 17.) At the time of his injection, the claimant reported severe pain in his right buttock and right leg, to the degree it was difficult for him to walk. (Ex. 4 at 17.)

¶24 Following the May 12th steroid injection, the claimant experienced improvement of his pain to the point that on May 30, 2000, Sarah C. Walker, a physician's assistant at Dr. Vranish's office, recorded, "[h]e was doing very well until this weekend." (Ex. 2 at 3.) P.A. Walker then goes on to report,

> Was pushing a boat somewhat carefully, but had sudden onset pain, lost control of his lower ext [extremity], and had a shooting electric type sensation in the lower ext. Since then has had significant pain that is not responding to Lortab [a narcotic drug].

(*Id*.)

¶25 The claimant thereafter returned to Dr. Hollis on June 19, 2000. (Ex. 5 at 6.) On examination of the claimant, Dr. Hollis noted that the claimant was limping and that he had lost strength in one of his leg muscles. (*Id*.) Dr. Hollis thereafter prescribed further epidural steroid injections and nerve blocks. (*Id*. at 1-5.) By October 26, 2000, the herniated disk had resorbed. (*Id*. at 2.) The claimant's back pain improved over time but he continued to have pain and his treatment was picked up by Dr. Steven M. Martini, a pain specialist. Dr. Martini first saw the claimant on January 4, 2001, and his records reflect continuing treatment of the claimant through September 26, 2003, primarily with narcotic drugs. (Ex. 7.)

¶26 The claimant returned to work in 2001 for Town Pump and quit for non-health reasons. At the time of trial he was working for a nursery.

¶27 Three medical depositions were taken in this case. The first was of Dr. Christopher H. Gill, who practices with Dr. Vranish. Dr. Gill, who is board certified in internal medicine and pediatrics, was not involved in the claimant's care until May 11, 2000, when he "reviewed the films and the treatment course" prescribed by the nurse practitioner who saw the

claimant on that date. Dr. Gill did not actually examine the claimant until August 2000. (Gill Dep. at 12, 23.) The second was of Dr. Stephen M. Martini, who as noted, began treating the claimant for pain in 2001. The final physician testifying was Dr. Bruce R. Belleville, who is board certified in occupational and family medicine.

¶28 I have carefully and completely read Dr. Gill's deposition. It establishes no more than a medical probability that the claimant's 1995 industrial accident *predisposed* him to further degeneration and injury of his lumbar spine. (*See* Gill Dep. at 21, 44, 50.) He agreed that the claimant reached maximum medical improvement (MMI) sometime in 1995. (*Id*. at 32.) He testified that after 1995 and prior to April 2000, the claimant was "functioning at a fairly high level" and that he did not have an acute herniated disk in 1995, although he felt that the 1995 injury could have been the beginning of a herniation. (*Id*. at 32, 42, 58, 59.) He agreed that the claimant's symptoms in April 2000 were significantly worse than his symptoms in 1995 and that his radicular symptoms (leg pain) were more acute and well defined in 2000 than they ever were in 1995. (*Id*. at 39, 41.) He agreed that the disk herniation diagnosed in 2000 could explain the claimant's increased pain and symptoms at that time. He could find nothing in the claimant's history indicating the cause of the acute herniation **other than** the work the claimant reported he had done on a guardrail two months prior to his first seeking medical care on April 26, 2000. (*Id*. at 40.) Finally, he testified that the claimant's pushing a boat in late May 2000 could have triggered additional nerve impingement with a corresponding increase in pain. (*Id*. at 16-17.)

¶29 In his testimony, Dr. Martini noted that most herniated lumbar disks resolve with conservative nonsurgical treatment. (Martini Dep. at 7.) He agreed that the claimant had reached MMI with respect to his 1995 back injury by 1998. (*Id*. at 8.) As did Dr. Gill, he opined that the 1995 industrial injury predisposed the claimant to further back problems, however, he also agreed that it "sounds as though" the guardrail and boat incidents were both aggravations of the claimant's preexisting low-back condition. (*Id*. at 13-14.) He did **not** testify that claimant's back problems in 2000 were just a natural progression of the preexisting condition.

¶30 Dr. Belleville testified by deposition. He performed an independent medical examination (IME). At the time he performed the IME he was unaware of any incidents in 2000 and essentially attributed the claimant's complaints in 2000 to his 1995 industrial accident. (Ex. 9 and Belleville Dep. at 19, 20.) However, during his deposition he was presented with the medical records, referred to earlier, about the onset of acute symptoms approximately two months prior to April 26, 2000, in connection with work the claimant was doing on a guardrail and with the record concerning the claimant pushing a boat in late May of 2000. Based upon the additional information, Dr. Belleville testified on a more-probable-than-not basis that the claimant's work on a guardrail earlier in 2000 caused the herniated disk discovered on May 11, 2000, and that his pushing a boat in late May 2000 caused a further worsening of his condition. (*Id*. at 45, 47.)

¶31 I find as a matter of fact that the claimant's acute back and leg pain and his herniated disk as imaged on May 11, 2000, were directly caused by his work on a guardrail some two months prior to 2000. He suffered a new, material, and permanent aggravation of his preexisting low-back condition at that time. Dr. Belleville testified unequivocally on this point. Neither Dr. Gill nor Dr. Martini contradicted his opinion, although their own opinions on this point were somewhat more equivocal. Moreover, Dr. Belleville's opinion is more consistent with the history the claimant provided to medical providers in April and May 2000 and with his prior history of back problems going back to 1977. It is also consistent with the fact that the claimant has never returned to his pre-2000 condition. As I noted earlier, I am convinced that the claimant has not fully disclosed the full extent and nature of his work on the guardrail and the specific incident which precipitated his herniated disk.

CONCLUSIONS OF LAW

¶32 This case is governed by the 1993 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).

¶33 The 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. Wickens Bros. Construction Co.*, 183 Mont. 190, 598 P.2d 1099 (1979). That includes proof, by a preponderance of the evidence, that his medical condition in 2000 and thereafter is attributable to his 1995 industrial accident.

¶34 Liberty has accepted liability for, and is certainly liable for, both disability and medical care that is causally related to the claimant's 1995 low-back injury. However, Liberty is not liable for disability and medical benefits that follow a material aggravation of the claimant's low back where the aggravation is due to a nonwork-related incident. Section 39-71-407(5), MCA (1993), 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.

¶35 It is undisputed that the claimant reached maximum healing with respect to his 1995 industrial accident long before 2000. Therefore, Liberty is not liable for any subsequent injury or material aggravation. An injury is defined in section 39-71-119, MCA (1993), as follows:

> **Injury and accident defined.** (1) "Injury" or "injured" means:
> (a) internal or external physical harm to the body;
> (b) damage to prosthetic devices or appliances, except for damage to eyeglasses, contact lenses, dentures, or hearing aids; or

(c) death.
(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.

All of the criteria are met. The injury definition is met since the claimant suffered additional harm to his low back. The accident requirements are similarly met. In his reports to Ms. Long on April 26, 2000, and to Dr. Hollis on May 12, 2000, the claimant identified at minimum an unusual strain in connection with work on a guardrail. The fact that he specifically associated the onset of his acute pain to his work on the guardrail indicates that it was an unusual strain; he was not forthcoming with any more detailed information as to exactly what occurred and I am convinced he is concealing information regarding the incident. While the exact date of the incident is unknown, it is sufficient that it occurred at a specific place and time and during a single work shift. I am persuaded that all of those criteria are met. Finally, the incident affected the claimant's low back, resulting in a herniated disk, thus the final criteria for an accident is met.

¶36 Medical testimony establishes that, on a more-probable-than-not basis approximately two months prior to April 26, 2000, the claimant suffered a material and permanent aggravation of his low back in a nonwork-related incident. Therefore, pursuant to section 39-71-407(5), MCA (1993), Liberty is not liable for the claimant's disability or medical care or any further workers' compensation benefits after the nonwork-related incident.

JUDGMENT

¶37 The claimant is not entitled to further workers' compensation benefits from Liberty with respect to his June 14, 1995 industrial accident. His petition is **dismissed with prejudice**.

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

¶39 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 5th day of November, 2004.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Darrell S. Worm
Mr. Larry W. Jones
Submitted: August 24, 2004

1. From the initials on the office note, it appears that the physical was done by Nancy J. Knaff, a certified nurse practitioner working in Dr. Vranish's office. *See* Ex. 2 at 1 (the list of practitioners at the bottom) and Ex. 2 at 9, which is the office note for April 30, 1996, dictated by NJK.

2. Naprosyn is a non-steroidal anti-inflammatory drug. Robaxin is a muscle relaxant.