

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2019 MTWCC 2

WCC No. 2018-4207

EVERETT PATE

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Summary: Petitioner asserts that he injured his shoulder in an industrial accident in which a rung on a ladder broke, causing him to fall down and backwards, partially into a crawlspace. Respondent denied liability, at first because Petitioner's medical providers did not identify any objective medical evidence of a shoulder injury. Respondent then relied on the opinion of its IME physician, who determined that while there is objective medical evidence of a shoulder injury or disease, there is no mechanism of a shoulder injury and that the time between the accident and the onset of Petitioner's shoulder pain is too great to support a causal relationship.

Held: Petitioner injured his left shoulder in his industrial accident. Respondent's IME physician failed to take an accurate history and, as a result, did not understand that the Petitioner used his arms to arrest his backwards fall. Respondent's IME physician also did not understand that Petitioner reported shoulder pain immediately after his fall and suffered shoulder pain again within two weeks of his fall. Thus, this Court gave more weight to the evidence from the orthopedist treating Petitioner's shoulder, which is sufficient to prove on a more-probable-than-not basis that Petitioner injured his shoulder in the fall.

¶ 1 The trial in this matter was held on May 3, 2018, in Great Falls. Petitioner Everett Pate was present and represented by Richard J. Martin. Respondent Montana State Fund (State Fund) was represented by Mark D. Meyer.

¶ 2 Exhibits: This Court admitted Exhibits 1 through 20. This Court overruled State Fund's objection to a portion of Exhibit 8.

¶ 3 Witnesses and Depositions: This Court admitted the depositions of Everett Pate, Margaret Cook-Shimanek, MD, Michael Bryant, DO, and Terrance J. Sweeney, MD, into evidence. Everett Pate, Caleb Sunwall, Brenna Brewer, Daneen Pate, Todd Pate, and Jennifer Papini-Chapla were sworn and testified at trial.

¶ 4 Issues Presented: The Pretrial Order sets forth the following issues:

Issue One: Whether Petitioner injured his left shoulder during the accident?

Issue Two: Whether Respondent was unreasonable for not accepting the left shoulder as part of this claim?

Issue Three: If Respondent is found to be unreasonable for not accepting liability for the left shoulder, then whether a penalty and attorney fees should be awarded to the Petitioner in this matter?

FINDINGS OF FACT

¶ 5 The following facts are established by a preponderance of the evidence.

¶ 6 Prior to July 9, 2015, Pate did not have any problems with his left shoulder. He worked as an electrician for Liberty Electric, which required him to frequently use his arms to work above his head. He was active outside of work, including hunting, restoring classic cars, four-wheeling, and cutting firewood with a chainsaw. He also worked around his house, including mowing, running the weed eater, and shoveling snow.

¶ 7 On the night of July 9, 2015, Pate was working at the medical clinic at Malmstrom Air Force Base. He was in the crawlspace, which was muddy. Thus, he radioed Brenna Brewer, a co-worker, and asked her to bring garbage bags to the crawlspace opening to put on his feet. Brewer and a housekeeper at the medical clinic took garbage bags to the crawlspace opening and waited for Pate.

¶ 8 To exit the crawl space, Pate started climbing up a six-foot, fixed welded ladder to the opening, which was approximately 36 inches by 42 inches. Pate reached the top rung, which was a few inches below floor level. After he lifted his right foot off the ladder to step up to the floor, the top rung broke, causing Pate to fall down and slightly backwards. Pate instinctively threw his arms away from his body. The back of Pate's thighs struck the next rung of the ladder, stopping his legs. His torso continued to fall backwards. As Pate fell backwards, his thighs slid back on the rung until his bent knees caught on the rung. His torso continued to fall backwards until he grasped the edge of the crawl space opening, quickly stopping his backwards fall with his head slightly below floor level. Pate scooted his legs forward to get the rung off the back of his knees, as he

felt pain in that area. As he got to the area where his thighs initially hit the rung, he felt even more pain. Thus, Pate scooted farther forward and pulled himself into a curled position, holding himself steady with his arms on the floor at the exit of the crawl space.

¶ 9 Brewer witnessed Pate's fall and confirmed at trial that he arrested his backwards fall with his arms. Recognizing that Pate was in pain and could not get himself out, Brewer ran to get help. She returned with co-worker Caleb Sunwall, who grabbed Pate's right arm and attempted to lift Pate out of the crawlspace by jerking him. Pate realized that Sunwall's efforts were fruitless and told him to wait until more help arrived. At the same time Brewer ran to get help, the housekeeper did the same, and eventually returned with Airman Mora. Airman Mora and Sunwall lifted Pate out of the crawlspace by grabbing him underneath his arms.

¶ 10 After Pate was out of the crawlspace, he leaned against the wall. Mike Petzak, the general contractor's site superintendent and safety officer, brought a chair. Airman Mora retrieved a first aid kit and gave Pate Ibuprofen. Pate had scratches and bruises on his legs and felt pain in his legs, back, knees, and shoulders.

¶ 11 Kevin Koehmstedt, who was in charge of Liberty Electric's night crew, arrived at the scene with paperwork to document the accident and injuries. Koehmstedt and Petzak asked Pate the questions and filled out the paperwork.

¶ 12 Petzak completed a "Loss/Near Loss Incident Investigation Form." Petzak wrote:

Everett was coming up from the crawlspace by climbing up a fixed welded ladder when the top rung weld broke. Everett fell on the next fixed rung on the back of his legs while catching himself with his outstretched arms at the surface of the opening.

¶ 13 Koehmstedt filled out an "Accident Report," which recounts the accident and states that Pate's injured body parts were his "legs, shoulders, back, knee possibly."

¶ 14 Koehmstedt also filled out a First Report of Injury or Occupational Disease, on State Fund's standard form. In the box for identifying the parts of the body that were injured, Koehmstedt wrote, "knee/back/shoulder."

¶ 15 On the night of the accident, Pate sought treatment at the emergency room. Pate described the areas of acute pain as his thighs, knees, and back. The attending physician prescribed pain medication, took Pate off work two days, and imposed a 15-pound lifting restriction.

¶ 16 When he came home from the hospital during the early morning hours of July 10, 2015, Pate told his wife he had significant pain from his neck to his legs. Pate was moving slowly and wincing. He tried to sleep but could not lay on his left side and spent the time tossing and turning.

¶ 17 On the afternoon of July 10, 2015, Pate saw Terrance Sweeney, MD, who practices at an urgent care clinic. Pate did not mention shoulder pain. Dr. Sweeney diagnosed leg contusions and a thoracic spine strain. Dr. Sweeney recommended pain medication, ice, and rest.

¶ 18 On July 11, 2015, State Fund mailed another First Report of Injury and Occupational Disease to Pate. This version of the First Report of Injury and Occupational Disease does not mention a shoulder injury; rather, it only states that Pate suffered sprain or strain to his legs. Pate signed the First Report of Injury and Occupational Disease and sent it back to State Fund.

¶ 19 On July 13, 2015, Pate returned to the urgent care clinic and saw Michael Hall, PA. Pate reported pain in his scapular region, mid back, and legs. Hall's impression was myofascial pain; i.e., muscular and tendon pain. Hall released Pate to return to work with a 20-pound lifting restriction due to his "mid back strain."

¶ 20 Pate returned to work on July 14, 2015, but, due to his pain and lifting restriction, was only able to move a ladder for two interns working under his supervision.

¶ 21 Pate returned to see Dr. Terrance Sweeney on July 18, 2015. Dr. Sweeney noted, "patient continues to have a significant amount of discomfort in his upper back area with muscle spasm." Dr. Sweeney did not note any complaint of shoulder pain. Dr. Sweeney continued Pate's work restrictions. Dr. Sweeney also prescribed an anti-inflammatory and a pain medication. Dr. Sweeney also recommended massage therapy.

¶ 22 During the week of July 23, 2015, Pate felt a stabbing pain in his left shoulder joint when he raised his left arm to point towards specific ceiling tiles while instructing the interns. This was the first time Pate had tried to use his shoulder in this motion since the accident.

¶ 23 On July 29, 2015, Pate saw April M. Posey for massage therapy. Pate reported pain in his "upper back, left shoulder, legs, and feet," with his pain in his back and shoulder at nine on the pain scale. Pate saw Posey 13 times over the next five weeks, each time complaining of left shoulder pain, along with back and leg pain.¹ Posey provided massage therapy from Pate's neck to his feet, focusing on his back and legs.

¹ At trial, State Fund objected to Exhibits 8-004 through 8-009 for lack of foundation. These records purport to be Posey's records for Pate's 13 visits from July 29, 2015, to September 2, 2015. The record for each visit is a typed paragraph, followed by Posey's signature. These records were not produced until approximately two months before the trial. State Fund correctly points out that Exhibits 8-010 through 8-013 purport to be Posey's records for the same dates. The record for each date of service is a typed paragraph. Posey signed the records only once at the end of the September 2, 2015, note. These records were provided shortly after this course of massage therapy. State Fund correctly points out that there are differences in these records. This Court notes that each record on Exhibits 8-004 through 8-009 specifically states that Pate complained of left shoulder pain whereas the records on Exhibits 8-010 through 8-013 do not mention left shoulder pain. State Fund points out that when Pate sent a letter demanding that State Fund pay for the massage therapy, he enclosed the records that are Exhibits 8-010 through 8-013. Pate stated that there "was no explanation" for why there are two sets of records for these dates of service. This Court overruled

¶ 24 In late August 2015, claims examiner Jennifer Papini-Chapla took Pate's statement. Pate explained the accident to Papini-Chapla, including that he used his arms to arrest his fall. Papini-Chapla asked Pate an open-ended question about what body parts were injured. Pate did not mention his left shoulder.

¶ 25 On August 29, 2015, Pate returned to the urgent care clinic and saw Dr. Terrance Sweeney, complaining of persistent mid- and low-back pain. Pate did not mention shoulder pain. Dr. Sweeney prescribed a pain medication and a muscle relaxant. Dr. Sweeney continued Pate's lifting restriction of 15-20 pounds. Finally, Dr. Sweeney referred Pate to pain management.

¶ 26 On September 28, 2015, Pate returned to the urgent care clinic, complaining of "pain in his left shoulder, mid and upper back." Hall refilled Pate's prescriptions and continued his work restrictions.

¶ 27 On September 29, 2015, State Fund accepted Pate's claim for the thoracic spine strain and posterior bilateral thigh contusions. However, State Fund denied liability for Pate's shoulder and knee pain, explaining: "the medical reports available [do] not support injury to these body parts."

¶ 28 Pate again saw Dr. Terrance Sweeney on October 3, 2015, complaining of mid- and low-back pain. Dr. Sweeney referred Pate to Craig K. Sweeney, DO, for pain management.

¶ 29 On October 9, 2015, Pate filled out a form for the pain management department at the Great Falls Clinic. Pate wrote that his main source of pain was his "mid upper back, left foot."

¶ 30 On the morning of October 28, 2015, Pate again felt a stabbing pain in his left shoulder while working on phone lines, work that required him to frequently reach with both hands above his head.

¶ 31 That afternoon, Pate returned to the urgent care clinic. Hall noted:

Everett presents today for evaluation of his shoulder. [H]e indicated he hurt his shoulder when he was reaching upward. He says it hurts in the anterior portion now but previously was in the lateral aspect. He has problems with unassisted lowering of his shoulder. . . . [H]e notes that this is . . . a result of his fall and his work comp injury.

the foundation objection under ARM 24.5.317(3) and (4) and stated it would give the records whatever weight they deserved. Upon reviewing the records and observing Pate's testimony, wherein he credibly testified that he told Posey about his shoulder pain, this Court finds that Pate told Posey that he had pain in his left shoulder on his visits from July 29, 2015, to September 2, 2015. While this Court questions why there are two sets of records, there is no evidence from which this Court could find that there was any wrongdoing.

Hall noted that Pate had pain with abduction and limited range of motion due to pain. Hall recommended ice and anti-inflammatories and restricted Pate from lifting his arm above his shoulder. Hall also documented:

We also talked about today that, at this time I think he needs an independent examiner to evaluate him as I believe that we have brought him as far as we can. We also talked about that he has a lot of subjective complaints that may need a different type of therapy and that I also think that he may benefit from some occupational therapy to evaluate his functional ability.

¶ 32 Dr. Terrance Sweeney testified, but could not say whether it was more probable than not that Pate's left shoulder was injured in the fall. Dr. Sweeney testified that Pate never complained of shoulder pain to him. Dr. Sweeney thought it was "possible" that Pate injured his shoulder in the fall but explained that the issue was outside his area of expertise and that a specialist such as an orthopedic surgeon should answer the question.

¶ 33 On October 9, 2015, Pate saw Dr. Craig Sweeney, complaining of mid- and low-back pain and left foot pain. He did not mention his shoulder pain. Dr. Sweeney made treatment recommendations for Pate's back pain.

¶ 34 On November 19, 2015, Pate returned to Dr. Craig Sweeney. Pate told Dr. Sweeney that his shoulder pain flared while carrying his 19-pound toolbox at work. Dr. Sweeney noted:

Does complain of low shoulder pain that has flared . . . over the last week or 2. This has happened in the past but this has resolved on its own. Denies any history of shoulder dislocation or shoulder surgery in the past. A lot of his pain is over the lateral and posterior portion of the joint just in the subacromial region. He states that this shoulder pain gets so bad that he doesn't really think about the mid back pain that he has typically been complaining of. This doesn't radiate into the left upper extremity distal to about the mid bicep region on the left side. He did have a positive [S]peed's sign as well as a positive Neer's and abduction was limited to about 90-100° actively secondary to pain. Good strength in the bilateral upper extremities and he was neurovascularly intact. At this point I don't necessarily think that this is a tear of any form but rather some impingement or maybe even some biceps tendinitis. I don't think an MRI is needed but I did offer an x-ray to look for a bone spur [or] something irritating this. Would probably recommend that before ever doing an injection however. [If] I did anything it would most likely be a subacromial bursa injection but again I would like to see if this improves on its own. Instructed him to take a week's worth of anti-inflammatories on a fairly regular basis and if it doesn't improve at that point we will get the x-ray.

¶ 35 Pate returned to Posey on February 5, 2016, for a course of massage therapy that lasted for approximately three months. Pate complained of left shoulder pain at most of these visits.

¶ 36 On March 1, 2016, Dr. Craig Sweeney reviewed a January 21, 2016, x-ray of Pate's left shoulder, and noted, "No further work-up of left shoulder warranted at this time."

¶ 37 On April 6, 2016, Dr. Craig Sweeney wrote a "TO WHOM IT MAY CONCERN" letter, clearing Pate "to return to work with modified restrictions as of 4/8/16." Dr. Craig Sweeney restricted Pate to lifting no more than 25 pounds, and stressed that Pate should avoid work "requiring repetitive bending, stooping, or twisting motions."

¶ 38 In the spring of 2016, Pate's supervisor told him that Liberty Electric could no longer accommodate his restrictions. Pate's last day of work for Liberty Electric was April 25, 2016.

¶ 39 Pate continued to see Dr. Craig Sweeney every two to three months, primarily for treatment of his back pain. Pate continued to report shoulder pain at some of these visits. Dr. Sweeney did not see any signs of a rotator cuff injury. In his record dated October 11, 2016, Dr. Sweeney examined Pate's shoulder and noted, "the vast majority of my testing was negative on examination today." However, because Pate's shoulder pain had not improved, Dr. Sweeney referred him to Michael P. Bryant, DO, an orthopedic surgeon.

¶ 40 State Fund denied authorization for Pate to see Dr. Bryant on the grounds that it had denied liability for Pate's left shoulder. However, Pate scheduled an appointment with Dr. Bryant, as he was covered by his health insurance.

¶ 41 Pate saw Dr. Bryant on November 29, 2016. Dr. Bryant noted that Pate had fallen while climbing out of a crawl space and, since then, has had left shoulder pain with overhead activities. Dr. Bryant's physical examination showed "very positive impingement signs." Dr. Bryant gave Pate a cortisone shot and recommended physical therapy. Dr. Bryant stated that if Pate's shoulder pain continued, he would obtain an MRI.

¶ 42 Pate returned to Dr. Bryant on January 3, 2017. Although the cortisone shot and physical therapy provided some relief, Pate was still suffering from left shoulder pain. On physical examination, Dr. Bryant again noted "very positive impingement signs." Dr. Bryant's impression was impingement syndrome with bicep tendinitis. After discussing multiple treatment options, including a cortisone shot in Pate's shoulder joint, Pate opted to continue with physical therapy for 4-6 weeks.

¶ 43 From the date of the accident to present, Pate's family noticed a decreased range of motion in Pate's left shoulder and his inability to complete the household chores he did before his fall, in part because of the pain in his left shoulder. Pate has also not been able to do the recreational activities he enjoyed before his fall, in part because of the pain in his left shoulder.

¶ 44 On February 24, 2017, Pate had an independent medical evaluation (IME) with Margaret Cook-Shimanek, MD, to determine, *inter alia*, whether he suffered a left shoulder injury when he fell. Dr. Cook-Shimanek specializes in public health and occupational medicine. The majority of her work is conducting IMEs, the rest is serving as co-medical director for the Department of Labor & Industry. She does not have hospital admitting privileges.

¶ 45 As part of the IME, Dr. Cook-Shimanek ordered an MRI of Pate's left shoulder. The MRI revealed a labrum tear, fluid around Pate's biceps tendon, and degenerative changes in the joint, i.e., osteoarthritis.

¶ 46 State Fund provided Dr. Cook-Shimanek with Pate's medical records and some of the claim documents. State Fund did not provide Dr. Cook-Shimanek with the paperwork from the night of Pate's fall; i.e., it did not provide her with the paperwork stating that Pate used his arms to arrest his fall and that he had shoulder pain immediately after his fall.

¶ 47 Dr. Cook-Shimanek concluded that Pate did not injure his shoulder nor aggravate any preexisting degenerative condition during his fall. She based her opinion on two factors.

¶ 48 First, Dr. Cook-Shimanek found that Pate did not have any trauma to his shoulders during his fall. According to Dr. Cook-Shimanek, Pate did not use his arms to catch himself and arrest his fall; rather, she testified that Pate "described to me that he was resting on the second rung of the ladder when the arms became involved, implying that he had stopped." Dr. Cook-Shimanek explained that merely reaching to the floor after stopping in a seated position would not be the mechanism of a traction-type injury; i.e., "a sudden motion that pulls the arm and impacts at the level of the shoulder."

¶ 49 Second, Dr. Cook-Shimanek determined that the temporal relationship between Pate's fall and the initial onset of his shoulder pain was inconsistent with his claim that he suffered a shoulder injury in the fall. According to Dr. Cook-Shimanek, Pate told her during the history part of her examination that he did not have "left shoulder pain at the time of initial injury." Dr. Cook-Shimanek glossed over Pate's statement to her that he had shoulder pain two weeks after the accident and emphasized documents setting forth that Pate did not report shoulder pain. Dr. Cook-Shimanek also stated that the first medical record documenting shoulder pain was on October 28, 2015, which she emphasized was 111 days after his fall. Dr. Cook-Shimanek glossed over Dr. Craig Sweeney's statement in his November 19, 2015, records that Pate had had previous flares of shoulder pain and interpreted his records as stating that Pate's shoulder pain started in the fall of 2015. Dr. Cook-Shimanek reasoned that if Pate "had sustained a labral tear or an aggravation of underlying osteoarthritis that he would have had symptoms at the time of injury and presented for care for that reason."

¶ 50 On May 17, 2017, Pate returned to Dr. Bryant. Dr. Bryant noted that the MRI showed degenerative changes around Pate's labrum and fluid around his biceps tendon.

Dr. Bryant recommended an internal joint injection under fluoroscopy. If that did not provide complete relief, Dr. Bryant noted that the next step would be a shoulder surgery.

¶ 51 On June 15, 2017, State Fund denied Dr. Bryant's request for authorization for the internal joint injection on the grounds that it had denied liability for Pate's shoulder.

¶ 52 On June 30, 2017, Dr. Bryant responded to a letter from Pate's attorney. In response to a somewhat confusing question asking whether Pate "sustain[ed] a left shoulder injury when he was injured while working on July 9, 2015," Dr. Bryant did not check either the "yes" or "no" box; rather, he wrote a question mark. In response to a question asking about Pate's description of his mechanism of injury, Dr. Bryant wrote that Pate injured his shoulder "while climbing out of crawl space." In response to a question whether the proposed "left shoulder fluoroscopic injection [was] a result of his work related injury dated July 9, 2015," Dr. Bryant checked the "yes" box.

¶ 53 Papini-Chapla wrote to Dr. Bryant, asking why he wrote a question mark in response to Pate's attorney's question asking whether Pate "sustain[ed] a left shoulder injury when he was injured while working on July 9, 2015." Dr. Bryant did not respond.

¶ 54 At Dr. Bryant's deposition, he could not remember why he wrote a question mark in response to Pate's attorney's question. He initially testified that he thought that Pate's biceps tendinitis was caused by his industrial accident, which was the reason he asked State Fund to authorize the injection. However, because labral tears can be degenerative and asymptomatic, Dr. Bryant testified that he cannot be "sure" that Pate tore his labrum during his fall. On cross-examination, Dr. Bryant hedged on his opinion that Pate's biceps tendinitis was caused by his industrial accident. He explained that he could not offer an opinion as to whether the issues for which he had been treating Pate were caused by his July 9, 2015, workplace accident because he did not know Pate's "baseline" before his fall; i.e., "if he was having problems with his shoulder prior to that or not." However, on redirect examination, Dr. Bryant testified as follows:

Q. If I ask you to assume that he had no pre-existing shoulder symptomology until the injury of July 9, 2015.

A. Okay.

Q. Does that lead to a conclusion of reasonable medical probability that his shoulder symptomology for which you treated him was caused by the injury that he had on July 9, 2015?

A. Yeah, assuming he had no, no problems with his shoulder prior [to] that. He may still have had some of these MRI findings if we were able to get an MRI, so he could have had degenerative osteoarthritis, degenerative labral tear prior to his fall. Does that answer your question?

Q. I think your answer was, yes, if we don't know of anything other than the fall.

A. Uh-huh.

Q. It is reasonably probable that the fall caused an injury to his shoulder?

A. Yes.

Resolution

¶ 55 Generally, the opinion of a treating physician is afforded a greater weight than the opinion of a competing expert.² In weighing medical opinions, this Court considers such factors as the relative credentials of the physicians and the quality of evidence upon which the physicians base their respective opinions.³

¶ 56 Applying these factors, this Court gives more weight to Dr. Bryant's opinions than Dr. Cook-Shimanek's. Dr. Bryant, an orthopedic surgeon who treats shoulder injuries, has superior credentials to opine on the cause of a shoulder injury than Dr. Cook-Shimanek, a public health and occupational medicine physician.⁴ State Fund did not introduce any evidence indicating that Dr. Cook-Shimanek had any prior experience evaluating or treating shoulder injuries.

¶ 57 Moreover, Dr. Bryant's opinions are supported by the evidence whereas Dr. Cook-Shimanek's are not. Neither of the factors on which Dr. Cook-Shimanek based her opinion are grounded in fact.

¶ 58 Dr. Cook-Shimanek's finding that there was no mechanism of injury for a shoulder injury is baseless. The evidence from the night of the accident shows that Pate arrested his backwards fall with outstretched arms. Although Dr. Bryant could not remember the details of Pate's accident, it is clear that he thought Pate suffered shoulder trauma when he fell. In contrast, Dr. Cook-Shimanek did not understand what occurred in the accident, as she did not think Pate used his arms to arrest his fall. When told that Pate used his arms to catch himself, Dr. Cook-Shimanek testified that "if he were to catch himself with outstretched arms at the opening to the crawl space [it] would be an entirely different

² *Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶ 27, 365 Mont. 405, 282 P.3d 687 (citation omitted).

³ See, e.g., *Floyd v. Zurich Am. Ins. Co. of Ill.*, 2017 MTWCC 4, ¶ 47 (citation omitted).

⁴ See, e.g., *Wright v. ACE Am. Ins. Co.*, 2010 MTWCC 11, ¶ 75 (giving more weight to orthopedic surgeon's opinion over treating physician's because treating physician was chronic pain specialist and issue in case was whether orthopedic surgery was indicated); *Frisbie v. Champion Int'l Corp.*, 1995 MTWCC 13, ¶ 31 (resolving conflict in medical opinions in favor of IME physicians who specialized in treatment of low-back conditions over opinion of claimant's treating physician, who was family practitioner).

mechanism of injury.” In short, Dr. Cook-Shimanek failed to understand what occurred when Pate fell.

¶ 59 Likewise, Dr. Cook-Shimanek’s finding that Pate did not have shoulder pain for more than 100 days after the fall is not supported by the evidence. The paperwork Pate’s supervisor filled out within an hour of Pate’s fall shows that he reported shoulder pain at that time. Pate credibly testified that he did *not* tell Dr. Cook-Shimanek that he had no shoulder pain at the time of his fall. Pate also credibly testified that he had a stabbing pain in his left shoulder when he raised his arm and pointed to the ceiling, which occurred two weeks after his fall. Pate reported left shoulder pain to his massage therapist starting on July 29, 2015, within three weeks of his fall. Pate reported left shoulder pain to PA Hall on September 28, 2015, a medical record that Dr. Cook-Shimanek overlooked. Pate also told Dr. Craig Sweeney on November 19, 2015, that he had a “flare” in his shoulder pain while working with his arms overhead, which he had experienced in the past. Pate’s medical records make it clear that in the months following his accident, his shoulder pain was secondary to his back pain and that his shoulder pain bothered him only when he reached over his head, which was infrequent. In short, Dr. Cook-Shimanek failed to understand Pate’s history of shoulder pain.

¶ 60 This Court gives more weight to Dr. Bryant’s opinions and therefore finds that Pate suffered a left shoulder injury during his fall on July 9, 2015.

CONCLUSIONS OF LAW

¶ 61 This case is governed by the 2013 version of the Workers’ Compensation Act since that was the law in effect at the time of Pate’s industrial injury.⁵

Issue One: Whether Petitioner injured his left shoulder during the accident?

¶ 62 Section 39-71-407(3), MCA, provides, in relevant part:

(a) An insurer is liable for an injury, as defined in 39-71-119, only if the injury is established by objective medical findings and if the claimant establishes that it is more probable than not that:

(i) a claimed injury has occurred; or
(ii) a claimed injury has occurred and aggravated a preexisting condition.

(b) Proof that it was medically possible that a claimed injury occurred or that the claimed injury aggravated a preexisting condition is not sufficient to establish liability.

⁵ Ford, ¶ 32 (citation omitted); § 1-2-201, MCA.

¶ 63 Section 39-71-119(1), MCA, defines an “injury” in relevant part as an “internal or external physical harm to the body that is established by objective medical findings.” Subsection (2) states:

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.

¶ 64 Section 39-71-116(22), MCA, defines “objective medical findings” as “medical evidence, including range of motion, atrophy, muscle strength, muscle spasm, or other diagnostic evidence, substantiated by clinical findings.”

¶ 65 State Fund maintains that the evidence from Dr. Bryant is insufficient to prove that Pate suffered an injury under these statutes. State Fund points to Dr. Bryant’s testimony that he could not say “for sure” whether Pate injured his shoulder during the fall and to his testimony that Pate could have had degenerative osteoarthritis and a degenerative labral tear before the fall. Thus, State Fund maintains that Dr. Bryant’s testimony is merely proof that it was possible that Pate suffered a shoulder injury during his fall, and not proof that it was more probable than not that he did so.

¶ 66 Pate points to Dr. Bryant’s testimony that if Pate had no problems with his shoulder before his fall, then it is reasonably probable that he injured his shoulder in his fall. Pate asserts that this is sufficient medical testimony to prove that he suffered an injury during his fall on a more-probable-than-not basis.

¶ 67 In *Ford v. Sentry Casualty Co.*, the Montana Supreme Court explained a claimant’s burden of proof under these statutes. The court first reaffirmed that a claimant must prove an injury or aggravation to a preexisting condition, and a causal connection between the accident and injury or aggravation on a more-probable-than-not basis.⁶ The court also held that since 1995, the WCA requires claimants to prove causation with medical expertise or opinion that is given on a more-probable-than-not basis.⁷ However, because many physicians give their opinions to a “reasonable degree of medical certainty,” a phrase the court noted is ambiguous,⁸ the court explained that a physician need not use any particular language to convey his or her opinion:

Of course, notwithstanding the particular language used in the statute, we cannot control how doctors phrase their opinions and testimony on these issues, and we not do purport to do so here. As a result, there may be

⁶ *Ford*, ¶ 38.

⁷ *Ford*, ¶¶ 47-49.

⁸ *Ford*, ¶ 41.

cases in which a doctor states his or her opinion in terms of “a reasonable degree of medical certainty” or fails to state that his or her opinion is on a “more probable than not” basis. Nevertheless, the probative force of the opinion “is not to be defeated by semantics if it is reasonably apparent that the doctor intends to signify a probability supported by some rational basis.

What is essential is that *the WCC* applies the correct standard in determining whether there was an accident in the course of employment, whether the claimant suffered an injury or an aggravation of a preexisting condition, and whether there is a causal connection between the accident and the injury/aggravation. That standard is “more probable than not.”⁹

¶ 68 This Court made its finding that Pate suffered a shoulder injury during his fall on a more-probable-than-not basis. This Court considered all of the evidence, including Dr. Bryant’s medical records, his request for authorization from State Fund for a shoulder injection procedure, his response to Pate’s attorney’s letter, and his testimony, including his agreement that while Pate “may” have had asymptomatic shoulder problems before his fall, if Pate did not have shoulder symptoms before his fall, then it is probable that he injured his shoulder in the fall. It is apparent to this Court that it is Dr. Bryant’s medical opinion that it is more probable than not that Pate injured his left shoulder during his fall on July 9, 2015. Dr. Bryant’s opinion is rational and supported by the other evidence in this case. Accordingly, under §§ 39-71-407, -119, -116(22), MCA, and *Ford*, this Court concludes that the evidence from Dr. Bryant was sufficient to prove that Pate injured his shoulder in his industrial accident on July 9, 2015.

¶ 69 State Fund also asserts that it is not liable for Pate’s biceps tendinitis nor his osteoarthritis because they are, by definition, degenerative conditions. However, § 39-71-407(3)(a)(ii), MCA, provides that an injury which aggravates a preexisting condition is compensable. This Court has explained:

It has long been the law of Montana that employers take their workers as they find him, with all their underlying ailments, and that a traumatic event or unusual strain which lights up, accelerates, or aggravates an underlying condition is compensable. “The rule is that when preexisting diseases are aggravated by an injury and disabilities result, such disabilities are to be treated and considered as the result of the injury.”¹⁰

Dr. Bryant’s records and testimony establishes that it is his medical opinion that Pate’s current shoulder problems, including his biceps tendinitis, are a result of his industrial accident. And, Dr. Cook-Shimanek agreed that trauma can aggravate preexisting degenerative conditions such as osteoarthritis and make them symptomatic. Because

⁹ *Ford*, ¶¶ 42-43 (citations omitted) (emphasis in original).

¹⁰ *Weatherwax v. State Comp. Ins. Fund*, 2000 MTWCC 15, ¶ 40 (citations omitted).

this Court has found that Pate injured his left shoulder during the accident, it concludes that State Fund is liable for his left-shoulder-related conditions.

Issue Two: Whether Respondent was unreasonable for not accepting the left shoulder as part of this claim?

and

Issue Three: If Respondent is found to be unreasonable for not accepting liability for the left shoulder, then whether a penalty and attorney fees should be awarded to the Petitioner in this matter?

¶ 70 Section 39-71-2907, MCA, provides that this Court may award a 20% penalty on the amount of benefits due a claimant if the insurer unreasonably delays or refuses to pay benefits.

¶ 71 Section 39-71-611, MCA, provides that this Court must award a claimant his attorney fees if this Court adjudges a claim as compensable and finds that the insurer unreasonably denied liability.

¶ 72 Pate argues that State Fund's refusal to accept liability for his shoulder was unreasonable, taking issue with State Fund's "blind" reliance on Dr. Cook-Shimanek's opinion. To be sure, this Court has significant concerns about Dr. Cook-Shimanek's IME and State Fund's reliance upon it. Giving her the benefit of the doubt, Dr. Cook-Shimanek failed to take an accurate history. This Court has ruled that it is unreasonable for an insurer to rely upon an IME physician's opinion when it is evident that the physician has made a material mistake.¹¹ However, even without Dr. Cook-Shimanek's opinion, State Fund had grounds to question whether Pate injured his shoulder in his fall. Although Pate reported shoulder pain immediately after his fall, he did not report shoulder pain to anyone at Dr. Terrance Sweeney's office until September 28, 2015, more than two months after his fall, and did not highlight shoulder pain until October 28, 2015. Pate did not report shoulder pain to Dr. Craig Sweeney until his second appointment. Neither Dr. Terrance Sweeney nor Dr. Craig Sweeney diagnosed a shoulder injury. And, Dr. Bryant gave an equivocal response to Pate's attorney's letter asking questions about whether Pate suffered a shoulder injury in his industrial accident. In short, the factual dispute of whether Pate suffered a shoulder injury during his fall was legitimate and required resolution by this Court; therefore, State Fund's denial of liability was reasonable.¹²

¹¹ See, e.g., *Floyd v. Zurich Am. Ins. Co. of Ill.*, 2017 MTWCC 4, ¶¶ 60-61, 63 (citation omitted) (explaining that insurer must fairly and reasonably evaluate all facts and opinions with regard to medical issues and ruling that insurer was unreasonable because it blindly accepted IME physician's opinions even though IME physician made two significant mistakes).

¹² See *Marcott v. La. Pac. Corp.*, 275 Mont. 197, 203-04, 911 P.2d 1129, 1133-34 (1996) (holding that insurer acts reasonably where there is a legitimate factual dispute regarding the circumstances of the alleged injury).

JUDGMENT

¶ 73 Pate injured his left shoulder in his industrial accident on July 9, 2015, and State Fund is therefore liable for benefits under the Workers' Compensation Act.

¶ 74 Pate is not entitled to a penalty pursuant to § 39-71-2907, MCA, or his attorney fees under § 39-71-611, MCA.

¶ 75 Pursuant to ARM 24.5.348(2), this Judgment is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

DATED this 18th day of January, 2019.

/s/ DAVID M. SANDLER
JUDGE

c: Richard J. Martin
Mark D. Meyer

Submitted: May 15, 2018