

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1996 MTWCC 73

WCC No. 9609-7620

DEBORAH (EVANS) BRIAN

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

DOC AND EDDY'S

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Lounge and restaurant worker had history of back pain. On June 20, 1995, an orthopedic surgeon recommended surgery, based on a diagnosis of a herniated disc and degenerative disc disease. On June 24, 1995, only four days later, claimant slipped and fell at work. The insurer accepted liability for the fall and began paying temporary total disability benefits. Claimant needs surgery, which is not disputed. The insurer refuses to pay for surgery or for an impairment award following surgery. Three physicians agree that without surgery claimant is totally disabled and not likely to improve in the foreseeable future. Prior to the fall, she was able to work, although with pain. The insurer's refusal is based on the fact that there appears to be no difference in an MRI taken before the fall and after. An orthopedic surgeon and a neurosurgeon, however, agreed that claimant permanently aggravated her low-back condition during the fall, even though no significant change appears on the post-injury MRI.

Held: The back surgery is compensable. The neurosurgeon persuasively testified that even a small change in the extent of nerve root constriction, not apparent on an MRI, could significantly increase pain. Physician who opined the fall did not cause a permanent aggravation conceded he discounted claimant's statements that her pain and disability permanently increased following the accident. While a physician can appropriately consider a claimant's veracity when making diagnoses and treatment recommendations, the Court must make its own independent determination of claimant's credibility. In this case, the Court finds claimant credible. Her credibility is bolstered by evidence that she

was a hard worker prior to the injury, even with her back condition, and her testimony, supported by two physicians, that she cannot now work. Claimant is entitled to surgery as a reasonable primary medical service. She will be entitled to an impairment award following surgery if a physician issues an impairment based on her low-back condition. Penalty and attorneys fees are also awarded where there was overwhelming evidence that the June 24 accident caused increased, disabling pain to claimant.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-611, MCA (1993). Attorneys fees awarded where insurer unreasonably refused to pay for back surgery although overwhelming evidence indicated claimant's accident caused increased, totally disabling back pain. Reliance on fact that pre- and post-accident MRIs were the same, and fact that surgery had been recommended prior to the accident, was not reasonable where claimant and physicians made clear her pain increased and total disability ensured, where she had previously been working.

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-2907, MCA (1993). Penalty awarded where insurer unreasonably refused to pay for back surgery although overwhelming evidence indicated claimant's accident caused increased, totally disabling back pain. Reliance on fact that pre- and post-accident MRIs were the same, and fact that surgery had been recommended prior to the accident, was not reasonable where claimant and physicians made clear her pain increased and total disability ensured, where she had previously been working.

Attorney Fees: Cases Awarded. Attorneys fees awarded where insurer unreasonably refused to pay for back surgery although overwhelming evidence indicated claimant's accident caused increased, totally disabling back pain. Reliance on fact that pre- and post-accident MRIs were the same, and fact that surgery had been recommended prior to the accident, was not reasonable where claimant and physicians made clear her pain increased and total disability ensured, where she had previously been working.

Attorneys Fees: Unreasonable Denial or Delay of Payment. Attorneys fees awarded where insurer unreasonably refused to pay for back surgery although overwhelming evidence indicated claimant's accident caused increased, totally disabling back pain. Reliance on fact that pre- and post-accident MRIs were the same, and fact that surgery had been recommended prior to the accident, was not reasonable where claimant and physicians made clear her pain increased and total disability ensured, where she had previously been working.

Benefits: Medical Benefits: Surgery. Back surgery was compensable, and penalty and attorneys fees ordered against insurer, where overwhelming evidence indicated claimant's slip and fall caused increased, totally disabling back pain. Insurer's reliance on fact that pre- and post-accident MRIs were the same, and fact that surgery had been recommended prior to the accident, was not reasonable where claimant and physicians made clear her pain increased and total disability ensued and she had previously been working.

Medical Conditions (By Specific Condition): Herniated Disk. Back surgery was compensable, and penalty and attorneys fees ordered against insurer, where overwhelming evidence indicated claimant's slip and fall caused increased, totally disabling back pain. Insurer's reliance on fact that pre- and post-accident MRIs were the same, and fact that surgery had been recommended prior to the accident, was not reasonable where claimant and physicians made clear her pain increased and total disability ensued and she had previously been working.

Penalties: Insurers. Penalty awarded where insurer unreasonably refused to pay for back surgery although overwhelming evidence indicated claimant's accident caused increased, totally disabling back pain. Reliance on fact that pre- and post-accident MRIs were the same, and fact that surgery had been recommended prior to the accident, was not reasonable where claimant and physicians made clear her pain increased and total disability ensued, where she had previously been working.

Witnesses: Credibility. While a physician can appropriately consider a claimant's veracity when making diagnoses and treatment recommendations, the Court must make its own independent determination of claimant's credibility.

This case came for trial on November 6-7, 1996, in Billings, Montana. Petitioner, Deborah (Evans) Brian (claimant), was present with her attorney, Mr. James G. Edmiston. Respondent, State Compensation Insurance Fund (State Fund), was represented by Ms. Ann E. Clark.

Exhibits: Exhibits 1 through 22 were stipulated into evidence.

Witnesses and Depositions: Claimant and Tiffany Jaeger were sworn and testified. The testimony of Dr. Fred McMurray, Dr. William Shaw and Dr. Peter Teal was taken at their respective offices.

Issues Presented: (1) Whether the insurer is liable for claimant's back surgery; (2) whether it is also liable for any impairment rating for claimant's low-back condition; and (3) whether claimant is entitled to attorney fees, costs and a penalty.

No transcript of the trial has been prepared.

Having considered the Pre-Trial Order, the testimony at trial, the demeanor and credibility of the witnesses, the exhibits, and the arguments of the parties, the Court makes the following:

Findings of Fact

1. Claimant is forty-three years old and resides in Billings, Montana.
2. She has a well documented history of preexisting back problems, including pain in her left leg which radiated into her ankle and foot. On January 6, 1995, an MRI disclosed a "[h]erniated nucleus pulposus L4-L5 level midline and to the left." (Ex. 10 at 7.) The imaging also disclosed a "centrally protruding disk" at the L3-L4 level. (*Id.* at 6.) Her low-back and left leg pain were consistent with a herniated disk at the L4-L5 level.
3. Claimant was referred to Dr. Peter Teal, a board certified orthopedic surgeon. Dr. Teal examined claimant on June 20, 1995. At that time he diagnosed a "[h]erniated lumbar disc, L4-5" and "[d]egenerative disc disease, L3-4, 4-5, 5-1." (Ex. 7 at 1.) He recommended surgery, specifically a "laminotomy disc excision at L4-5 on the left side." (*Id.* at 2.)
4. Doc and Eddy's, a lounge and restaurant in Billings, hired claimant in April 1994. Up until the time of the industrial accident mentioned hereinafter, she worked between thirty-eight and fifty hours a week. During the period of her employment she only missed a few days of work on account of medical appointments and back pain.
5. Although claimant was able to work, she experienced continuous pain. Thus, on June 20, 1995, she agreed to Dr. Teal's surgical recommendation. On that same date, Dr. Teal also recommended that, pending surgery, her job be modified "so she can spend less time on her feet, have more resting time, perhaps 15 minutes out of the hour on her feet." (*Id.*)
6. On June 24, 1995, claimant slipped and fell at work. In falling she did "the splits." (*Id.*)
7. Claimant thereafter submitted a claim for workers' compensation.
8. At the time of claimant's slip and fall, Doc and Eddy's was insured by the State Fund. The State Fund accepted liability for the claim.
9. Claimant was unable to return to work after her slip and fall of June 24, 1995, and is presently totally disabled.
10. Since June 24, 1995, and continuing to the present time, the State Fund has paid claimant temporary total disability benefits. That payment constitutes an acknowledgment on the part of the State Fund that since June 24, 1995, the claimant has, in fact, been totally disabled on account of her June 24 industrial accident.
11. Claimant currently needs low-back surgery. While that surgery is considered elective, all three physicians who testified in this proceeding agree that surgery is warranted.

Claimant does not suffer from severe neurological loss, for example loss of bladder or bowel control, which would require emergency surgery, however, all three physicians agree that claimant's current condition totally disables her from working and that without surgery her condition is unlikely to improve in the foreseeable future.

12. Through her petition to this Court, claimant seeks a determination that the State Fund is liable for the proposed surgery despite the fact that surgery was recommended prior to her industrial accident.

13. On an objective basis there has been no significant change in claimant's condition since June 20, 1995. A new MRI study done in March 1996, is essentially identical to the one done in January 1995, although Dr. Shaw read the MRI as showing somewhat more pronounced herniation. However, claimant's pain and disability have both increased.

14. Both Dr. Peter Teal and Dr. Fred McMurray, a neurosurgeon who examined claimant in March 1996, agree that despite the absence of any significant change in claimant's MRI, she nonetheless permanently aggravated her low-back condition when she slipped and fell on June 24, 1995. Dr. McMurray testified that claimant may have suffered additional physical damage as a result of the fall even though the additional damage is not disclosed on the MRI. He testified that claimant's left nerve root at the L4-L5 level was already constricted prior to the June 24 incident and that additional constriction, even though small and not evident in imaging, could cause a significant increase in pain. His testimony was credible and persuasive.

15. Dr. Shaw, who opined that claimant had not suffered a permanent aggravation of her condition, agreed that "no science" can definitively determine whether or not claimant in fact suffered a permanent change in her condition as a result of the June 24 industrial accident. He testified that in reaching his opinion that she did not suffer a permanent aggravation he considered (1) claimant's reports that her pain is worse, (2) her inability to continue working, (3) a history of symptoms waxing and waning, (4) her overall presentation of objective clinical findings, e.g., straight leg raising results, (5) the MRI findings, (6) the fact that surgery was elective both before and after the incident, and (7) the general course of her symptoms, which he felt was generally consistent with her pre-accident condition.

16. Dr. Shaw was part of a medical panel which, at the request of the insurer, performed an independent medical examination of claimant. Dr. Robert S. Schultz, an orthopedic surgeon who participated in the panel examination, indicated in his written report that claimant "had pre-existing lumbar spine disease that was symptomatically exacerbated by her injury of June, 1995." (Ex. 18 at 10.) In light of the fact that at least some physicians use exacerbation to denote a temporary rather than permanent aggravation of a pre-existing condition, the Court is unable to read Dr. Schultz's statement as directly supporting a finding of permanent aggravation. The other panel physicians did not address the issue in their individual reports. (Ex. 18.)

17. The State Fund asked the panel to address three questions in its panel report. The questions were:

1) Based on the medical records, Ms. Evans (Brian) was scheduled for surgery before our injury occurred. Her condition pre-existed our injury, however, what will it take to get Ms. Evans back to "**pre-injury status**?"

2) Did the slip and fall at work hasten or increase the need for surgery?

3) Based on the MRI done in January 1995 and July of 1995, **it appears there is no significant change**. Would you agree that the incident did not result in additional injury?

It should be noted that Ms. Evans' pre-existing back condition was the result of a non-industrial injury.

(Ex. 18 at 7, first emphasis in original, second emphasis added.)

18. As can be seen from the questions, they were phrased to suggest, first, that there was no significant change in claimant's condition following her June 1995 injury and, second, that in determining whether there was an aggravation the panel should look at the objective findings, specifically the MRI.

19. Not surprisingly, in reaching its determination that the June 1995 injury did not significantly change claimant's condition, the panel relied on the objective findings and disregarded the subjective changes in her condition, observing:

There is no way to measure either her subjective complaints or her ability to function in the work place. Therefore, **there is no scientific recommendation** that we can make to "get her back to pre-injury status."

(Ex. 18 at 24, emphasis added.) Specifically addressing the aggravation issue, *as phrased by the State Fund*, the Panel responded:

3) Based on the MRI done in January 1995 and July 1995, it appears there is no significant change. Would you agree that the incident did not result in additional injury? As noted above, there are no objective indications of change in the historical reports of symptoms, physical findings, or imaging studies. The only indicators of possible additional injury are the reports of increased pain and diminished functional capacity.

It is noted that there has been progression in MRI findings between July 25, 1995 and March 14, 1996. There is no scientific way to attribute these changes to a specific incident. Specifically, there is no way to determine, to a reasonable degree of medical certainty, the extent, if any, to which the work-related incident of June 1995 or the motor vehicle accidents of August and December 1995 may have contributed to this progression.

(*Id.* at 24-25.)

20. In his testimony at trial, Dr. Shaw conceded that in concluding that claimant did not suffer a permanent aggravation of her condition he discounted her statements that her pain and disability permanently increased following the June 1995 incident. He noted that her reports were inconsistent. In effect he made a judgment concerning her credibility.

21. The Court agrees that it is appropriate for a physician to consider inconsistencies in a patient's history and to make judgments concerning the accuracy and the veracity of the history provided by the patient. Credibility judgments in some cases may be essential to appropriate diagnosis and treatment. However, where credibility is an issue, the Court must make its own independent determination concerning the claimant's credibility.

22. The evidence supporting claimant's contention that her symptoms permanently increased following her June 24, 1995 fall is overwhelming. Up to that time she was able to work, albeit in pain. Her employer reported that she was hardworking and overall a good employee. Dr. Teal's records reflect that she was genuinely desirous of and willing to attempt a return to work in late 1995. Not one of the physicians who examined claimant suggests that she was able to return to work at any time after the June 24, 1995 incident. While claimant may be an imperfect medical historian, no evidence was mustered which would support a finding that since the June 24, 1995 injury she has deliberately exaggerated her symptoms. I therefore find that claimant's pain and disability permanently increased as a result of her June 24, 1995 industrial accident and that the accident permanently aggravated her preexisting condition. In light of her increased pain, her total disability, and her decreased ability to perform ordinary activities, I also find that the indications for surgery are more compelling now than prior to June 24, 1995.

23. The State Fund's continued denial of liability for claimant's surgery is unreasonable. Claimant is not required to present objective evidence, such as MRI findings, to prove that her condition worsened as a result of her fall. (Dr. Shaw opined that the March 1996 MRI showed a more pronounced herniation in comparison to the January and July 1995 MRIs, thus providing objective evidence of a worsening of the physical findings, but was unable to attribute the increased herniation to the accident.) Moreover, in continuing to pay claimant temporary total disability benefits up to and including the day of trial, the State Fund conceded, and properly so, (1) that claimant is in fact unable to work and (2) that her disability is attributable to her industrial accident. Thus, it has conceded that the industrial accident worsened her condition. The evidence that the worsening is permanent is overwhelming in light of the medical evidence that claimant's condition will not improve, and that she will not be able to return to work, absent surgery. It should have been reasonably clear to the State Fund at least by March 1996, following Dr. McMurray's examination and recommendation, that surgery was necessary and related to the injury.

24. At trial the State Fund raised the possibility that two automobile accidents in late 1995 aggravated claimant's preexisting condition. However, there was no medical testimony supporting such a conclusion.

25. Dr. Shaw pointed out in his testimony that further delay in surgery may adversely affect the surgical outcome. As he poignantly stated, claimant needs surgery and someone needs to step up, accept responsibility for the surgery, and get the job done.

26. Claimant has not previously received workers' compensation benefits on account of her low-back condition.

CONCLUSIONS OF LAW

1. Claimant's industrial accident occurred on June 24, 1995. Pursuant to the rule that the law in effect at the time of the injury applies, *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986), the 1993 version of the Workers' Compensation Act applies.

2. The State Fund has accepted liability for this claim and continues to pay temporary total disability benefits on an undisputed basis. In doing so, the State Fund concedes that claimant in fact suffered an industrial injury on June 24, 1995, that her temporary total disability is "supported by a preponderance of medical evidence," § 39-71-701(2), MCA (1993), and that her disability is the result of her industrial injury.

3. Pursuant to section 39-71-704(1)(a), MCA (1993), claimant is entitled to "reasonable primary medical services for conditions resulting from the injury for those periods as the nature of the injury or the process of recovery requires." "Primary medical services" are those services "prescribed by a treating physician, for conditions resulting from the injury, necessary for achieving medical stability." § 39-71-116(21), MCA (1993). "Medical stability" means "maximum healing," which is "a point in the healing process when further material improvement would not be reasonably expected from primary medical treatment." § 39-71-116(14), MCA (1993). The medical testimony shows that claimant may reasonably be expected to benefit from surgery. Thus, she has not reached medical stability and the State Fund is liable for the surgery unless her condition is not the result of her industrial injury.

4. Under long established court precedents, *Welch v. American Mine Services, Inc.*, 253 Mont. 76, 81-82, 831 P.2d 580, 584 (1995), as well as by statute, § 39-71-407(2)(a)(ii), MCA (1993), insurers are liable for aggravations of preexisting medical conditions. The aggravation must be material and significant. *Caekaert v. State Compensation Mut. Ins. Fund*, 268 Mont. 105, 112, 885 P.2d 495, 499 (1994). Evidence that a specific incident caused disability, i.e., an inability to work, where the claimant had previously been able to work, is a strong indicator that the incident aggravated the preexisting condition. *Shepard v. Midland Foods, Inc.*, 205 Mont. 146, 153, 666 P.2d 758, 762 (1983). Even lacking specific objective findings attributable to the industrial injury, medical opinions relating increased

pain and resulting disability to the injury, along with an explanation as to how the incident may have physically caused the increased pain, is sufficient to establish an aggravation. See *Houts v. Kare-Mor, Inc.*, 257 Mont. 65, 69, 847 P.2d 701, 703-704 (1993); *Lahey v. Kerrian's*, 228 Mont. 139, 141-42, 741 P.2d 416, 417-418 (1987). Claimant in this case has established that she suffered a permanent, significant aggravation of her preexisting condition.

5. It is reasonably clear that under the Montana Workers' Compensation Act the claimant is not required to prove she suffered a permanent aggravation of her preexisting condition by objective, physical findings specifically related to her industrial accident. As the medical testimony in this case points out, medical science has not yet reached the point where every instance of physical damage to the human body can be objectively imaged. The State Fund's insistence on such objective evidence was unreasonable in light of overwhelming evidence that the June 24, 1995 industrial accident caused increased, disabling pain. In continuing to pay temporary total disability benefits to claimant, the State Fund conceded that her current disability, and thus her current condition, is attributable to the accident. Indeed, it had no substantial basis to conclude otherwise. Thus, I have found that the State Fund's denial of responsibility for surgery is unreasonable. Based on that finding, claimant is entitled to attorney fees and a penalty. §§ 39-71-611 and -2907, MCA (1993).

6. Since she has prevailed, claimant is entitled to her costs in an amount to be determined at a later time.

7. The State Fund is liable for any impairment rating attributable to claimant's low-back condition. The employer takes its workers as it finds them, preexisting conditions included. *Larson v. Cigna Ins. Co.*, 271 Mont. 98, 103, 894 P.2d 327, 330 (1995). As previously held, the employer is responsible for aggravations of a preexisting condition. Section 39-71-703(5), MCA (1995), provides that an award payable for a subsequent injury to the same part of the body "may not duplicate any amounts paid for the previous injury or injuries." Thus, had claimant received a previous impairment award, that previous award would have to be deducted from any impairment award determined to be due her on account of her present condition. However, she has not received any previous impairment award, so there is nothing to deduct.

JUDGMENT

1. The State Fund is liable for, and shall pay for, the low-back surgery recommended by Drs. Teal and McMurray should one or both of those doctors adhere to their recommendation of surgery following further examination of claimant and should claimant elect to undergo surgery.

2. The State Fund is liable for the full amount of any impairment rating attributable to claimant's low-back condition.

3. The State Fund shall pay claimant a penalty in an amount equal to 20% of the cost of her surgery and follow-up care.

4. The State Fund shall pay claimant's attorney fees in an amount to be determined in accordance with ARM 24.5.343.

5. The State Fund shall pay costs in an amount to be determined in accordance with ARM 24.5.342. The claimant shall have 10 days from the date of this judgment in which to submit an affidavit of costs. The State Fund shall thereafter have ten days in which to object to any item.

6. This Judgment is certified as final.

7. 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 22nd day of November, 1996.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. James G. Edmiston

Ms. Ann E. Clark

Submitted: November 18, 1996