IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2004 MTWCC 73

WCC No. 2004-1121

JOHN T. RICE

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer.

DECISION AND JUDGMENT

Summary: The claimant injured his neck and head in a 1996 motorcycle accident and underwent a diskectomy and fusion at the C4-5 level, however, he thereafter returned to work and worked successfully over a four-year period until he was thrown about the cab of his truck when a large boulder struck the truck. The incident was work related. The claimant thereafter experienced significant neck and arm pain, as well as headaches. A neurosurgeon diagnosed a C5-6 level herniated disk and performed a diskectomy and fusion at that level. Based on independent medical examination (IME) opinions, however, the insurer denied liability for the surgery, medical care, and indemnity benefits.

Held: The opinions of the treating neurosurgeon are more persuasive in light of his greater expertise regarding the condition at issue, his continuing treatment of the claimant over the years, the fact that the claimant plainly suffered a significant increase of symptoms following the 2003 work-related incident, and the fact that the surgery resulted in a significant improvement of his symptoms. Dr. Ross' testimony that claimant's symptoms were anatomically inconsistent with a herniated cervical disk was unconvincing where the neurosurgeon plainly felt they were not.

Topics:

> **Attorney Fees: Reasonableness of Insurers.** The Workers' Compensation Court has indicated in past decisions that an insurer is entitled to rely on the opinion of an independent medical examiner. While the statement is generally true, the prior decisions should not be read as indicating that an insurer acts reasonably in every case in which a denial of liability is based on an IME opinion. The insurer has a duty

to consider all facts and circumstances in determining liability. Other facts and circumstances may indicate that it cannot reasonably rely on an IME opinion.

Penalties: Insurers. The Workers' Compensation Court has indicated in past decisions that an insurer is entitled to rely on the opinion of an independent medical examiner. While the statement is generally true, the prior decisions should not be read as indicating that an insurer acts reasonably in every case in which a denial of liability is based on an IME opinion. The insurer has a duty to consider all facts and circumstances in determining liability. Other facts and circumstances may indicate that it cannot reasonably rely on an IME opinion.

Proof: Conflicting Evidence: Medical. Treating physician's opinions are more persuasive where he has more expertise in the area of medicine under consideration, where the opinions are more consistent with the claimant's history, and where the treatment prescribed by the treating physician is consistent with his opinions and in fact materially improves the claimant's condition.

¶1 The trial in this matter was held on October 22, 2004, in Billings, Montana. Petitioner, John T. Rice (claimant), was present and represented by Mr. Thomas J. Lynaugh. Respondent was represented by Mr. Larry W. Jones. Exhibits 1 through 3, 5, 7 through 10, and 12 were admitted without objections. Exhibits 4, 6, 11, and 13 were admitted over objections. The claimant, Debra Rice, Dr. Scott Ross, and Gary Schild were sworn and testified. In addition, the Court considered the depositions of the claimant, Dr. Robert C. Wood, Dr. Scott K. Ross, and Gary Schild.

¶2 After considering the trial testimony, exhibits, and depositions, the Court bench ruled in favor of the claimant, holding that he suffered an industrial injury to his neck on April 1, 2003, and that the injury and his subsequent medical treatment, including neck surgery, were causally connected to his industrial injury. Therefore, I ruled that Liberty Northwest Insurance Corporation (Liberty) is liable for indemnity benefits, which it has been paying under a reservation of rights, and for the claimant's post-injury medical expenses related to his neck and surgery. The rationale for my decision was delivered orally. The parties agreed that a transcript of the Court's oral decision may constitute its findings of fact and conclusions of law. A copy of the transcript is therefore attached.

FACTUAL BACKGROUND

¶3 While the transcript of my bench ruling is attached, some factual background information is necessary to understand my ruling. The important facts are as follows:

¶4 The claimant is a heavy equipment operator for the Decker Coal Company at its Decker, Montana, mine. He has worked for Decker for thirty years.

¶5 The claimant was involved in a motorcycle accident in June 1996 when he hit a deer. He suffered neck, head, and other injuries.

¶6 Following the1996 motorcycle accident, the claimant was off work for approximately one year. He returned to work in June 1997, but in September 1998 began experiencing severe neck and arm pain attributable to his 1996 accident. He was diagnosed with a herniated cervical disk at the C5-C6 level. Dr. Robert Wood, a neurosurgeon, operated, doing a diskectomy and fusion at the C5-C6.

¶7 After the claimant recovered from the surgery, Dr. Wood asked Dr. Scott Ross, who specializes in occupational medicine, to evaluate the claimant with respect to a return to work. Dr. Ross saw the claimant in February of 1999 and approved claimant's return to work as an equipment operator without restrictions.

¶8 The claimant returned to work in 1999 but again sought medical advice from Dr. Robert Schultz in 2001 on account of left arm pain. At the time, the claimant's primary job was driving a dozer, which involved extensive use of his left arm in an outstretched position. His difficulty was felt to be positional and related to his dozer operation. Upon Dr. Schultz's advice, the claimant arranged with his employer to operate the dozer only occasionally, and even then to cease doing dozer work if his arm started to hurt.

¶9 The limitation of his dozer work alleviated his arm pain and he did not thereafter seek medical care until April 2, 2003, after an April 1, 2003 work-related incident where the truck he was driving was hit by a large boulder and he was thrown about the cab of the truck, hitting his head. Following that event, the claimant experienced extreme neck and arm pain, as well as increased headaches.

¶10 Dr. Wood, the neurosurgeon, resumed the claimant's care. He ultimately ordered a CT myleogram which disclosed a disk protrusion at the C6-C7 level. He thereafter performed a diskectomy and fusion at that level. The claimant's pain improved significantly following the surgery.

¶11 Liberty denied liability for the surgery on the ground that the surgery was unrelated to the April 1, 2003 incident. The denial was largely based on the opinion of Dr. Ross, who evaluated the claimant prior to the surgery. Dr. Ross evaluated the claimant on referral by Dr. Wood, however, Dr. Wood made the referral at the express request of a medical case manager employed by Liberty, although Dr. Wood selected the doctor.

¶12 Dr. Ross viewed his evaluation of the claimant as an independent medical examiner and opined that claimant's surgery was a result of his preexisting condition and not attributable to his 2003 work-related accident. Dr. Wood emphatically testified that the claimant's condition and surgery were due to a material aggravation which he suffered on April 1, 2003.

¶13 While denying liability for the surgery, Liberty has been paying temporary total disability benefits to the claimant. In addition, while the causation issue has been contested, Blue Cross/Blue Shield paid for the lion's share of the claimant's surgery and medical care.

¶14 It is against the above background that I considered the medical opinions and testimony expressed in this case, as well as the reasonableness of the insurer's denial of the claim.

JUDGMENT

¶15 The claimant suffered a work-related injury on April 1, 2003, which resulted in a material and permanent aggravation of his preexisting neck condition. Liberty is liable for the aggravation, for the ensuing surgery and medical treatment, and for indemnity benefits arising from the aggravation.

¶16 The parties and the Court anticipate a request by Blue Cross/Blue Shield for reimbursement of benefits it paid for the claimant's surgery and medical care. The amount of any such reimbursement is governed by the reimbursement schedules provided under the Workers' Compensation Act.

¶17 With respect to all medical benefits payable as a result of this judgment, it appears that pursuant to *Lockhart v. New Hampshire Ins. Co.,* 1999 MT 205, 295 Mont. 467, 984 P.2d 744, claimant's counsel is entitled to a lien for attorney fees equal to 25% of the medical benefits. Liberty is therefore authorized to withhold 25% of medical benefits payable as a result of this decision. The Court retains jurisdiction over any dispute which may arise concerning the entitlement of the claimant's attorney to the fees or the amount of those fees. Fees which are not disputed by Blue Cross/Blue Shield and/or the medical providers ultimately entitled to reimbursement may be disbursed by Liberty to the claimant's attorney.

¶18 The claimant is entitled to reimbursement for out-of-pocket medical expenses which he incurred as a result of his industrial injury. The Court retains jurisdiction regarding any dispute which may arise over the payment of the out-of-pocket expenses.

¶19 Liberty has not acted unreasonably, therefore the claimant is not entitled to attorney fees. § 39-71-611, MCA (2001).

¶20 The claimant is entitled to his costs and shall submit a memorandum of costs. Liberty has waived the time limits applicable to submission of the memorandum. The Court will retain jurisdiction over any dispute which may arise over costs.

DATED in Helena, Montana, this 4th day of November, 2004.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Thomas J. Lynaugh
Mr. Larry W. Jones
Submitted: October 22, 2004
Attachment: Bench Ruling

WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

WCC No. 2004-1121

JOHN T. RICE,

Petitioner,

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION,

Respondent.

BEFORE THE HONORABLE MIKE McCARTER
WORKERS' COMPENSATION COURT
FOR THE STATE OF MONTANA
October 22, 2004

APPEARANCES:

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(The following is an excerpt of the hearing for John Rice taken on October 22, 2004.)

THE COURT: Well, I'm going to give you a ruling. Do you want it organized or disorganized? If you want it organized --

MR. LYNAUGH: Just give us your ruling.

THE COURT: I'm going to go with Dr. Wood's opinion. I think there's pretty darn good reasons to go with Dr. Wood's opinion. Maybe I can outline some of those here. Firstly, if everything was anatomically perfect with these conditions in the neck and the back, this would be a great world, but I've heard too many cases to know that everything doesn't fit classical anatomic distributions.

I've been around long enough to know that there are disagreements even among physicians about some of these things, and I've heard enough doctors testify. So the fact that his neck doesn't have classical symptoms is not at all conclusive to me.

What's screaming in this case is the history about the neck pain, part of which is contributed to by Dr. Ross, who in 1999 examines him

24 and returns him to work without restrictions. And
25 basically at that point he's saying he's about at

1 100 percent and Dr. Ross doesn't dispute that. We
2 have this report by Dr. Schultz in 2001 about his
3 having problems with his arm and the fact that it is
4 positionally related, essentially, to what he was
5 doing.
6 We've got his testimony, absolutely
7 unrebutted, that he quit driving that dozer or drove
8 it only occasionally. And whenever his arm started
9 to bother him, he would go to his employer and stop
10 driving the dozer and he did, and he didn't have any
11 problems. There aren't any medical records
12 indicating -- contradicting his testimony and
13 besides that, I listened to him and I thought that
14 he was absolutely believable on that point.
15 Then we get this jostling about the cab in
16 2003. I don't think there is any dispute whatsoever
17 about that. It's validated by the employer's
18 records. He has immediate pain and goes to the
19 emergency room the next day. And basically after
20 that, you have a continuation of the pain.
21 And the fact that he had a prior fusion
22 and the fact that that prior fusion may have led to
23 some additional stress and strain of both above and
24 below the prior fusion, firstly, I don't think there

25 is anything noteworthy about that. I've heard that

1 time and time again with orthopedic physicians,
2 particularly about the lower part of the back. So
3 there is nothing whatsoever that's noteworthy about
4 that article.
5 Secondly, it doesn't address the question
6 in this case, which is whether or not his underlying
7 neck condition became symptomatic, was lit up on a
8 permanent basis by this particular accident. And
9 the evidence in this case, just the history of the
10 case, says it was. I think Dr. Ross completely
11 ignores that.
12 I'm a little bit bothered by Dr. Ross's
13 role in this case, to be honest with you. When he
14 saw him in 1999, he was seeing him at the request of
15 the treating physician. If I had a treating
16 physician and he sent me to a specialist for
17 specific medical advice, I would look at that as
18 also a treating physician. And now he's turned
19 around and considered an IME.
20 I'm a little bit bothered by the fact that
21 now he comes in and says this is all attributable to
22 the preexisting condition. Whereas, in 1999, he
23 releases this guy and tells him to go back to work
24 with all this labor without any restrictions
25 whatsoever. I'm having some difficulty in how he

has handled this and what his testimony is.

MR. JONES: I thought I may have heard you say that when Dr. Ross saw Mr. Rice the second time that he was an IME. In fact, that was a second referral from Dr. Wood. We did not chose Dr. Ross for an IME. It was a referral from Dr. Wood. I thought I heard you say that Dr. Ross, the second time --

THE COURT: In 2004.

MR. JONES: Right. He was a referral from Dr. Wood at that time also. I think Tom will stipulate to that.

MR. LYNAUGH: Dr. Wood did make a referral at some point. Dave Lundin, the case manager that was hired by Liberty, asked him to make that referral. It's Exhibit 9, which was Dave Lundin's letter to Dr. Ross. Dave Lundin went to Dr. Wood and asked Dr. Wood to refer him to Dr. Ross. Dave Lundin wrote the letter with the records to Dr. Ross. It's Exhibit 9.

THE COURT: Well, Dr. Ross, my impression today is he certainly didn't see himself as a treating physician in this case.

MR. JONES: Your Honor, I simply pointed out what I believe that the facts show. That is

that we did not retain Dr. Ross as you would with a normal IME. But instead, as Dr. Wood testified, he did refer Mr. Rice to Dr. Ross.

THE COURT: Okay. But Dave Lundin works for --

MR. JONES: He was hired by us, Your Honor. The record is clear, Dr. Wood was free to make any referral he wanted. Again, I guess I should put it the other way. We did not ask for the IME. That's the point I wanted to make.

THE COURT: But you have a case manager who is involved, who is basically directing traffic here. In any event, Dr. Ross clearly saw his role in this case as an IME, not as a treating physician. Whereas back in 1999, I think his role, whether or not he is confused about it, really is part of the treatment of the claimant. He's sort of in a situation of wearing two different hats and speaking out of both sides of his mouth and that concerns me a bit.

The other thing is, we are dealing with a neurosurgical problem and the weight goes to the neurosurgeon for a neurosurgical problem, rather than an occupational disease specialist. All you have to do is look at the history of this case.

Back in 1999, the physician treating was Dr. Wood,

2 the neurosurgeon.

3 For his particular medical problem, he was

4 referred to Dr. Ross to evaluate the appropriateness

5 of going back to work, which is specifically an

6 appropriate task for an occupational disease

7 physician. So I think on the expertise level, the

8 greater weight goes to the neurosurgeon.

9 Obviously, Dr. Wood wasn't nearly as

10 concerned as Dr. Ross about the anatomical aspects

11 of the case and the classic anatomy of the case.

12 And we've also got the fact that he's had surgery

13 and he's improved, which I think is entitled to some

14 consideration in this case.

15 If you've got an accident and it causes

16 these symptoms and you perform surgery and you get

17 better, you've got to think something happened. It

18 did something, even if it was only psychological.

19 It did something to address those symptoms that were

20 caused by the accident. I think we certainly have

21 evidence of that in this case.

22 And then we've got the CT myelogram, and

23 Dr. Wood provided a very good explanation of the

24 difference between the MRIs and the CT myelograms

25 and the relative accuracy. Again, I've heard enough

1 cases to know that all those things aren't perfect,

2 all those medical tests aren't perfect.

So in any event, I come down on the side of Dr. Wood and find that he did suffer an aggravation and that the surgery is related to the aggravation that we addressed. The penalty issues --

MR. JONES: Excuse me, Your Honor, there is no penalty on the attorney fee issue.

THE COURT: Okay. I'm concerned about cases like this in context of the duty of the insurer to look at the full picture and to take into consideration the full picture. I've said in the past that insurers -- where there is a split in medical opinion, is a judicable issue. I think at some point, that's probably not true. I think at some point, depending on who the IME physician is, what the expertise is, whether or not they evaluated the claimant, the circumstances of getting that IME evaluation, the information furnished to the IME doctor, taking all those things into consideration, there may well be times where the insurer is not reasonable in relying on the IME physician's opinion, where there is a good, strong conflicting opinion by the treating

physician. In prior cases I've indicated that when there is a conflict of opinions, the insurer is

entitled to litigate them and I think, generally, that's true. I don't think in this case that the insurer was -- that the facts and the circumstances in this case are such that the insurer was unreasonable in litigating this case. There are several things that really convinced me of that. Secondly, they did go out and try to get another opinion. Mr. Schild has testified, and I believe his original plan was to try to set up with a medical evaluation panel and get a more proper examination, which might have muddied the waters too. In any event, I'm satisfied with that explanation.

I would be a little bit more concerned if he had relied absolutely, totally on Dr. Ross's opinions, especially in light of Dr. Ross's roles and the strength of the opinion of Dr. Wood and the history of this case, the pain history of this case, but he did not. He got another medical opinion. He went through the exchange of letters requested, which I think was a very reasonable thing to do. He also had a circumstance here where the

surgery was getting paid for, so there was a little bit of breathing room in this case, as far as making sure that he had the medical care. He wasn't being deprived of medical care. So I don't think this is

a case in which I can say that the insurer was unreasonable in relying on independent medical opinions in disputing the case.

Dr. Ross did provide some good reasons for his opinions. I haven't accepted them, but they are not off-the-wall opinions. They are entitled to some weight. I just didn't find them convincing.

Do I need to say more? That pretty much covered it.

MR. JONES: May we go off the record?

THE COURT: Yes.

(Discussion off the record.)

THE COURT: Off the record, we had a bit of a discussion about the payment of the medical bills. There are some out-of-pocket expenses and there may be some providers who are not paid.

Apparently, not a great deal of money, as I understand. It's somewhere in the range of a thousand dollars and there may be some futures that will become payable.

In any event, I will retain jurisdiction if there arises some sort of dispute over the

payment of those. I would expect that Counsel can work that out and make sure that those bills get paid. As for the monies that Blue Cross has paid, I would anticipate -- Counsel probably will anticipate that Blue Cross will be knocking on Liberty's door

and asking for reimbursement. As I understand, Mr. Lynaugh, you are going to claim a Lockhart Lien on the medical part of it.

MR. LYNAUGH: Yes, I am.

THE COURT: And I think you are entitled to that Lockhart Lien, and so I am going to authorize Liberty to withhold 25 percent. The fee agreement is 25 percent. And so Liberty is to withhold that 25 percent and if there are no objections, that will be disbursed.

If some of the medical providers object to that, I will have to hear from them. But I think the law is fairly well established at this point that there is an entitlement to a Lockhart Lien in cases where medical is disputed. We'll see what they say, if anything. So I'll reserve jurisdiction with that regard but I will authorize you to withhold.

MR. LYNAUGH: Thank you, Your Honor.

THE COURT: I'm not going to deal with

future potential issues and there may be no issues in any event.

MR. LYNAUGH: Just a point of clarification, if I can. I did ask for costs. Is that --

THE COURT: Yes, you are entitled to your

costs. And I suspect if you get those to Larry, he will pay them. There is a time requirement on submitting those costs, so you ought to be aware of it. If Larry wants to waive, that's fine.

MR. JONES: It's waived.

THE COURT: Okay. So why don't you get together with him and if you have a problem with it, get it to me and I'll resolve it. I suspect there won't be a problem. Do you want a written opinion on this?

MR. JONES: We're in agreement. We do not need a written order. As you've done in other cases where you bench rule, if there is a question, we'll just get a copy of the transcript.

THE COURT: Okay. I'll have Sindi do a transcript. What I'll do is enter a judgement and indicate that I'm adopting my oral findings of fact.

MR. JONES: Nothing further from Liberty, Your Honor.

MR. LYNAUGH: Nothing further.

THE COURT: Okay. Thank you.

(Hearing concluded at 12:30 p.m.)

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1 STATE OF MONTANA)

2) ss. REPORTER'S CERTIFICATE

3 COUNTY OF YELLOWSTONE)

4 I, Cynthia M. Smith, do hereby certify

5 that I am a Shorthand Reporter and Notary Public

6 within the State of Montana; that previous to the

7 commencement of the examination, the witness was

8 duly sworn to testify to the truth.

I further certify that this hearing was taken in shorthand by me at the time and place herein set forth and was thereafter reduced to typewritten form, and that the foregoing constitutes a true and correct transcript.

I further certify that I am not related to, employed by, nor of counsel for any of the parties or attorneys herein, nor otherwise interested in the result of the within action.

In witness whereof, I have affixed my signature and seal this _____ day of _____, 2004.

My commission expires September 20, 2006.

_____

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