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

**2001 MTWCC 12**

**WCC No. 2000-0217**

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**SAM STEPHENSON, III**

**Petitioner**

**vs.**

**CIGNA INSURANCE COMPANY**

**Respondent/Insurer for**

**ARCO**

**Employer.**

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FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

**Summary of Case**: Claimant injured his back in 1987 while employed by ARCO. He lost three weeks of work and worked for ARCO for another eight and one-half years, then was laid off on December 31, 1995. His back continued to hurt and he sought further medical care in 1992 and 1995. Following his lay off, he was employed for short periods in 1996, then ceased working. Meanwhile, he suffered increasing back and left leg pain, causing him to again seek medical care in July 1998. He has been released by an IME physician to return to work in two sedentary positions with the proviso that he begin on a part-time basis and increase his hours as his pain tolerates. He claims that his pain precludes him from returning to any job.

**Held**: (1) Claimant's present back condition is the result of his 1987 injury. While the 1987 injury merely "lit up" and made his underlying back disease symptomatic, it constituted a material aggravation for which the insurer remains liable absent it showing that the present condition arose independently of the aggravation from some subsequent event. (2) Claimant's pain complaints are credible and such that he cannot hold regular employment. (3) Since claimant prevailed, he is entitled to attorney fees. The 1985 law applies and does not require that he prove that the insurer's denial was unreasonable. (4) Claimant is not entitled to a penalty since the insurer reasonably questioned his claims concerning the severity of his pain and therefore his disability.

**Topics**:

**Injury and Accident: Aggravation: Generally**. Where an industrial injury lights up or makes symptomatic a preexisting condition, the insurer is liable for the condition unless some subsequent event or condition intervenes.

**Benefits: Permanent Total Benefits: Generally.** While pain is only one component to be considered in determining whether a claimant is permanently totally disabled, where pain is of such magnitude that it prevents the claimant from holding regular employment, the claimant is permanently totally disabled.

**Attorney Fees: Denial or Delay of Payment.** Under 1985 law, which applies in this case, the claimant is entitled to attorney fees since the insurer denied his request for permanent total disability benefits and he prevailed in his request.

**Penalties: Insurers:** No penalty where the claim for permanent total disability is based upon pain and the insurer reasonably questioned the claimant's credibility as to his pain complaints.

**Montana Code: 39-71-611 (1985).** Under 1985 law, which applies in this case, the claimant is entitled to attorney fees since the insurer denied his request for permanent total disability benefits and he prevailed in his request.

**Montana Code: 39-71-2907 (1985).** No penalty where the claim for permanent total disability is based upon pain and the insurer reasonably questioned the claimant's credibility as to his pain complaints.

¶1 The trial in this matter was held on February 22, 2001, in Butte, Montana. Petitioner, Sam Stephenson, III (claimant), was present and represented by Mr. Bernard J. Everett. Respondent, Cigna Insurance Company (CIGNA), was represented by Mr. Robert Cameron.

¶2 Exhibits: Exhibits 1 through 4 and 8 were admitted without objection. Exhibits 5 through 7 were admitted over objections. Exhibit 9 was withdrawn.

¶3 Witnesses and Depositions: The parties agreed that depositions of claimant and Dr. Catherine C. Capps, M.D., shall be considered by the Court. Claimant and Kathryn Kleinkopf were sworn and testified.

¶4 As stated in the Pre-trial Order, the issues are as follows:

1. Whether SAM STEPHENSON III is permanently totally disabled as the result of his industrial injury of May 28, 1987?

2. Whether SAM STEPHENSON III is entitled to permanent total disability benefits as the result of that injury?

3. Whether SAM STEPHENSON III is entitled to costs and attorney fees for insurer's failure and refusal to pay Sam Stephenson III benefits as the result of his industrial injury?

4. Whether the penalty provisions of the Workers' Compensation Act should be invoked against insurer for its failure and refusal to pay claimant total disability benefits?

(Pre-trial Order at 2.)

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

FINDINGS OF FACT

¶6 Claimant is 55 years old. He has a bachelor of science degree in mineral dressing engineering (a metallurgical engineering degree).

¶7 Claimant went to work of ARCO in 1971 as a junior testing engineer. (Ex. 4-1.) He worked for ARCO for nearly 25 years, holding jobs with increasing responsibilities until he finally became a superfund specialist.

¶8 On May 28, 1987, while working for ARCO as an environmental coordinator, claimant fell and injured his back. (Petition for Hearing at 2.)

¶9 Claimant spent the weekend following his injury in bed. On Monday, May 31, 1987, he went to Dr. James P. Murphy, an orthopedic surgeon. (Ex. 1-1.) Dr. Murphy noted claimant's complaints as low-back and left leg pain. (*Id.*) X-rays taken at that time revealed narrowing at the L5-S1 and an old compression fracture at T12. Dr. Murphy prescribed muscle relaxants and physical therapy. (*Id.)*

¶10 Dr. Murphy suggested surgery, but claimant elected conservative treatment. (Ex. 2-2.)

¶11 Claimant was off work for three weeks. He then returned to full-time work at light duty. Gradually, he increased his activity level to include all of his regular duties. (Ex. 4-2.) ¶12 At the time of his injury, ARCO was insured by CIGNA. CIGNA accepted liability for the injury (Uncontested Fact 2), and initially paid temporary total disability and medical benefits. (Petition for Hearing at 4).

¶13 Claimant worked at ARCO until December 31, 1995. During that time he continued to have low-back and left leg pain and sometimes missed work on account of the pain. Occasionally he was unable to travel and attend meetings.

¶14 Following his initial treatment in 1987, claimant did not require regular medical treatment. He did see Dr. Dana Headapohl, a physician specializing in occupational and

environmental medicine, on at least two occasions: once in 1992 and the other in 1995. (Ex. 4-2.) She noted chronic back pain. (*Id*.) His pain gradually increased, and his left leg began giving way. (Ex. 4-2.)

¶15 On December 31, 1995, claimant was laid off by ARCO when it reduced its work force.

¶16 In 1996 claimant was hired by ICF Kaiser Engineering as an adjunct employee. He worked part time for several months, preparing a bid on behalf of the company. In July 1996 he went to work as a construction inspector for ESA Consultants, Incorporated. He worked for three months, then was laid off due to lack of work. (*Id*.; Ex. 9-4.) He has not been employed since. (Trial Test.)

¶17 In July 1998 claimant's back pain increased. Claimant testified that he "got to the point where [he] couldn't walk without falling." He contacted CIGNA, which authorized him to return to Dr. Murphy. (*Id*. at 4.)

¶18 Dr. Murphy examined claimant on July 14, 1998. Claimant presented with the same type of back pain as before, only with some radicular pain associated with it. (Ex. 1-6.) Dr. Murphy noted that claimant had "occasional numbness in the lower extremity, pain with cough, sneeze & Valsalva[(1)] which went all the way to the small toe on the left particularly." Dr. Murphy also noted that claimant "walks with a list at this time." (*Id*.) Plain x-rays showed marked degenerative arthritic change, as well as marked narrowing, particularly L5-S1 posteriorly. Dr. Murphy diagnosed low-back strain or sprain or a possible herniated disk which he thought could be "traced back" to claimant's 1987 industrial injury. (Ex. 1-12.) He prescribed conservative treatment of muscle relaxants, anti-inflammatories, and physical therapy for a month. (Ex. 1-6.)

¶19 On August 18, 1998, Dr. Murphy recommended an MRI but CIGNA refused to authorize it. (Ex. 1-8.) In his office note of that date, Dr. Murphy also noted that claimant had "gotten worse over the past 2-3 months and now has in addition to his back pain, leg pain with numbness and tingling." (Ex. 1-7.) After further discussion with Dr. Murphy regarding a possible herniated disk, claimant obtained an MRI even though he knew CIGNA had refused to cover it.

¶20 A lumbar MRI was done on September 17, 1998. The findings were 1) advanced osteoarthritis with disk desiccation, degenerative disk space narrowing, and schmorl node formation and 2) central disk bulges at L2-3 and L3-4, and central and right parasagittal disk herniation at L4-5. (Ex. 1-9.)

¶21 As Dr. Murphy was getting ready to retire, claimant also sought care from Dr. Peter Wendt, an orthopedic surgeon practicing in Anaconda. (Ex. 2-2; Ex. 4-3; Trial Test.) On August 16, 1999, Dr. Wendt noted that claimant had "evidence of a left L4 radiculopathy. This very well may be on the basis of an L4-5 disk injury." (Ex. 2-3.) The doctor prescribed Lorcet10/650 for pain and Celebrex (for his arthritis). (*Id*.) After review of the MRI, Dr. Wendt

noted "the overall picture is one of multi-level disk disease with focal herniation at L4-5 on the right." (Ex. 2-4.) In addition to the herniation, Dr. Wendt noted claimant had significant lumbar spondylosis and arthritis. Dr. Wendt did not recommend either surgery or an epidural injection. (*Id.*)

¶22 At Dr. Murphy's recommendation, however, claimant received an epidural steroid injection in August or September of 1998. (Ex. 2-2; Ex. 4-2.) The injection provided some relief from thigh discomfort. (*Id*.)

¶23 CIGNA referred claimant to Dr. Catherine C. Capps for an independent medical evaluation (IME). Dr. Capps is an orthopedic surgeon. She examined claimant on December 16, 1999. (Ex. 4-1.) She noted that following claimant's epidural injection in August or September he had less left leg pain and no give way of his leg. (Exs. 4-2, 4-3.) She further noted that he walked with a markedly antalgic gait: he sometimes misstepped as though the left leg would give way, then he dipped a little before he was able to continue walking. (Ex. 4-4.)

¶24 Dr. Capps ordered plain x-rays which showed "severe degenerative disk disease at L3 to S1 . . . with large spurs." (Ex. 4-6.) She diagnosed "[c]hronic low back and left lower extremity pain with recent MRI scan positive for right-sided disk herniation at L4-L5." (Ex. 4-6.)

¶25 Dr. Capps noted that after claimant was laid off in 1995 "his pain changed in character in that it was sharp and stabbing in the left anterior thigh and he developed some leg give-away which apparently he did not have prior to this time." (*Id*.) But she also testified that "[h]e's had chronic back pain that hasn't really changed that much in character as far as location." (Capps Dep. at 18.) She opined that the L4-L5 herniated disk was not contributing to his symptoms. The herniation was on the right side, whereas his weakness and pain were predominantly on the left side. (Capps Dep. at 53-54; Ex. 4-8.) She also opined that the herniated disk was not related to claimant's 1987 industrial injury. (Capps Dep. at 21.)

¶26 With respect to the relationship of claimant's continuing chronic back and left leg pain, Dr. Capps noted that "[i]t is clear that the patient had ongoing back and left leg complaints since the date of injury and continues to do so though the nature of his pain has slightly changed." (Ex. 4-6.) She testified that although claimant has "severe degenerative disk disease of diffuse nature," he became "symptomatic" as a result of his 1987 industrial injury. (Capps Dep. at 23, 25, 37-39.) She said that, based on claimant's medical history, the 1987 industrial injury was "**the precipitating event for his pain**." (*Id*. at 38, emphasis added.)

¶27 At her deposition, Dr. Capps was questioned as to the impact of claimant's industrial injury on his degenerative spinal condition:

> Q. --but what I guess I'm trying to--

A. It was the accident, quote, that lit up, end quote, that process.

Q. Right.

A. That's what started.

Q. **So it's either the cause of the degenerative condition is the injury and the aging processes or the injury aggravated the preexisting condition.**

A. **I think it lit it up or aggravated it, and then it just continued on independent of that, but, you know, by then he was -- of course, started his symptoms.**

(Capps Dep. at 39, emphasis added.)

¶28 Dr. Capps opined that since claimant had experienced chronic pain since his injury of 1987, his prognosis with respect to future pain was poor. (Exs. 4-6, 4-7.) Due to his chronic problems, she limited him "to light work, alternating sitting and standing for comfort and avoiding repetitive or frequent bending, twisting and stooping." (Capps Dep. at 25; Ex. 4-9.) She further opined that claimant was capable of gainful employment within these restrictions. (*Id*.)

¶29 Based on claimant's improvement from a single epidural injection in 1998, Dr. Capps recommended that he undergo a further series of epidural injections. However, CIGNA refused to authorize the injections.

¶30 Claimant asserts in this proceeding that his pain prevents him from holding regular employment. He takes Lortab for his pain. Lortab is a combination drug consisting of acetaminophen and hydrocodone. Hydrocodone is a narcotic. Claimant testified that even with this medication he has constant back and leg pain. He has good days and bad days. He cannot predict a bad day. On bad days he has to lay down. His pain impairs his ability to drive a car and travel by airplane. He testified that he could work if he could find a job which would permit him to lay down a couple of times a day and not work on his bad days.

¶31 Despite his back and leg pain, claimant is able to care for himself and engage in limited recreational activities. He does his own laundry and cooks for himself. He has a computer and uses it daily. To a limited extent he engages in his premorbid hobbies. He ties flies, hunts big game and water fowl, shoots skeet, reloads shells, fishes and gunsmiths. However, he does so on a very limited basis. His recreational activities are limited by his pain. While he shot a deer this past year, he hunted from the road, shooting the deer while a few steps away from his truck. While he helped gut the deer, the deer was small and it took him much longer to complete the job than before his injury. All of his hunting and related activities have been severely limited as to number of times he engages in the activities and the extent and duration of the activities. Claimant also has done some limited carpentry work and welding work, but as with his hunting, it has been severely

limited. His recreational and other activities do **not** show that he could work on a regular, sustained basis.

¶32 CIGNA submitted three full-time job analyses for claimant. The analyses are found at Exhibits 5 through 7. Exhibit 7 was not approved by any physician, so it merits no further discussion. Exhibits 5 and 6, which were medically approved, are for full-time jobs as environmental engineers for two different companies. Both jobs are sedentary. (Exs. 5-3, 6-3.)

¶33 Dr. Capps approved both of the environmental engineer positions, however, her approval was with limitations. She stated claimant should "**start part-time and [increase] as tolerated. . . .** " (Exs. 5-8, 6-8, emphasis added.)

Resolution

¶34 CIGNA contends that claimant's current back and left leg problems are unrelated to his 1987 industrial injury. It further contends that irrespective of his current back problems he is able to work and therefore is not permanently totally disabled.

¶35 I find that claimant's current back pain and disability are related to his 1987 injury. Dr. Capps' testimony, as well as the claimant's medical history and other medical opinions, persuade me that the 1987 industrial incident triggered his pain symptoms. While he had underlying degenerative back disease, the incident made his underlying condition symptomatic. He never completely recovered from the accident. Since the accident he has had continual low-back and leg pain. There is no evidence of any new, intervening event causing claimant's continued back and leg pain.

¶36 I further find that claimant's current level of pain precludes him from holding regular employment. The insurer argues that his recreational activities show a high level of function inconsistent with permanent total disability. However, as I have found, those activities are sporadic, limited in nature, and of short duration. I found claimant's testimony concerning his pain, his limitations, his frequent need to lay down, and his bad days, credible and persuasive. Dr. Capps medically approved him for part-time work only, allowing only that claimant could increase his work "as tolerated." She thus acknowledged that pain is a limiting factor in claimant's employment. CIGNA has not presented evidence identifying jobs which would allow claimant to lay down as needed and be off work on his bad days.

¶37 Finally, I find that claimant's inability to work dates from July 14, 1998, when he returned to Dr. Murphy for further care. While claimant testified to his belief that his disability occurred at an earlier date, I am not persuaded. Significantly, his condition prior to July 1998 was such that he did not seek out medical care.

¶38 While finding claimant permanently totally disabled, I note that claimant obtained significant pain relief from a single epidural injection done in 1998. Based on that relief, Dr. Capps recommended a further series of epidural injections. That series of injections *might* improve his pain and permit him to hold regular employment. The insurer, however, has refused to authorize the injections.

Reasonableness of the Insurer's Denial

¶39 The insurer's denial of permanent total disability benefits was not unreasonable. Claimant's case rests entirely on his credibility. He was released to return to work by Dr. Capps on a part-time basis, with the proviso that he could increase his work hours as tolerated by his pain. Pain is subjective. The claimant's continued participation in recreational activities, such as hunting and skeet shooting, his continued employment for almost ten years following his injury, his limited medical care during those ten years, and the fact that he was laid off and still did not seek medical care for two and a half years after he was laid off, all raise serious questions as to his current claims concerning his pain level. Ultimately, I have found his complaints credible, but not without some agonizing on my part.

CONCLUSIONS OF LAW

¶40 The 1985 version of the Workers' Compensation Act applies since that was the law in effect on the date of claimant's alleged injury. *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶41 The claimant has the burden of proving by a preponderance of the evidence that he is entitled to compensation. *Ricks v. Teslow Consolidated*, 162 Mont. 469, 512 P.2d 1204 (1973); *Dumont v. Wicken Bros. Construction Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

¶42 Initially, the insurer questions the relatedness of the claimant's current condition to his 1987 injury. It has long been the rule that the employer takes its workers as it finds them and is liable for injuries which materially aggravate preexisting conditions. The rule is found in *Robins v. Anaconda Aluminum Co.,* 175 Mont. 514, 575 P.2d 67 (1978), a case in which the claimant suffered broken bones and a head injury in a 1964 industrial accident. Robins settled his claim and returned to work in a less demanding job at a lower wage. In 1973 he fell and injured his back. Of note was the fact that claimant also suffered from a congenital abnormality of the spine at the lumbosacral junction. His treating physician testified "that people who have this abnormality have more problems with their backs than those who do not." *Robins* at 518. The insurer denied liability on the basis of the congenital condition, but the Court held in claimant's favor. Relevant language from the opinion is as follows:

> The well established rule in Montana is that an employer takes his employee subject to the employee's physical condition at the time of the employment. The fact that an employee is suffering from or [is] afflicted with a pre-existing disease or disability

> does not preclude compensation if the disease or disability is aggravated or accelerated by an industrial accident.

*Id.*, citations omitted. Thus, if an industrial accident lights up or worsens the claimant's disability or preexisting condition, the insurer is liable for the full extent of the disability existing after the aggravating accident. *Birnie v. U.S. Gypsum Co.,*134 Mont. 39, 44, 328 P.2d 133, 136 (1958) "That an employee was suffering from or afflicted with a pre-existing disease or disability does not preclude compensation if the disease or disability was lit up, aggravated or accelerated by an industrial injury."[(2)] *Id.* at 45. Since the claimant's 1987 injury "lit up" and made his preexisting back condition symptomatic, and since his back has remained symptomatic ever since, deteriorating even further, the insurer is liable for his present back condition and any medical expenses and disability resulting from it.

¶43 Section 39-71-116(13), MCA (1985), governs the claimant's request for permanent total disability benefits. It provides:

> "Permanent total disability" means a condition resulting from injury . . . that results in the loss of actual earnings or earning capability that exists after the injured worker is as far restored as the permanent character of the injuries will permit and **which results in the worker having no reasonable prospect of finding regular employment of any kind in the normal labor market.** Disability shall be supported by a preponderance of the medical evidence. [Emphasis added.]

While pain is just one factor to be considered in determining whether a claimant is permanent totally disabled, pain may be so severe that it renders a claimant physically unable to engage in regular employment. *Killoy v. Reliance Nat. Indem.*, 278 Mont. 88, 923 P.2d 531, (1996). This is such a case. Accordingly, claimant is entitled to permanent total disability benefits commencing July 14, 1998.

¶44 Section 39-71-611, MCA (1985), governs claimant's request for attorney fees. The section does not require a showing of unreasonableness by the insurer as a prerequisite for awarding attorney fees - the unreasonable requirement was not effective until July 1, 1987. 1987 Mont. Laws, ch. 464, §§ 16, 17, 72, and 73. The 1985 version applicable to this case provides:

> **39-71-611. Costs and attorneys' fees payable on denial of claim or termination of benefits later found compensable.** In the event an insurer denies liability for a claim for compensation or terminates compensation benefits and the claim is later adjudged compensable by the workers' compensation judge or on appeal, the insurer shall pay reasonable costs and attorneys' fees as established by the workers' compensation judge.
>
> All criteria for an award of attorney fees have been met: (1) The insurer denied liability for permanent total disability benefits and (2) the claim for such benefits has

been adjudged compensable. Claimant is therefore entitled to attorney fees in an amount to be determined by the Court.

¶45 Claimant's request for a penalty, however, does require proof of unreasonableness. Section 39-71-2907, MCA (1985), provides:

> **39-71-2907. Increase in award for unreasonable delay or refusal to pay.** When payment of compensation has been **unreasonably delayed or refused** by an insurer, either prior or subsequent to the issuance of an order by the workers' compensation judge granting a claimant compensation benefits, the full amount of the compensation benefits due a claimant, between the time compensation benefits were delayed or refused and the date of the order granting a claimant compensation benefits, may be increased by the workers' compensation judge by 20%. The question on unreasonable delay or refusal shall be determined by the workers' compensation judge, and such a finding constitutes good cause to rescind, alter, or amend any order, decision, or award previously made in the cause for the purpose of making the increase provided herein. [Emphasis added.]

I have found that the insurer did not unreasonably dispute claimant's entitlement to permanent total disability benefits, therefore, he is not entitled to a penalty.

¶46 At trial, the claimant also challenged the insurer's failure to pay for medical care and to authorize further epidural injections. Neither the Petition for Hearing nor the Pre-trial Order raise these issues, therefore, the Court cannot consider them.

JUDGMENT

¶47 1. Claimant is permanently totally disabled as a result of his industrial injury of May 28, 1987. His disability dates from July 14, 1998, therefore, CIGNA shall pay claimant permanent total disability benefits retroactive to July 14, 1998, and continuing so long as he remains permanently totally disabled or he otherwise becomes ineligible for the benefits.

¶48 2. Claimant is entitled to attorney fees in an amount to be determined by the Court pursuant to its rules. ARM 24.5.343.

¶49 3. Claimant is entitled to costs in an amount to be determined in accordance with its rules. ARM 24.5.342.

¶50 4. Claimant is not entitled to a penalty.

¶51 5. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM24.5.348.

¶52 6. 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 29th day of March, 2001.

(SEAL)

\S\ Mike McCarter
JUDGE

c: Mr. Bernard J. Everett
Mr. Robert Cameron
Submitted: February 22, 2001

1. Valsalva is "a forceful attempt at expiration when the airway is closed at some point; *especially*: a conscious effort made while holding the nostrils closed and keeping the mouth shut especially for the purpose of testing the patency of the eustachian tubes, adjusting middle ear pressure, or aborting tachycardia." http://dict.medscape.com/scripts/cgi-bin/medical.exe

2. The aggravation rule was codified in 1987 in Section 39-71-407(2)(a), MCA, which provides that an aggravation of a preexisting injury constitutes an injury within the meaning of the Act. It states:

> (a) An insurer is liable for an injury, as defined in 39-71-119, if the claimant establishes that it is more probable than not that:
>
> (i) a claimed injury has occurred; or
>
> (ii) a claimed injury aggravated a preexisting condition.