

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2020 MTWCC 4

WCC No. 2017-4143

MICHAEL NEISINGER

Petitioner

vs.

NEW HAMPSHIRE INS. CO.

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Summary: Petitioner suffered a compensable left-leg injury and had surgery to repair his torn quadriceps. Thereafter, Petitioner developed severe low-back pain, with pain radiating into his hips and legs. Petitioner contends that his industrial accident aggravated his preexisting lumbar spine condition. Petitioner relies on the causation opinions of physicians and chiropractors, who in large part based their opinions on Petitioner's statements that he had an immediate onset of pain from his lumbar spine at the time of his industrial accident or shortly thereafter. Respondent denied liability for Petitioner's lumbar spine condition, maintaining that his industrial accident did not aggravate his preexisting lumbar spine condition. Respondent relies on the causation opinion of an IME physician, who determined that, based on Petitioner's medical records, his onset of symptoms was approximately ten months after his industrial accident.

Held: Respondent is not liable for Petitioner's lumbar spine condition. Although Petitioner's symptoms significantly worsened after his industrial accident, he did not meet his burden of proving that the industrial accident was the cause of the worsening. This Court gave more weight to the opinion of the IME physician because he was correct that the onset of Petitioner's symptoms was approximately ten months after his industrial accident.

¶ 1 The trial in this matter was held on July 11, 2018, in Billings, Montana. Petitioner Michael Neisinger was present and represented by Thomas J. Murphy. Respondent New Hampshire Ins. Co. (New Hampshire) was represented by Kelly M. Wills.

¶ 2 Exhibits: This Court admitted Exhibits 1 through 13, 19, 20, 22, 26, 29, and 36 without objection. Trial Exhibits 14 through 18, 21, 23, 24, 25, 27, 28, 30 (pages 1-60), 31, 38, and 39 were admitted after resolution of the parties' objections and/or reservations. During trial, page 61 to Exhibit 30 and Exhibits 40 and 41 were offered and admitted. Exhibits 32 through 35, and 37 were withdrawn.

¶ 3 Witnesses and Depositions: This Court admitted the depositions of Michael Neisinger, John VanGilder, MD, and Timothy Six, DC, into evidence. Kelly Neisinger, Michael Neisinger, and Joseph M. Erpelding, MD, were sworn and testified at trial.

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

Issue One: Is New Hampshire liable for Neisinger's low-back condition?

Issue Two: Is Neisinger entitled to back surgery by Dr. John VanGilder as treating physician?

Issue Three: Is Neisinger entitled to costs, attorney fees, and a penalty?

FINDINGS OF FACT

¶ 5 Neisinger had episodic, mild to moderate low-back pain dating back to 2009, when he started treatment with Timothy Six, DC, in Great Falls. At that time, Neisinger was able to work a heavy labor activity job. However, Dr. Six noted that Neisinger had grade 1 spondylolisthesis at L5-S1, meaning that his S1 vertebrae had "slipped" posteriorly and did not line up with his L5 vertebrae. Spondylolisthesis is caused by a fracture in the pars interarticularis, commonly referred to as a pars defect, which is spondylolysis. These fractures are oftentimes caused by trauma around the age of puberty. If the fracture does not heal back together, it can cause spondylolysis which can lead to spondylolisthesis. Spondylolisthesis is diagnosed in four grades, with grade 1 being the least severe.

¶ 6 From July 22, 2011, to April 21, 2014, Neisinger saw Aaron Hammons, DC, more than 50 times after strain and sprain injuries. Dr. Hammons summarized his treatments of Neisinger as follows:

It is clear from the records that his treatments were for uncomplicated soft tissue injuries, typically brought on by various lifting, twisting and axial compression mechanisms. However, a few were insidious in nature. The patient responded well to short term chiropractic care. Mr. Neisinger did not

complain of any radicular symptoms in his lower extremities during his time as a patient at this office.¹

¶ 7 On May 27, 2015, Neisinger suffered a left-leg injury in the course of his employment. Neisinger was working on a four-foot platform when a powerful stream of water shot out of a porthole, hitting him in the left thigh. The force of the water spun Neisinger around and, despite his attempt to brace himself with his right foot, knocked him off the platform. He landed with his feet on a concrete floor. Neisinger had immediate pain in his left knee and leg.

¶ 8 New Hampshire accepted liability for Neisinger's left-leg injury.

¶ 9 After the accident, Neisinger saw an onsite nurse. He had severe pain in his left leg and knee. The nurse noted bruising and swelling on Neisinger's left thigh and knee.

¶ 10 In early June 2015, Neisinger saw Jose F. Ortiz, MD, at Colstrip Medical Center, on two occasions, complaining of mild to moderate pain in his left thigh and cramping. Dr. Ortiz noted that x-rays did not reveal any injury to Neisinger's left femur or knee, but observed that Neisinger had "soft tissue swelling and some tendon swelling" Dr. Ortiz diagnosed Neisinger with a left-"knee/leg sprain." Because Neisinger's symptoms were not improving, Dr. Ortiz ordered an MRI.

¶ 11 On June 15, 2015, Neisinger saw Benjamin Phipps, MD, at Ortho Montana. Neisinger complained of restricted range of motion in his knee and trouble walking. However, Neisinger did not have numbness, tingling, or radicular symptoms. Because the MRI showed a "fairly substantial quadriceps tear," Dr. Phipps referred Neisinger to a surgeon.

¶ 12 On June 18, 2015, Neisinger saw Todd Hull, PA-C, at Ortho Montana. Neisinger complained of, *inter alia*, numbness and tingling "down the left leg."

¶ 13 On June 22, 2015, James S. Elliott, MD, from Ortho Montana, performed a quadriceps repair surgery on Neisinger.

¶ 14 Neisinger underwent an extensive course of physical therapy from July 1, 2015, to January 26, 2016. The physical therapists consistently documented Neisinger's reports of left-leg pain, which waxed and waned but improved over time. However, the physical therapists did not document that Neisinger ever complained of low-back pain, pain radiating into and down his legs, or hip pain.

¶ 15 On August 27, 2015, Neisinger saw Dr. Elliott, who noted, "He is doing excellent. He has regained extension and flexion [and] is doing very well. [He] [h]as been advanced

¹ Emphasis in original.

to resisted quad strengthening. He is being weaned out of his brace. Having no pain, no numbness or tingling.”

¶ 16 On October 29, 2015, Neisinger saw Dr. Elliott, who noted that Neisinger was “doing very well,” with no swelling in his knee, full terminal extension, and excellent strength in his quadriceps. Neisinger had pain at the repair site and near his knee, but Dr. Elliott thought that would improve with physical therapy.

¶ 17 On December 17, 2015, Neisinger returned to Dr. Elliott for his six-month follow-up. Dr. Elliott noted that Neisinger was, “[d]oing much better following quad repair.” On physical examination, Dr. Elliott noted that Neisinger’s “[m]uscles [had] returned nicely,” that he walked without a limp, that he had full extension and excellent flexion, and that he had “[g]ood power in the quad.” Despite “slight pain” in his left leg, Neisinger reported that he was ready to return to work. Dr. Elliott released Neisinger to full duty.

¶ 18 On February 4, 2016, Neisinger returned to Dr. Elliott because he had quadriceps and knee pain while working, especially when coming down ladders. Dr. Elliott was concerned because Neisinger had a lack of quadriceps strength and “marked quadriceps atrophy,” and required physical therapy to control his pain.

¶ 19 Neisinger returned to Dr. Elliott on February 25, 2016. Neisinger had an MRI, which showed that the quadriceps repair was intact. Dr. Elliott summarized Neisinger’s condition as follows:

He is now 8 months out from repair of a torn quadriceps tendon on that left lower extremity. [H]e has returned to work, using modifications as far as climbing and stress to the quadriceps. He has had extensive physical therapy, and he says he does get improvement from the stretching and the ultrasound for both the functionality standpoint and pain. Without it he has pain which [he] describes mainly [as] involving the lower portion of the patella and patellar tendon with some pain at the area [of the] quad repair. He has markedly decreased bulk and tone to the quadricep[s] on the repaired side. We had obtained an MRI to evaluate [his] repair site as he is slow to make progress toward full functionality and full return to quadricep[s] strength and bulk.

¶ 20 On March 14, 2016, Neisinger saw Bonnie Z. Dean, MD, for an electromyogram (EMG). Neisinger told Dr. Dean that he had had a “sudden” onset of left-knee pain, low-back pain, and hip pain in his industrial accident. The EMG was normal.

¶ 21 On April 21, 2016, Neisinger returned to Dr. Elliott. For the first time, Neisinger complained to Dr. Elliott of pain in his low back and right leg. Dr. Elliott noted:

His new issue is continuing worsening of issues on the right side which he also believes may be secondary to the fall at work which caused the quad

tendon rupture on the left side. He has a shooting sensation [which] comes from the lower back region across the lateral aspect of the proximal thigh extending down anteriorly over the distal aspect of the thigh. With that he feels [] occasional [weakness]. No true issues of deep hip pain and no knee symptoms. No numbness or tingling going into the foot.

Dr. Elliott recommended an evaluation by a spine surgeon for an opinion as to whether Neisinger had a lumbar spine problem that was resulting in the failure of his left quadriceps to develop and his right-sided symptoms.

¶ 22 On June 15, 2016, Neisinger underwent an examination pursuant to § 39-71-605, MCA, with Joseph M. Erpelding, MD. Based on Neisinger's medical records and the history Neisinger gave, Dr. Erpelding did not think it was likely that his industrial accident caused a worsening of his lumbar spine condition. Dr. Erpelding stated:

It is conceivable that he could have had a back injury in concert with the event; however, in reviewing the records, the only mention of a left leg numbness or tingling was about three weeks after the event and then there was an absence of any right lower extremity symptoms until many months later. In addition, EMG studies confirm no evidence of nerve damage in the left leg. Hence, when looking at [the] mechanism of injury, diagnosis based on objective testing, timing and onset of symptoms, anatomic correlation and symptom concordancy, it is less likely than not that his current nonverifiable radicular-like complaints are a direct consequence of either the injury of May 27, 2015 or consequences thereof.

Dr. Erpelding concluded that Neisinger had reached maximum medical improvement for his left quadriceps tendon rupture and determined that his whole person impairment rating was 5%.

¶ 23 On August 9, 2016, Neisinger again saw Dr. Elliott, who noted:

Returns with continued symptoms. Ongoing issues associated with bilateral lower extremities. He is now 14 months out from repair of a quad tendon rupture which appears to [have] healed [] well both on physical exam and on MRI. Left with inability on the left side to develop fully his quad strength. Subsequently he has developed issues with pain and shooting sensations going down the right femoral region.

Again I do not think there is anything to be gained by reexploring his quad tendon. He needs [to] continue working on quad strengthening. We did obtain EMG and nerve conduction studies of the left upper extremity which showed no neurologic compromise related to his quadriceps on that side.

Since his time of injury [he] developed [] right lower extremity issues which I think may be more back related. Difficult for him to work continuously when climbing et cetera. Also continue major issues with the right lower extremity. At the time of our initial evaluation there was not any mention of problems with the right lower extremity issues.

¶ 24 On August 18, 2016, Dr. Elliott sent a letter to the claims examiner in which he stated that he agreed “with Dr. Erpelding’s findings and return to work status.”

¶ 25 On October 13, 2016, Neisinger saw Gregory McDowell, MD, a spine surgeon at Ortho Montana. Neisinger explained that he had seen Dr. Six and Dr. Hammons for chiropractic care but had not seen a chiropractor for several years. Neisinger described his accident and told Dr. McDowell that he had been having low-back pain, pelvic discomfort, and pain radiating into his legs since the accident. Neisinger reported that his low-back pain was persistent, more severe and intense than it had ever been in his life, and worsening. Dr. McDowell noted that x-rays showed “an obvious spondylolysis at L5 and a grade 1 lytic spondylolisthesis at L5-S1.” Dr. McDowell opined that Neisinger had aggravated his spondylolisthesis in his industrial accident, explaining:

I don’t think he initially made a lot [out] of the back discomfort because of the severity of the left leg discomfort[.]

. . . .

It is reasonable to presume on a more probable than not basis based on the information that I have at hand at this time that this work related injury aggravated the underlying back pain on a more likely than not basis. It certainly did not cause it entirely nor did it cause a spondylolysis entirely.

¶ 26 On December 21, 2016, Neisinger returned to Dr. McDowell. Dr. McDowell again opined that Neisinger’s industrial accident “did not whol[ly] cause the grade 1 lytic spondylolisthesis” but opined that it aggravated his preexisting lumbar spine condition.

¶ 27 On January 31, 2017, Dr. Erpelding issued an addendum to his June 15, 2016, report, which was based on his review of Neisinger’s medical records since he examined Neisinger. Dr. Erpelding agreed that Neisinger has objective findings of lumbar spine problems which correlate to Neisinger’s subjective complaints and that Neisinger may require surgery. However, Dr. Erpelding again opined that, on a more-likely-than-not basis, Neisinger’s industrial accident did not aggravate his lumbar spine condition.

¶ 28 Dr. Erpelding considered six factors to reach his causation opinion. First, although Dr. Erpelding agreed that Neisinger’s industrial accident was a possible mechanism of injury for a lumbar spine injury, he found this factor “indeterminate” on the basis that he thought the MRI showed only degenerative problems and stenosis, a congenital condition. Second, although Dr. Erpelding agreed that objective medical evidence “confirm[ed] significant lumbar disease,” and acknowledged that Neisinger’s “subjective

symptoms may or may not have been permanently aggravated as a consequence of his fall,” he did not think this evidence indicated causation because it was obtained too long after Neisinger’s fall. Third, Dr. Erpelding thought that the onset of Neisinger’s symptoms was too remote from his industrial accident to establish a causal connection between the industrial accident and Neisinger’s current lumbar spine condition. Dr. Erpelding stated that if the fall had materially aggravated Neisinger’s lumbar spine condition, he would have developed low-back pain and/or lower extremity neurogenic complaints within four weeks. Fourth, addressing “[a]natomic relation,” Dr. Erpelding agreed that Neisinger’s subjective complaints correlate with his objective medical findings, but again stated that the problems in Neisinger’s lumbar spine were degenerative and congenital. Fifth, Dr. Erpelding determined that because Neisinger did not have a disk herniation, his symptoms were concordant with degenerative changes and not an acute injury. Sixth, Dr. Erpelding determined that the contributing factors to Neisinger’s lumbar spine problems were his preexisting condition and his smoking.

¶ 29 On March 17, 2017, Dr. McDowell responded to a letter from the claims examiner asking if he agreed with Dr. Erpelding’s opinions. Dr. McDowell did not check the box for “concur” nor the box for “don’t concur.” Instead, he “deferred” to Dr. Erpelding, writing, “The pt is not under my care!”

¶ 30 On May 25, 2017, Neisinger returned to Dr. Elliott, who opined that the quadriceps tendon repair was stable. Dr. Elliott referred Neisinger to John VanGilder, MD, for a second opinion for his lumbar spine.

¶ 31 On June 29, 2017, Neisinger saw Dr. VanGilder, who is a neurosurgeon. Neisinger described his accident and reported that he had had increased low-back pain “[s]ince the accident.” Neisinger reported that his back pain was worsening. Dr. VanGilder reviewed Neisinger’s MRI and gave him several treatment options, including a L4-S1 decompression and fusion. Dr. VanGilder opined that Neisinger’s accident caused his back pain, explaining that Neisinger “did not have problems with the back prior to this accident other than occasional chiropractic manipulations, and I suspect from the patient’s history that the injury caused his back pain to occur. He did have preexisting issues with the pars defect, but again he was relatively asymptomatic from this.”

¶ 32 Also on June 29, 2017, Dr. Six evaluated Neisinger to give an opinion on the issue of whether Neisinger’s industrial accident materially aggravated his lumbar spine condition. Neisinger told Dr. Six that he had an “immediate onset” of low-back pain and left-leg pain in his industrial accident. Neisinger stated that his pain had progressively worsened and that he was suffering from severe low-back pain, left worse than right, pain running down his legs bilaterally, groin pain, severe cramps in the legs and feet, and severe numbness and tingling in his legs and feet. Dr. Six noted that Neisinger’s condition was “much worse” than it was in 2009, with “obvious atrophy of the left leg,” difficulty walking, and muscle spasms. Based on the history Neisinger gave and his presentation,

Dr. Six opined that “his condition has worsened and [is] more likely due to the 5/27/15 accident.”

¶ 33 On July 25, 2017, Neisinger’s attorney wrote Dr. Hammons a letter, asking him to review medical records and opine whether Neisinger’s condition had worsened since his visits to Dr. Hammons’s office. On August 2, 2017, Dr. Hammons responded, stating that “Based on the record review, it is my opinion that his condition is significantly worse than it was when he last saw me.” Dr. Hammons opined that it was “more likely tha[n] not that the May 27, 2015 accident caused a significant aggravation of his preexisting condition”

¶ 34 Dr. Hammons based his causation opinion on four factors. First, Dr. Hammons noted that Neisinger did not treat between April 21, 2014, his last visit with Dr. Hammons, and May 27, 2015, the date of the accident. Second, Dr. Hammons noted that Neisinger was able to work in a labor-intensive job until his accident. Third, Dr. Hammons stated that the medical literature did not support the position that degenerative disk disease and osteoarthritis would become symptomatic and disabling at a specific point in time, absent an aggravating event. Dr. Hammons thought it was “highly unlikely” that Neisinger’s lumbar condition would have become symptomatic “coincidentally right around the time of his very traumatic industrial accident.” Dr. Hammons also explained that, “Given [the] axial force involved in the fall having been enough to partially tear his left quadriceps tendon, it seems more likely than not that it would also cause a pre-existing degenerative lower back condition to become symptomatic.” Dr. Hammons also explained that Neisinger’s failure to initially report his low-back pain could be due to the severity of his quadriceps injury, which Dr. Hammons stated was an “extremely painful and debilitating injury.” Dr. Hammons found Dr. Erpelding’s opinion to be “speculative and unlikely” given the timing of the onset of his low-back pain. Finally, Dr. Hammons stated that he did not see any evidence that Neisinger aggravated his lumbar condition in an activity outside of work.

¶ 35 During his deposition, Neisinger testified that the onset of his low-back pain was immediately after his industrial accident. He explained that he did not pay attention to it because of the intense pain from his quadriceps. He also testified that during his course of physical therapy, he noticed low-back pain and that he then started suffering from the pain radiating from his low back to his hips and legs. At trial, Neisinger testified that he has had low-back pain since his industrial accident that he would rate from 6 to 8 on a 10-point pain scale.

Testimony Regarding Causation

Dr. VanGilder

¶ 36 Dr. VanGilder testified that it is his opinion that Neisinger’s preexisting spondylolisthesis was materially aggravated by his industrial accident. Dr. VanGilder relied on two factors. First, Dr. VanGilder testified that Neisinger’s back pain, left-leg pain

and tingling, and right-leg pain and tingling, “match up” with the lumbar spine problems seen on the MRI. Second, Dr. VanGilder thought that there was a temporal relationship between Neisinger’s industrial accident and the onset of his symptoms from his lumbar spine. Dr. VanGilder explained that spondylolisthesis is oftentimes asymptomatic. Thus, Dr. VanGilder testified that before May 17, 2015, Neisinger’s “spondylolysis was there, was preexisting, and he was living with it.” However, relying on Neisinger’s report that “he had some prior [back] pain before, but it got worse with the accident,” Dr. VanGilder opined that the industrial accident substantially aggravated Neisinger’s preexisting lumbar spine condition. Dr. VanGilder explained:

He was able to live with those structural findings. He was able to do his job with those structural findings. He had this injury, and I think those structural findings became symptomatic on him. And now he is in the state with the back pain and has the leg issues that he has.

Dr. VanGilder explained that Neisinger’s torn quadriceps served as a “distracting injury,” meaning that it masked the symptoms from the aggravation of his lumbar spine condition.

Dr. Six

¶ 37 Dr. Six also testified that it was his opinion that Neisinger’s industrial accident aggravated his lumbar spine condition. Dr. Six reiterated that in 2009 Neisinger “was well managed” and that his symptoms were “mild to moderate.” Dr. Six found it significant that Neisinger had left-leg numbness and tingling three weeks after the accident. Dr. Six testified that while spondylolisthesis can degenerate, he thought the trauma of the industrial accident caused the worsening because landing from a fall from four feet, which causes an “axial compression load,” is a mechanism of a lumbar spine injury and because he thought that the onset of symptoms from the lumbar spine was immediately after the industrial accident.

Dr. Erpelding

¶ 38 Dr. Erpelding testified that while it was possible that Neisinger’s industrial accident aggravated his preexisting lumbar spine condition, it was not probable. Like Dr. VanGilder and Dr. Six, Dr. Erpelding based his causation opinion largely on the temporal relationship between Neisinger’s industrial accident and the onset of symptoms from his lumbar spine. However, Dr. Erpelding opined that the onset of such symptoms was too far removed from the industrial accident to support medical causation. Dr. Erpelding opined that Neisinger’s lumbar spine condition degenerated. Dr. Erpelding agreed that a torn quadriceps tendon causes severe pain and could be a distracting injury for a lumbar spine injury. But, Dr. Erpelding opined that a torn quadriceps would distract for only three weeks.

Resolution

¶ 39 Although not conclusive, the opinion of a treating physician is generally afforded greater weight than the opinion of a competing expert.² When 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

¶ 40 Although Dr. Erpelding is not one of Neisinger's treating physicians, this Court finds that his causation opinion is entitled to greater weight than Dr. McDowell's, Dr. Six's, Dr. Hammons's, and Dr. VanGilder's because it is based upon better evidence. These medical professionals all based their causation opinions in large part on the temporal relationship between the industrial accident and the onset of Neisinger's symptoms from his lumbar spine condition. Dr. McDowell, Dr. Six, Dr. Hammons, and Dr. VanGilder based their causation opinions upon their determination that Neisinger had an immediate or near-immediate onset of such symptoms. Dr. Erpelding based his causation opinion in large part on his determination that Neisinger did not have such symptoms for approximately ten months.

¶ 41 This Court is convinced that the onset of Neisinger's symptoms from his lumbar spine was not immediately after the industrial accident, nor in the weeks after his surgery. Rather, this Court finds that the onset was approximately ten months after his industrial accident. Although Neisinger reported numbness and tingling down his left leg three weeks after his industrial accident, this Court is not convinced that this pain was caused by Neisinger's lumbar spine because, at the time, he had a severe leg injury and the pain did not persist over time. Moreover, although Neisinger testified that he had severe back pain, hip pain, and pain radiating into his legs either immediately after his industrial accident or shortly after his surgery, this Court does not find his testimony credible because neither Dr. Elliott, PA Hull, nor the physical therapists documented that Neisinger complained of such pain, which Neisinger characterizes as severe. This Court finds that the onset of Neisinger's symptoms from his lumbar spine was approximately ten months after his industrial accident. Neisinger did not elicit testimony from Dr. McDowell, Dr. Six, Dr. Hammons, or Dr. VanGilder as to whether they would have the same causation opinion if Neisinger did not experience symptoms from his lumbar spine until ten months after his injury.

¶ 42 This Court is not convinced that Neisinger's quadriceps injury was a distracting injury during the months after his surgery. The medical records show that Neisinger's quadriceps and left-knee pain gradually improved after his surgery. Indeed, on August 27, 2015, Dr. Elliott noted, "Having no pain, no numbness or tingling." And, this Court cannot reconcile Neisinger's claim that his quadriceps and knee pain after his surgery masked the pain coming from his lumbar spine with his testimony that the pain

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).

from his lumbar spine was severe during this same time. If he felt severe pain from his lumbar spine, the pain was not masked.

¶ 43 Because Dr. Erpelding's causation opinion is supported by the evidence, while Dr. McDowell's, Dr. Six's, Dr. Hammons's, and Dr. VanGilder's are not, this Court gives greater weight to Dr. Erpelding's opinion⁴ and finds that Neisinger's industrial accident did not aggravate his preexisting lumbar spine condition.

CONCLUSIONS OF LAW

¶ 44 This case is governed by the 2013 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Neisinger's industrial accident.⁵

Issue One: Is New Hampshire liable for Neisinger's low-back condition?

¶ 45 Section 39-71-407(3), MCA, states, 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.

¶ 46 The Montana Supreme Court has explained: "Causation is an essential element to an entitlement to benefits and the claimant has the burden of proving a causal connection by a preponderance of the evidence."⁶

¶ 47 Here, this Court has found that Neisinger did not carry his burden of proving a causal connection between the worsening of his preexisting lumbar spine condition and his industrial accident. The evidence shows only that it was medically possible that he aggravated his preexisting lumbar spine condition but not probable, which is not sufficient

⁴ See, e.g., *Cole v. Mont. State Fund*, 2015 MTWCC 4, ¶ 17 (ruling that an insurer does not have to accept a treating physician's opinion "when there is reliable and credible evidence indicating that the treating physician does not have all the relevant facts or is relying upon information that is false"); *Warburton v. Liberty Nw. Ins. Corp.*, 2016 MTWCC 1, ¶ 47 (assigning no weight to a treating physician's opinion because the physician based his opinion largely on claimant's history, which was inaccurate); *Rushford v. Mont. Contractor Comp. Fund*, 2014 MTWCC 16, ¶ 205 (ruling that IME physician's opinion had more weight over treating physician's because IME physician had higher quality of evidence on which to base his opinions).

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

⁶ *Ford*, ¶ 34 (citation omitted).

to establish liability. Therefore, New Hampshire is not liable for his lumbar spine condition.

Issue Two: Is Neisinger entitled to back surgery by Dr. John VanGilder as treating physician?

¶ 48 Because New Hampshire is not liable for Neisinger's lumbar spine condition, it is not liable for the back surgery proposed by Dr. VanGilder under § 39-71-704, MCA.

Issue Three: Is Neisinger entitled to costs, attorney fees, and a penalty?

¶ 49 Because Neisinger has not prevailed, he is not entitled to his costs, attorney fees, nor a penalty under §§ 39-71-611, -612, or -2907, MCA.

JUDGMENT

¶ 50 New Hampshire is not liable for Neisinger's low-back condition.

¶ 51 New Hampshire is not liable for the back surgery proposed by Dr. VanGilder as treating physician.

¶ 52 Neisinger is not entitled to costs, attorney fees, nor a penalty.

¶ 53 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 26th day of February, 2020.

(SEAL)

DAVID M. SANDLER
JUDGE

c: Thomas J. Murphy
Kelly M. Wills

Submitted: July 11, 2018