IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2004 MTWCC 45

WCC No. 2002-0498

LORI MEYERS BAIN

Petitioner

vs.

LIBERTY MUTUAL FIRE INSURANCE COMPANY

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

APPEALED 6/10/04
AFFIRMED 12/16/05 - *Bain v. Liberty Mutual Fire Ins. Co.*, 2005 MT 299N

Summary: Claimant seeks a determination that various medical conditions from which she suffers were caused by one or both hepatitis B vaccinations she received in early 1996.

Held: While the vaccinations were in the course and scope of claimant's employment, her claim is time-barred under both sections 39-71-603 and -601, MCA. Moreover, she has failed to persuade the Court that her maladies are related to her hepatitis B vaccinations.

Topics:

Limitations Periods: Notice to Employer. The thirty-day period for notifying the employer of an industrial injury is tolled during the period the employee was unaware an incident caused physical harm requiring medical treatment but begins running again after claimant requires medical treatment and believes that the work-incident caused the need for treatment. § 39-71-603, MCA (1995-2003).

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-603, MCA (1995-2003). The thirty-day period for notifying the employer of an industrial injury is tolled during the period the employee was unaware an incident caused physical harm requiring medical treatment but begins running again after claimant requires medical treatment and believes that the work-incident caused the need for treatment. § 39-71-603, MCA (1995-2003).

Limitations Periods: Claim Filing: Waiver of Time. Waiver of the one- year limitations period for filing a claim is limited to the additional two-year period specified by section 39-71-601(2), MCA (1995-2003). Prior Court decisions placing no restrictions on the time for waiver have been superceded by the statute.

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-601, MCA (1995-2003). Waiver of the one-year limitations period for filing a claim is limited to the additional two-year period specified by section 39-71-601(2), MCA (1995-2003). Prior Court decisions placing no restrictions on the time for waiver have been superceded by the statute.

Employment: Course and Scope: Generally. Section 39-71-407, MCA (1995-2003), provides for compensation for injuries "arising out of and in the course and scope of employment." In *Pinyard v. State Compensation Ins. Fund,* 271 Mont. 115, 119-120, 894 P.2d 932, 935 (1995), the Supreme Court parsed the requirement, holding as follows:

"The language 'in the course of employment,' generally refers to the time, place and circumstances of an injury in relation to employment. . . . The phrase "arising out of" is related to the concept of causation."

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 38-71-407, MCA (1995-2003). Section 39-71-407, MCA (1995-2003), provides for compensation for injuries "arising out of and in the course and scope of employment." In *Pinyard v. State Compensation Ins. Fund,* 271 Mont. 115, 119-120, 894 P.2d 932, 935 (1995), the Supreme Court parsed the requirement, holding as follows:

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Employment: Course and Scope: Generally. Whether an injury arises "out of and in the course of employment" is determined by analyzing four factors, all of which must be considered together and none of which is conclusive: (1) whether the activity was undertaken at the employer's request; (2) whether employer, either directly or indirectly, compelled employee's attendance at the activity; (3) whether the employer controlled or participated in the activity; and (4) whether both employer and employee mutually benefitted in the activity.

Employment: Course and Scope: Vaccinations. A vaccination paid for, arranged and encouraged by the employer for its high risk employees is within the scope and course of employment, thus reactions and injuries resulting from the vaccination are compensable.

Proof: Conflicting Evidence: Medical. In assessing conflicting medical opinions, the Court takes into consideration, among other things, (1) whether the opining physician reviewed the claimant's medical records before reaching his or her conclusions; (2) in cases where actual examination of a claimant is important, whether the physician physically examined the claimant; (3) the professed or obvious biases of the physician; (4) the specific areas of expertise of the physician; (5) peer reviewed articles authored by the physician, particularly in the subject area in which opinions are rendered; (6) the physician's standing among peers in the specialized medical area involved in the opinions; (7) the physician's specific analysis in the case; (8) the physician's consideration and evaluation of other explanations for the claimant's condition; (9) the accuracy of the facts upon which the physician's opinions are based; and (10) medical and scientific literature brought to the Court's attention which tends to support or contradict the physician's conclusions.

¶1 The trial in this matter was fragmented and held over several days.

¶2 The following is a summary of the proceedings:

February 14, 2003	Kalispell	Bruce Belleview, M.D., testified in person.
February 21, 2003	Kalispell	Irene Martin, M.D., testified in person.
April 2, 2003	Great Falls	Burton Waisbren, M.D., testified by live video conference. Lori Meyers Bain, Jeffrey Bain, and Lynn Gasser testified in person.
April 7, 2003	Helena	Anthony Montanaro, M.D., testified by live video conference.
April 17, 2003	Kalispell	Lori Pryor, Joan Paulson, Michelle Stedman, Michael G. Boharski, M.D., and John V. Stephens, M.D. testified in person.
April 28, 2003	Helena	F. Blaine Hollinger, M.D., testified in person.

May 19, 2003	By telephone	By agreement of counsel, Lori Meyers Bain testified as a rebuttal witness. The Court did not personally listen to the testimony but has reviewed a transcript of the testimony.

Throughout all of the proceedings, the petitioner was represented by Mr. Thomas A. Marra and the respondent by Mr. Larry W. Jones. All testimony has been transcribed. The minute entries reflect, and my recollection is, that the petitioner was present during all of the above proceedings except for the testimony of Drs. Montanaro and Hollinger.

¶3 In addition to the above testimony, the depositions of Joseph M. Power, Tim Stephens, Joseph W. Russell, Lori Pryor, Lori Meyers Bain, Shannon Chambliss, Anthony Montanaro, M.D., Burton A. Waisbren, M.D., Michael Boharski, M.D., Irene Martin, M.D., Joan Paulson, R.N., and Michelle Stedman were submitted for the Court's consideration.

¶4 Exhibits: Exhibits 1 through 26 were admitted into evidence. There were relevancy objections to Exhibits 2, 3, 5, 10, 12, 13, and 24 through 26, and further objections to 24 through 26 as being cumulative. Since the Court must review the exhibits to determine if they are in fact relevant, they are admitted but are considered only insofar as they tend to make a fact of consequence more or less likely. Some of the exhibits were also duplications of others. The claimant objected to Exhibit 21 on hearsay and foundation grounds. The exhibit is an article from the New England Journal of Medicine and was cited and discussed by the physicians testifying in this case. The objection is overruled. [(1)]

¶5 Comment Concerning Exhibits: The medical records are found in Exhibit 1. Exhibit 1 is divided into three parts separated only by pink pages. The first part fills a three and one-half inch binder plus another three-inch binder. The exhibits in the first part are mostly in date order beginning in 1985 (Ex.1 at 000923) and ending on April 19, 2002 (Ex. 1 at 000001). They are numbered on the **back** of the pages, sequentially and in reverse order, the first page being page 000924 and the last page being 000001. While the pages are also numbered on the front, those numbers are not sequential and should be disregarded. In any event, since the records are in chronological order, I cite them by date rather than by page number.

¶6 The second part of Exhibit 1 – the part following the first pink page – is described in the list of exhibits as Dr. Martin's records from her deposition. However, they are not in the order of the exhibits attached to Dr. Martin's deposition and are far fewer than those attached to the deposition. They also are mostly in chronological order, beginning on February 28, 2002 and ending in early 2003.

¶7 The third section consists of miscellaneous undated records and documents and is not cited.

¶8 Issues Presented: The Court restates the issues as follows:

¶8aWhether two hepatitis B vaccinations of the claimant, one on January 30, 1996, and the other on March 11, 1996, were done in the course and scope of her employment with Shopko Stores, Incorporated.

¶8bWhether the petition is time-barred for the claimant's failure to give her employer notice of her alleged injuries within thirty days, § 39-71-603, MCA (1995), and for failure to file a written claim within one year, § 39-71-601, MCA (1995). [(2)]

¶8cIf the claimant's vaccinations were in the course and scope of her employment and her claim is timely, whether either vaccination caused the claimant physical harm or permanently aggravated any preexisting medical conditions.

¶8dWhether the insurer acted unreasonably in denying the petitioner's claim for compensation with respect to the vaccinations, thereby entitling her to attorney fees and a penalty.

OVERVIEW

¶9 Lori Meyers Bain, hereinafter "claimant," suffers from numerous medical conditions, including chronic fatigue, chronic aching of her muscles and joints, a skin rash, memory lapses, difficulty in maintaining her balance, an altered gait (walk), and periodic seizures during which she cannot move an arm or a leg. She suffers from a demyelinating disease with symptoms similar to multiple sclerosis (MS), however, she had not been diagnosed with MS at the time of trial. She alleges that all of her symptoms and her demyelinating diseases were caused by one or both of the hepatitis B vaccinations she received in 1996 at her employer's behest.

¶10 There are two preliminary issues raised by the respondent Liberty Mutual Fire Insurance Company (Liberty). The first is whether the vaccinations were within the course and scope of her employment. The other concerns the timeliness of both her notice to her employer and the filing of her written claim. Those issues were initially raised in a motion for summary judgment but are wrapped into this decision since the issues are fact driven and I deemed it more expeditious to address them after trial.

¶11 The larger issue is causation. Both the claimant and Liberty presented testimony of nationally recognized medical experts which supports their positions. Those experts in turn referred to and relied upon various studies and journal articles concerning adverse reactions to the hepatitis B vaccine, including an Immunization Safety Review of the

Institution of Medicine of the National Academies. [3] The study was published in 2002 and concludes that scientific "evidence favors rejection of a causal relationship between hepatitis B vaccine administered to adults and incident multiple sclerosis . . . [and] between hepatitis B vaccine administered to adults and multiple sclerosis relapse." (Ex. 11 at 83.) The Immunization Safety Review Committee further found the evidence "inadequate to accept or reject a causal relationship between hepatitis B vaccine" and several other reported conditions, including "first episode of central nervous system demyelinating disorder." (*Id*. at 83-84.)

¶12 The issue of causation is complicated by the fact that the claimant suffers from other conditions which may explain her initial reaction to the vaccine and her current symptoms. She has a fear of needles, which may explain how she felt upon receiving the injections. The claimant does not suffer from hepatitis B but does have hepatitis C, which is unrelated to the vaccinations and was acquired more than a decade ago even though it was not diagnosed and did not become symptomatic until after the claimant's hepatitis B vaccinations. She does not claim that the hepatitis C was caused by the hepatitis B vaccinations. Some of her complaints -- the chronic fatigue, and joint and muscle pain -- are well-known symptoms of hepatitis C infection.

¶13 In reaching my decision in this case, I have meticulously sorted through and considered all of the evidence. In the decision itself, I have devoted a great deal of space to the testimony concerning the vaccinations and the claimant's reactions immediately following them because the nature of the reaction is important in some of the medical opinions provided in this case.

¶14 Now, having considered the Pretrial Order, the testimony presented at trial, the demeanor and credibility of the witnesses, the depositions and exhibits, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

¶15 This case arose in January 1996, when the claimant received the first of two hepatitis B vaccinations. At that time she was forty-one years old and had just begun living with Jeffrey Bain, whom she later married. [4]

¶16 The claimant presently suffers from joint and muscle pain, chronic fatigue, visual difficulty, and memory lapses. She has trouble with her balance and walking. She is unable to work and alleges that her disabling conditions were caused by two hepatitis B vaccinations she received in January and March 1996. The claimant contends that her disabling conditions were caused by the 1996 vaccinations.

¶17 Before discussing the evidence concerning the causation of the claimant's medical condition, I want to make several things clear.

¶17aFirst, there is not a doubt in my mind that the claimant is suffering from serious, disabling medical conditions, including some sort of demyelinating condition akin to MS. I observed her walking during the proceedings we held in this case. At times she was unaware of my observation. Even to my untrained eye, her gait, i.e., the way she walked – was abnormal. I also do not doubt her reports of her aches and pains, of extreme fatigue, and of memory loss.

¶17bSecond, the claimant's conditions are disabling. I have no doubt that she has been physically unable to work since May 1999. In light of her work history, I also have no doubt that she would rather be working than disabled.

¶17cThird, in assessing the medical opinions in this case, I have considered my own assessment of the various physicians when testifying, as well as my analysis of their medical credentials, their logic, their biases, and the medical authorities upon which they relied.

¶17dFinally, I have also carefully examined the facts surrounding the vaccinations themselves since the extent and nature of the claimant's reactions to the vaccinations play a role in the medical opinions provided in this case.

¶18 The claimant is an optician. She worked as an optician at Shopko's store in Great Falls, Montana, from 1988 until 1994. In 1994 she became the optical department manager for the Shopko store in Kalispell, Montana.

¶19 Employers are mandated by law to establish blood borne pathogen programs for employees who are exposed to human blood or its components. The program is mandated in 29 C.F.R. § 1910.1030, which is part of the occupational safety regulations promulgated by the Occupational and Health Administration of the United States Department of Labor. Among other things, the section requires that employers make available and pay for hepatitis B vaccinations for at-risk employees. Subsection (f) of 1910.1030 provides:

(f) Hepatitis B vaccination and post-exposure evaluation and follow-up--

(1) General.

(i)The employer shall make available the hepatitis B vaccine and vaccination series to all employees who have occupational exposure, and post-exposure evaluation and follow-up to all employees who have had an exposure incident.

(ii)The employer shall ensure that all medical evaluations and procedures including the hepatitis B vaccine and vaccination series and post-exposure evaluation and follow-up, including prophylaxis, are:

(A) Made available at no cost to the employee;

(B)Made available to the employee at a reasonable time and place;

(C)Performed by or under the supervision of a licensed physician or by or under the supervision of another licensed healthcare professional; and

(D)Provided according to recommendations of the U.S. Public Health Service current at the time these evaluations and procedures take place, except as specified by this paragraph (f).

(iii)The employer shall ensure that all laboratory tests are conducted by an accredited laboratory at no cost to the employee.

(2)Hepatitis B Vaccination. (i)Hepatitis B vaccination shall be made available after the employee has received the training required in paragraph (g)(2)(vii)(I) and within 10 working days of initial assignment to all employees who have occupational exposure unless the employee has previously received the complete hepatitis B vaccination series, antibody testing has revealed that the employee is immune, or the vaccine is contraindicated for medical reasons.

(ii)The employer shall not make participation in a prescreening program a prerequisite for receiving hepatitis B vaccination.

(iii)If the employee initially declines hepatitis B vaccination but at a later date while still covered under the standard decides to accept the vaccination, the employer shall make available hepatitis B vaccination at that time.

(iv)The employer shall assure that employees who decline to accept hepatitis B vaccination offered by the employer sign the statement in appendix A. [(5)]

(v)If a routine booster dose(s) of hepatitis B vaccine is recommended by the U.S. Public Health Service at a future date, such booster dose(s) shall be made available in accordance with section (f)(1)(ii).

¶20 In the fall of 1995, Shopko provided its employees, including the claimant, with a video concerning blood borne pathogens. The video is Exhibit 8 and I have viewed it. It specifically refers to HIV and hepatitis B and notes that of the two pathogens, hepatitis B is the more infectious, infecting 200,000 to 300,000 persons annually in the United States. The video further identifies the types of employees most at risk for infection. Those employees include employees who fit eyewear, i.e., optical department employees, apparently because of their contact with tears, which is a bodily fluid. The video encourages at-risk employees to seek hepatitis B vaccinations and states that Shopko will pay for the vaccinations. The video further informs employees that any at-risk employee must sign a written waiver if he or she declines to be vaccinated. [(6)]

¶21 Approximately a billion people worldwide have received the hepatitis vaccine. (Hollinger Tr. Test. at 57.) In much of the United States children are required to be vaccinated as a prerequisite to attending public schools. (20/20 Exposé, Ex. 13.) The widespread use of the vaccine, however, is not proof that the claimant did *not* suffer an adverse reaction to the vaccine.

¶22 The hepatitis B vaccine is given in a series of three injections over a period of six months. The second injection is given one month after the first and the third six months after the first. (Hepatitis B Vaccine product insert, Ex. 5.)

¶23 The Kalispell Shopko arranged for the vaccination of at-risk employees through the Flathead County Health Department. The claimant did not initially sign up for the vaccinations and on several occasions during the fall of 1995 was reminded of the vaccine's availability by Shopko's risk manager.

¶24 The claimant was hesitant to undergo the vaccinations because of her fear of needles. However, in January 1996 the claimant finally decided to submit to the series of vaccinations. At the time she made her decision, she was well aware she could decline the vaccinations. However, the Shopko presentations had convinced her that the vaccinations were wise in light of her potential exposure to the hepatitis B virus in her job.

¶25 On January 30, 1996, the claimant had her first hepatitis B vaccination at the Flathead County Health Department. Shopko paid for that vaccination, as well as a second, March 11, 1996 vaccination.

¶26 Joan Paulson (Paulson), a registered nurse employed by the Health Department, administered both vaccinations.

¶27 The vaccine administered on both January 30th and March 11th was Recombivax HB, which is manufactured by Merck & Company. The product insert for the vaccine is found at Exhibit 5.

¶28 Paulson testified that it was standard procedure to provide patients seeking vaccinations with information concerning possible reactions. The claimant did not recall being provided with the information but I am convinced she was.

¶29 The claimant's immediate reaction to either of the two vaccinations is significant to the medical opinions provided in this case. Dr. Waisbren, who testified on behalf of the claimant, characterized it as an anaphylactic-type reaction. Physicians testifying on behalf of Liberty opined that claimant simply suffered an anxiety attack arising out of her fear of needles.

¶30 The claimant testified that upon receiving the first, January 30th, injection she was immediately ill. At trial she described her reaction as follows:

14 Q Can you tell us what you felt at the time that
15 the shot was given?
16 A Immediately I felt like I had just put my hands
17 into an electrical outlet. I felt a tingling that went up
18 my arms and across my back and just down my spinal cord.
19 So it was like an electrical shock. That's the only way I
20 can explain it. It was tingling but it was a painful
21 tingling. It felt like I had been shocked. And then I
22 felt like I was almost being crushed. I felt like I was
23 going to fall to the floor. I felt I couldn't get clear
24 vision. I felt -- I kept trying to blink because I felt
25 like everything was swimming.

1 I felt pain. I don't know how to explain it,
2 the deepest pain I've ever felt in my entire life, was
3 different pain than a migraine headache or female pain,
4 you know, it was pain everywhere. I felt sweaty and yet
5 freezing. I was shaking and I was confused. I really
6 felt confused. I felt nauseous instantly. I just wanted
7 to get out of there.

(April 2, 2003 Tr. at 134-35.) In her deposition she testified that she felt shaky and like she was going to vomit and pass out. (L. Bain Dep. at 41.)

¶31 Jeff Bain, who accompanied the claimant to the health department, testified that he was not present when the injection was administered but saw the claimant a few minutes later. (April 2, 2003 Tr. at 166.) He testified that she looked "rather peaked. She was sweaty and seemed rather dizzy." (*Id*.) He described her reaction in further detail, testifying:

3 Q What did Lori say to you after she received the
4 vaccination?
5 A Well, she felt -- right away her first words out
6 of her mouth was that she felt a tingling sensation up and
7 down her spine and she felt light-headed. And I could
8 tell she was, you know, sweaty forehead and basically, you
9 know, had to lean on me so I could help her walk back out
10 to the truck.
11 Q Did you observe Lori at any time after you
12 walked her back out to the truck over the ensuing 24 or 48
13 hours after the vaccination in January of 30th of 1996?

14 A Yes, I did.
15 Q What did you observe?
16 A I observed more of the same. She was nauseous
17 and had some balance issues. She was rather, you know,
18 upset, you know, about these feelings she's having.

(*Id*. at 167).

¶32 Paulson, who administered both shots, was trained to watch for adverse reactions to vaccinations, especially anaphylactic reactions. She described an anaphylactic reaction as typically manifested by difficulty breathing and often hives within a few minutes after the injection, and as requiring immediate treatment, usually through the administration of adrenalin. (April 17, 2003 Trial Test. of Paulson at 16-17.) She also testified that she was familiar with anxiety reactions caused by injections. (*Id*. at 17-18.)

¶33 Paulson had met the claimant in Great Falls many years before when the claimant was working for an eye doctor. She recognized the claimant when she came into the health department on January 30th and recalled that the claimant was "nervous about her shot." (*Id*. at 23.) After giving the claimant the injection, Paulson did not notice or note any significant adverse reaction by the claimant. (*Id*. at 24-26.)

¶34 The claimant clearly was affected by the shot to the degree that she did not want to go through with a second shot. However, she was encouraged by Jeff Bain to undergo the full series of three shots.

¶35 The claimant went for her second shot on March 11th. She best described her own state of mind at the trial, testifying, " . . . I went **kicking and screaming** with Jeff Bain, I did not want to go. . . ." (April 2, 2003 Tr. at 138, emphasis added.) She further said, "I was afraid." (*Id*.) Her testimony is important in light of her fear of needles and medical testimony, which will be discussed later on, that her reactions to the injections were anxiety attacks.

¶36 The claimant described her reaction to the second shot on March 11th as very similar to her reaction to the first one:

5 Q What happened after you received the second
6 shot?
7 A Instantly an electrocuted feeling. The very
8 same exact electrocuted feeling of tingling all down
9 through my entire body, everything went black. I couldn't
10 see. I couldn't focus at all this time. I instantly
11 became nauseous. I felt like I was going to pass out.
12 And I felt like -- I guess it was just so magnified, it
13 was exactly the same as before only magnified a thousand

14 times is how I felt.

(*Id*. at 139.) Jeff Bain testified that the claimant also had "balance issues" and dizziness in the twenty-four to forty-eight hours following the injection.

¶37 As with the first injection, Paulson noted no unusual reaction. She testified that an anxiety reaction would not have been noted since anxiety reactions are common. (April 17, 2003 Trial Test. of Paulson at 27.)

¶38 The claimant testified that a second person was at the health department assisting with the shots and that she told that person she thought she was going to pass out but the person thought she was merely having a panic attack. (April 2, 2003 Tr. at 139, 141.)

¶39 According to the claimant, she has never felt the same since the first vaccination. (*Id*. at 136.) She described the progression of her symptoms since the vaccinations as follows:

9 Q Lori, could you tell us about the progression of
10 your health from the spring of 1996 up to the present
11 time.
12 A Yes, I can. The first obvious thing was the
13 rash that happened to me. I had the rash for 17 months
14 about. It was longer than a year. I know it was longer
15 than 15 months. The rash has come back at least three or
16 four times since then and lasted over half a year. I've
17 been having trouble with balance ever since then. I'm
18 having --
19 THE COURT: Ever since when?
20 THE WITNESS: Ever since I had my second
21 vaccination in March of 1996.
22 A I have had seizures recently that are MS like.
23 And the reason I say that is that's what they are calling
24 them in all the diagnoses and MS like symptoms. What
25 happens is either my arm or my leg go into a seizure where

1 I can't move it. Sometimes the whole side. I've had
2 trouble with my mental clarity, with my memory. I've had
3 trouble with tingling sensations. I still have that
4 electrical feeling every once in a while zoom through my
5 body. What else. I have nausea all the time. I'm
6 nauseous all the time.

(April 2, 2003 Tr. at 150-51.)

¶40 The claimant and her husband testified that during the three months immediately following the second shot she vomited **every** day. (April 2, 2003 Tr. at 151.) In addition, according to the testimony of both claimant and her husband, she developed a rash within a short time after the second shot. According to Jeff, the rash developed "within less than two weeks." (April 2, 2003 Tr. at 150, 172.) Also, the claimant testified that she has had persistent balance problems ever since the second injection. (*Id*. at 150.)

¶41 In light of the seriousness of these complaints, one would expect that the claimant would have sought medical care shortly after the second shot, especially in light of pre-1996 medical records of the claimant indicating that she had not hesitated in the past to seek medical care. (*See* Ex. 1 at 771A to 924.) The claimant testified that she "thought" she sought medical care a day or two after the second shot because she "felt so bad." (April 2, 2003 Tr. at 144.) She was unable to produce records of any such care and the claimant was unsure of her recollection. She also testified that she was "confused in those few weeks after all of this . . . ." (April 2, 2003 Tr. at 146.) I find that in fact that she did not seek immediate medical care.

¶42 Indeed, her first medical care following the second shot was on May 21, 1996, when she went to the Family Healthcare Clinic for a rash. (April 2, 2003 Tr. at 147-48, Ex. 1 at 000770-000771.) The clinic note for that date states that she was suffering from a rash of only **one week's duration**. The note indicates the claimant had shortness of breath associated with the outbreak of the rash. The handwritten office note states, "Last wk [week] broke out in rash all over body – itching – Has noticed a lot of sweating & coldness – at times chest feels heavy & hot." (Ex. 1 at 000771.) The typewritten note for that visit says:

> C/o a rash that she has on her body that she has had for about one week. The rash is spreading over her body. These are very scattered, slightly raised less than 1 mm vesicles that itch quite a lot any time of the day or night. She also is feeling SOB [short of breath] and heaviness in her chest with regards to this. Felt that this might have been a herpes breakout . . . .

(Ex. 1 at 000770.)

¶43 The claimant saw Dr. Irene Martin, a family practitioner, the next day (May 22, 1996.) This was the first time Dr. Martin examined the claimant. Thereafter Dr. Martin became the claimant's regular family physician and continues to treat her.

¶44 On May 22nd, Dr. Martin recorded that the claimant was complaining of a rash, fever, "a feeling of spinning," and muscle aches [(7)] of **two weeks duration.** [(8)] Dr. Martin suspected that the claimant had a case of influenza, hot tub dermatitis from soaking in a hot tub, and mild fibromyalgia. However, since her rash was atypical, Dr. Martin referred the claimant to a dermatologist. Of particular note, there was **no** mention by Dr. Martin of the hepatitis B

shots. There was, however, mention that the claimant was regularly exposed to a number of chemicals at work.

¶45 The claimant was seen by Dr. David K. Murdock, a dermatologist, on June 3, 1996. He diagnosed her rash as lichen planus, which he characterized as idiopathic. Idiopathic means "arising spontaneously or from an obscure or unknown cause." Merriam-Webster Medical Dictionary. Lichen planus is "a skin disease characterized by an eruption of wide flat papules covered by a horny glazed film, marked by intense itching, and often accompanied by lesions on the oral mucosa" (*id*.), a description that is consistent with the description of the claimant's condition found in the medical records. There was **no** mention of the hepatitis B vaccinations in Dr. Murdock's notes.

¶46 On June 3, 1996, the claimant also reported aching in her knees for the first time, a complaint she repeated to Dr. Martin on July 29, 1996. On July 29th, Dr. Martin wrote a lengthy note, beginning, "Lori is a true puzzle." She again noted the claimant's exposure to multiple chemicals at her work place. And, for the first time in the medical records, the hepatitis B shots are mentioned. However, Dr. Martin mentioned the shots in discussing the claimant's scheduled third shot, which Dr. Martin recommended against in light of the claimant's elevated liver function tests. There is **no** mention in Dr. Martin's note of any association between the claimant's complaints and the hepatitis B vaccinations. Indeed, Dr. Martin notes that some of the claimant's symptoms "including the lichen planus could be drug induced and could becoming [sic] from chemical exposure."

¶47 *In retrospect* both the claimant and her husband believe that her rash, dizziness, vomiting, and other malaise began immediately following the two hepatitis B shots, but I am convinced their memories are flawed. Her reports of a one and two-week duration of symptoms in late May are inconsistent with her recollection. It is also difficult for me to believe, and I do not believe, that she would not have sought medical care earlier had her rash, vomiting, and balance difficulty began immediately following the second injection. I find, as a matter of fact, that the onset of those symptoms did not begin until mid-May 1996. [(9)]

¶48 In any event, on August 12, 1996, Dr. Martin noted that the claimant was continuing to suffer from lichen planus but had also developed pain "over her distal quadriceps" and had "mild abnormal liver functions." The claimant reported feeling "extremely fatigued."

¶49 On August 15, 1996, a lab report also showed an elevated Epstein-Barre virus titer. The Epstein-Barre virus is associated with infectious mononucleosis and is also often associated with chronic fatigue. (Martin Trial Test. at 60 *and see* n.10.)

¶50 Upon referral by Dr. Martin, Dr. John Stephens, a physiatrist who had previously treated the claimant for myofascial pain, saw the claimant on August 29, 1996. At that

time, he noted that the claimant had a "long-standing history of chronic pain problems going back into the 80's" and commented, "I do expect when all is said and done that we will decide that she has fibromyalgia." However, he did not rule out chronic fatigue syndrome based on the elevated Epstein-Barre virus titer. [(10)] (August 29, 1996 Medical Record.)

¶51 During late 1996, there was some speculation that the claimant's multiple medical problems might be due to chemicals she was exposed to at work. (*See* records for 8/12/03, 10/26/03, 12/23/96.) Dr. Martin also wondered at one point whether she might be reacting to the hepatitis B shots. (8/12/96.) Dr. Martin wrote on August 12, 1996, ". . . I'm most suspicious that she's either reacting to the chemicals she's working with or to the B shot that she's gotten 2 in the past . . . ." (*Id*.) This is the first mention of a possible relationship between the claimant's complaints and the hepatitis B vaccinations.

¶52 In November 1996, the claimant was tested for hepatitis C; the tests came back positive. (Medical Records of 11/15/96 - 12/20/96.) A biopsy later done on March 4, 1997. confirmed the lab results and provided a definitive diagnosis of hepatitis C. (*See* records dated 3/4/97, 3/5/97, 6/19/97.)

¶53 Hepatitis C and B are both liver diseases but are caused by different viruses. (Belleville Trial Test. at 12-13.) Neither the hepatitis B virus nor the hepatitis B vaccine cause hepatitis C. (*Id*. at 13.)

¶54 The specific date on which the claimant was infected by hepatitis C, and the manner in which she was infected, have not been conclusively determined, and such determination is not essential to the decision in this case. Hepatitis C is transmitted through blood products and bodily fluids. It has a long latency period. *See Oswald v. Horizon CMS Healthcare Corp.,* 2002 MTWCC 62, ¶¶ 27b and 27h. Dr. Martin, who is the claimant's family physician, confirmed the long latency period, testifying:

> The course of hepatitis C is over decades. You, generally, do not see any deterioration and onset of cirrhosis for 20 or 30 years, depending on your patient population, and then maybe a decade beyond that to liver cancer. So people often have literally decades of asymptomatic life with living peacefully or fairly peacefully with hepatitis C.

(Martin Trial Test. at 71-72.)

¶55 In the history the claimant gave at the University of Washington Medical Center on September 18, 1997, she identified three possible means of infection during the 1980s. [(11)] (Ex. 1 at 582 and *see also* Belleville Trial Test., Ex. 2 at 22, ¶ 17 and at 23.) Irrespective of the specific source of infection, I am persuaded that the claimant contracted hepatitis C in the 1980s, long before she was vaccinated for hepatitis B.

¶56 On January 3, 1997, the claimant was seen for her hepatitis C by Dr. Craig Harrison, a gastroenterologist. Her complaints at that time were of "rash, fever, myalgias [muscle pain], malaise and fatigue." (January 3, 1997 Medical Records.) Dr. Harrison noted that the onset of the claimant's illness "seemed to coincide with the administration of a hepatitis B vaccine." (*Id*.) Thus, it is apparent that the claimant informed him that her symptoms arose about the time of her vaccinations. However, he believed that many of her symptoms were related to the hepatitis C, which he thought she had acquired thirteen years previously. (*Id*.)

¶57 On June 19, 1997, Dr. Michael Boharski, another gastroenterologist who began treating the claimant on June 9, 1997, reviewed the biopsy results and classified the claimant's hepatitis C as "chronic." (June 19, 1997 Medical Records.)

¶58 Common symptoms of hepatitis C include fatigue, joint pain, headache, abdominal pain, nausea, itching, and muscle pain. (Boharski Trial Test. at 17; Belleville Test. at 20-21.) The claimant had, and still has, all of these symptoms.

¶59 The claimant was initially treated for her hepatitis C with Interferon but reacted adversely to the drug and it was discontinued.

¶60 The claimant continued to have fatigue, along with joint and muscle pain. In the Spring of 1999 her hepatitis C virus titers [concentrations] increased, as did her fatigue.

¶61 Sometime in May 1999, Dr. Martin apparently took the claimant off work for thirty days. On June 10, 1999, she took the claimant off work for an additional thirty days. At that time, Dr. Martin wrote:

> Lori is in again today with complaints of fatigue. Arthralgias seeming to center mostly around her knees while making it difficult for her to walk. We have given her a 30 day leave from work to see if she could recoup he[r] renergy [sic] with additional rest but she says she is finding it harder and harder to move. She is having greater difficulty with memory and being able to concentrate. She finds that she is doing things, having to write things down so that she will not forget and the pain in her legs, if anything has increased. . . .
>
> A&P: [(12)] With her rising titer of hepatitis C in circulation, I have to infer that the growing intensity of her fatigue symptoms are directly related to her hepatitis C over expression. . . I am writing another 30 day leave for her to Shopko at this time. . . .

(June 10, 1999 Medical Record.)

¶62 On June 24, 1999, Dr. Martin took the claimant off work indefinitely and the claimant has never returned to work. (June 24, 1999 Medical Records.) Since then claimant has

continued to suffer extreme fatigue, muscle and joint pain, difficulty with her balance, and memory difficulties.

¶63 By the time of the June 10, 1999 visit, the claimant firmly believed that there was a relationship between her hepatitis B vaccinations and her illness. (*Id*.) Dr. Martin's medical record for the visit reflects that the claimant reported that "the fatigue and the arthralgias . . . came within the day or so after the injection she had of hepatitis B." (*Id*.)

¶64 By the time of the claimant's June 10, 1999 visit with Dr. Martin, the claimant had seen the ABC 20/20 Exposé about the hepatitis B vaccine. A videotape of the segment is found at Exhibit 13 and I have viewed it. In the segment, there are stories of a number of individuals who died or suffered catastrophic illnesses following hepatitis B vaccinations. The program chronicles the belief of some medical practitioners, along with the families of the individuals that the vaccine was the cause.

¶65 The claimant had already signed a claim for compensation on May 21, 1999. (Ex. 14.) The report was prepared by the employer based on information the claimant provided. The following is the description of the alleged industrial accident:

> Has been diagnosed with Hepatitis C and Feels that the Vaccination that she Received in Jan of 1996 is the cause of it.
>
> Lori has also shown adverse reactions dated back to the receiving of the shot.

(*Id*.) The present action is predicated on this claim.

¶66 Liberty has denied liability for the claim on numerous grounds. Initially, it alleges that the claimant failed to report her alleged injury within thirty days as required by section 39-71-603, MCA, and that her written claim was untimely under section 39-71-601, MCA, since it was not filed within one year of the alleged injury. It further denies that the vaccinations took place in the course and scope of claimant's employment. Finally, it denies liability on the merits, i.e., it disputes the claimant's contention that her conditions were caused by the 1996 vaccinations.

¶67 With respect to notice to the employer, the claimant testified that she first gave notice of her alleged adverse reaction to the hepatitis B vaccine the day after her first shot. According to the claimant, she told Shopko managers, including Tim Stephens (Stephens), who was in charge of Shopko's safety program, that she felt something funny, "like something had happened but I couldn't define it." (April 2, 2003 Tr. at 189-191.) She further testified that she told Stephens several times within the next two months that she felt "strange after my vaccination." (*Id*. at 192.) Just prior to going to see Dr. Martin in May 1996, she also told Stephens, as well as Lori Pryor (Pryor), that she was going to the doctor because she felt "strange." (*Id*. at 196-98.) I am persuaded that she did tell Stephens and Pryor following her first shot that she felt strange after the vaccinations. She provided no

further information. However, as I have found earlier, her significant symptoms did not arise until two months after her second shot. I am unpersuaded that at that time she associated the onset of her symptoms with the shots.

¶68 Indeed, at trial the claimant testified that she did not appreciate the relationship between the vaccinations and her symptoms until she saw the 20/20 Exposé in January 1999. On the other hand she testified that she specifically told Stephens right after the second shot that she "had some problems with this vaccination" and thought that he was filling out paperwork for a worker's compensation claim even though she did not discuss doing so with him. (April 2, 2003 Tr. at 131.)

¶69 In any event, at least as early as September 1997, the claimant clearly blamed her fatigue, aches and pains, and other symptoms on the vaccinations. A September 18, 1997 medical note from the University of Washington School of Medicine, where she sought advice, states,

> Patient [claimant] relates . . . that she had been feeling weak until mid-1996, when she began experiencing fatigue and rash following a vaccination for hepatitis B. Patient underwent two vaccinations, however, she did not go in for her third shot, **as she blamed her symptoms on the vaccine**. . . .

(September 18, 1997 Medical Record at 583, emphasis added.) Despite her belief, she did not provide any further notice to her employer at that time, and indeed did not do so until February or early March of 1999 when she notified her employer that she believed she suffered an adverse reaction from the vaccinations.

¶70 I will discuss how these findings fit into Liberty's notice and filing defenses in my conclusions of law. For now, I turn to the merits of the claim.

¶71 At present the claimant suffers from periodic outbreaks of lichen planus, extreme and chronic fatigue, constant nausea, mental confusion at times, memory difficulties, difficulty with her balance and gait (walking), and occasional seizures where she cannot move either an arm or leg. (April 2, 2003 Tr. at 150-51.) Objectively, she has had an MRI which shows cerebral atrophy. (Martin Trial Test. at 39.) She has also had "somatosensory evoked potentials [which] are suggestive [of Multiple Sclerosis]." However, her symptoms do not, at least at this time, meet the criteria for a diagnosis of multiple sclerosis. (Waisbren Dep. at 50.)

¶72 The question presented in this case is whether any of the claimant's medical symptoms and conditions were caused by her hepatitis B vaccinations, and, if so, which ones.

¶73 The claimant's case is based on the opinions of Dr. Waisbren. He was the only expert witness to endorse a causal relationship between the claimant's conditions and her

hepatitis B vaccine. While Dr. Martin was obviously sympathetic with Dr. Waisbren's opinions, she was unable to independently validate them to a reasonable degree of medical probability. When asked for her opinion concerning the cause of the claimant's "ongoing health problems, she responded:

> QDoctor, in looking back, with the benefit of hindsight and the information that you've gathered since 1996 and your treatment of Lori since that time, can you state what you think is the most likely cause of Lori's current and ongoing health problems?
>
> THE COURT: Do you want this to a reasonable degree of medical probability?
>
> MR. MARRA:Yes.
>
> THE COURT: Rather than just – Okay.
>
> THE WITNESS: Rather than my anecdotal experience.
>
> THE COURT:Do you have an opinion to a reasonable degree of medical probability?
>
> THE WITNESS:I think that Lori has been exposed to something that is causing an autoimmune reaction in her body that is making her ill, and my strongest suspicion is that it was the hepatitis B - - -
>
> MR. JONES:Excuse me, Your Honor. That doesn't satisfy the evidentiary standard.
>
> THE COURT:Okay. I'll take her testimony, but I understand what the standard is, and she does too.
>
> So go ahead.
>
> MR. MARRA:And I'll accept that.
>
> By MR. MARRA:
>
> QAre you done, Doctor?
>
> A I think it was the hepatitis B vaccine.
>
> THE COURT:But as I understand your testimony, you're highly suspicious of that, but you don't have an opinion to a medical probability that it was the hepatitis B vaccine?
>
> THE WITNESS:Because there is just really not that volume or body of evidence out there.
>
> THE COURT: Okay. Fair enough.
>
> THE WITNESS:It's difficult to refer to a body of evidence if it hasn't been generated.

(Martin Tr. Test. at 61-62.)

¶74 Dr. Waisbren has impressive credentials. He has practiced medicine since 1944. (April 2, 2003 Tr. at 4.) He has taught at Marquette Medical School and the University of Minnesota Medical School. (*Id*. at 4.) He has taught immunology and established a clinic to treat immunological diseases, including multiple sclerosis. (*Id*. at 5.) He is board certified in internal medicine but not in immunology. (Waisbren Dep. at 22.)

¶75 Dr. Waisbren presently operates the Waisbren Clinic, a clinic that he describes as engaged in "investigative internal medicine." (Waisbren Dep. Ex. 12.) He maintains a website on which he criticizes the hepatitis B vaccine. He contends that the vaccine is unsafe for universal use and should be limited to high-risk individuals. He believes that the vaccine may cause multiple sclerosis and other demyelinating diseases. (Waisbren Dep. Ex. 6.)

¶76 The claimant and Dr. Martin discovered Dr. Waisbren by searching the internet. (Martin Tr. Test. at 44; Waisbren Dep. at 14.)

¶77 Dr. Waisbren testified that the claimant's first vaccination in January 1996 caused the following conditions: lichen planus, arthritis, chronic fatigue, ataxia (unsteadiness in standing), iritis (inflammation of the eye), demyelinating disease, and fibromyalgia, all of which he attributed to an autoimmune reaction to the vaccine. (Waisbren Dep. at 15-17, 87; April 2, 2003 Tr. at 53.) According to Dr. Waisbren, the second, March 1996, vaccination just "made whatever happened worse." (*Id*. at 20.) In video conference testimony before the Court, he testified:

> 17 A My diagnosis was that she had developed a
> 18 chronic autoimmune disease due to the hepatitis B
> 19 vaccination as has been reported throughout the medical
> 20 literature.

(April 2, 2003 Tr. at 21.)

¶78 I have carefully and seriously considered Dr. Waisbren's opinions. However, I find them unpersuasive.

¶79 Initially, I note that it is abundantly clear that Dr. Waisbren is a crusader against the use of the hepatitis B vaccine except for high-risk individuals. He testified before Congress in 1999 against the hepatitis B vaccination policies of the Centers for Disease Control (CDC) and Food and Drug Administration (FDA). In his introductory remarks, he said, "I am here because I feel an injustice is being done to the children of this country. Included among these children are my sixteen grandchildren." (Waisbren Dep. Ex. 5.) He helped plan the 20/20 Exposé which was aired in January 1999 and which triggered the claimant to bring forth her claim. (Waisbren Dep. at 14.)

¶80 He has also written and self-published [13] a book advocating strict limitations on the use of the vaccine and arguing that it is responsible for a host of adverse reactions. The book is entitled *The Hepatitis B Vaccination Program in the United States – Lessons for the Future*. It is found in its entirety at Exhibit 7. Citations hereafter to the book are the page number of the book ("Waisbren Book") rather than the page number of the exhibit.

¶81 In his book, Dr. Waisbren advocates appealing to the courts for injunctive relief limiting hepatitis B vaccination, writing:

> I think the best hope to cure the most egregious injustice in the hepatitis B vaccine situation, the push for universal hepatitis B vaccination, is the obtaining of injunctive relief. I feel that if federal and/or state judges were presented the weakness in the arguments for universal hepatitis B vaccination that they would grant injunctions to stop this program. . . . It would seem apparent to me that a fair-minded judge would issue an injunction to halt this program until the need for and the ethics of this vaccination could be established.

(Waisbren Book at 69.)

¶82 In his book, Dr. Waisbren identifies the following autoimmune conditions as ones which can be caused by the hepatitis B vaccine:

- Multiple sclerosis.
- Meningoencephalitis.
- Chronic fatigue syndrome.
- Guillain-Barre syndrome. [14]

He further writes in the introduction, "This book will share my concerns regarding how proponents of vaccines have developed an intricate system by which the dangers of vaccinations have been withheld from the public in order to promulgate ambitious programs of vaccinations." (*Id*.)

¶83 Dr. Waisbren's bias is also reflected in his failure to adequately review the claimant's medical history and records. He saw the claimant on two occasions, the first time on February 7, 2000, and the second on October 29, 2002, when the present litigation had "heated up." (Waisbren Dep. at 27.)

¶84 In his initial report of February 7, 2000, Dr. Waisbren wrote that his opinion causally relating the claimant's medical conditions to her hepatitis B vaccinations were "based on a careful review of her [claimant's] medical records." (Ex. 1 at 274.) **In fact, Dr. Waisbren had not reviewed <u>any</u> of the claimant's medical records.** (Waisbren Dep. at 25.) The history he took from the claimant, which is set out in one and a half pages of his handwriting, was sorely incomplete when compared to the claimant's medical records. Dr. Waisbren also testified that he "did not get any idea of multiple medical problems prior to" her vaccinations. (*Id*.) The claimant's medical records are inconsistent with Dr. Waisbren's impression.

¶85 On the claimant's first visit, and without reviewing her medical records, Dr. Waisbren offered to testify on her behalf, writing, "As a public service, I will be glad to testify to the above [opinions] **without charge** to her attorney or the patient for the testimony as an expert who has also examined the patient." (Waisbren Dep. at 22.) Dr. Waisbren has testified on behalf of plaintiffs in between five and ten cases involving hepatitis B vaccinations. (Waisbren Dep. at 6.) Despite his professed altruism in not charging the claimant for his testimony, the Court notes that he charged Liberty $4,000 for a two hour and twenty-five minute deposition. (Waisbren Dep. at 4-5, 90.) With his extensive litigation experience, I doubt he was unaware that his deposition would be taken by Liberty.

¶86 When Dr. Waisbren saw the claimant a second time on October 29, 2002, he still had not reviewed any medical records except those of Dr. Martin, to whom he said he had talked and whom he characterized as "empathetic." (Waisbren Dep. at 31.)

¶87 Other facts and testimony also lead me to reject Dr. Waisbren's opinions.

> ¶87aInitially, Dr. Waisbren's causation opinion is based upon his finding that the claimant suffered an "anaphylactoid type of reaction to the vaccine which is consistent with the type of reaction noted in the vaccine recovery act table . . . ." (Waisbren Dep. at 20 and Dep. Ex. 2; April 2, 2003 Tr. at 18.) His characterization of her reaction as "anaphylactoid type" is in turn based on the claimant's report of immediate symptoms, including a feeling of electrical shock, loss of balance, vomiting, inability to visually focus, nausea, and flu-like symptoms. An anaphylactoid reaction is similar to an anaphylactic reaction. They differ principally in whether there is IGE antibody present. The antibody is present in anaphylactic reactions but not in anaphylactoid reactions. (Montanaro Dep. at 9.) The reaction in either case is characterized by "hives, shortness of breath, swelling of the lips and tongue . . . ." (*Id*. at 9-10.) Anaphylactic reactions may also involve closing of the throat, wheezing, and low blood pressure. (*Id*. at 10-11.) In extreme cases death may ensue. (*Id*. at 10.)
>
> ¶87bDr. Anthony Montanaro, whose credentials and testimony I discuss more fully later on, reviewed the symptoms which the claimant reported as occurring in

conjunction with her vaccinations, including her report of both an "electric shock and a feeling of impending doom." (*Id*. at 23.) He found her report consistent with classic symptoms of anxiety and hyperventilation, and inconsistent with an anaphylactic reaction. (*Id*. at 24, 27-31.) His opinion concerning the nature of the claimant's reaction to the vaccinations is supported by the facts and is persuasive.

¶87d Claimant admitted to a fear of needles. (L. Bain Trial Test. at 224.) In 1993, Dr. Bradley Root, a physiatrist treating claimant for myofascial upper back pain, noted claimant's resistence to trigger point injections, commenting that claimant "still expresses the desire to avoid injections if at all possible." (February 18, 1993 medical record.) Four months later he noted, "She states that it [myofascial pain] is getting to the point that it is so uncomfortable that even though patient is very much afraid of needles and injections that she might be willing to try some therapeutic injections." (June 7, 1993 Medical Record.) On June 10, 1993, Dr. Root further noted that claimant was going ahead with trigger point injections even though "she is deathly afraid of needleds [sic]" but that she had brought her husband, whom she later divorced, along "for support and to drive her." (June 10, 1993 Medical Report.) I find it significant that two and a half years later, in getting the hepatitis B vaccinations, she brought her current husband along for support and to drive her.

¶87eWhen offered the hepatitis B vaccinations by Shopko, the claimant procrastinated and had to be repeatedly reminded of their availability. Her hesitation indicated a reluctance to undergo the shots and is consistent with her fear of needles.

¶87fNo sort of anaphylactic reaction was noted by the trained nurse who administered the vaccinations. Indeed, she recalled the claimant suffered anxiety. Moreover, according to the claimant, another nurse present when she received the second injection told her she was hyperventilating, a symptom consistent with an anxiety reaction.

¶87gMany of the symptoms that Dr. Waisbren thought had arisen immediately after the injections did not in fact arise until several weeks later.

¶88 I therefore find, as fact, that the claimant merely suffered anxiety attacks when vaccinated on January 30 and March 11, 1996, and did not suffer an anaphylactoid reaction. Thus, the initial factual predicate for Dr. Waisbren's causation opinion is lacking.

¶89 Dr. Waisbren also dismissed the possibility that the claimant's hepatitis C is contributing to her condition, stating that her liver biopsy was "negative" and that her liver function tests were "normal." (Waisbren Dep. at 29-30.) Neither statement is accurate and reflects Dr. Waisbren's failure to review the claimant's medical records.

¶90 Dr. Waisbren was unable to cite empirical studies supporting his hypothesis that the hepatitis B vaccine causes autoimmune reactions, including demyelinating reactions. He relied instead on an accumulation of anecdotal case reports and his extrapolation of medical research concerning multiple-antigenic-mediated-autoimmunity (MAMA). (Waisbren Dep. at 29.)

¶91 Dr. Waisbren insisted in his deposition and at trial that individual reports of adverse reactions to the hepatitis B vaccine are not anecdotal. In his deposition, he testified,

> "[T]hese are not anecdotal for the reason that anecdotal by definition refers to one story. And as we pointed out here, there have been over a hundred case studies written by literally hundreds of scientists in about 50 journals around the world whose editors agreed. And so that body of information is not anecdotal because it's much more than one story. . . ."

(Waisbren Dep. at 34.) In his book he wrote that his discoveries concerning autoimmune reactions to the hepatitis B vaccine are based on his "bedside observations" and the observations of "other bedside clinicians." (Waisbren Book at 7.)

¶92 I find Dr. Waisbren's logic is flawed. An "anecdote is a short account of an event or story." Multiple anecdotes are nothing more than "multiple anecdotes;" they do not scientifically validate the theories for which they are proffered. A hundred reports of persons having heart attacks at baseball games does not support a theory that baseball games cause heart attacks. Pure chance indicates that some persons attending baseball games will have heart attacks. If the incidence of heart attacks among baseball fans is no greater than the incidence of heart disease among the population in general, the fact that some individuals suffer heart attacks at baseball games does not establish that their heart attacks are caused by their attendance at the games. Similarly, pure chance indicates that some persons receiving hepatitis B vaccine will suffer from medical conditions prevalent in the general population. The critical question, therefore, is whether there is scientific evidence of a causal relationship between any given condition and the vaccine, or whether there is good statistical or epidemiological [(15)] evidence showing that more than pure chance.

¶93 This is what the Institute of Medicine [(16)] had to say about the value of case reports:

> Case reports are useful for describing the domain of concerns, but the data are usually uncorroborated clinical descriptions that are insufficient to permit meaningful comment or to contribute to a causality argument. Case reports can, however, lead to hypothesis generation and the committee values their potential utility in this regard. . . .

(Ex. 11 at 28.) In other words, case reports are a good starting point for investigation of a *possible* relationship between the hepatitis B vaccine and various reported conditions, but they are **not** proof of a relationship between the vaccine and the reported conditions. Indeed, Dr. Waisbren admitted this very point in his own self-published book, in which he said:

> Case reports have been used for centuries as teaching tools to alert physicians as to what they might see in the future. This idea was advanced in the thirteenth century AD by a physician in Bologna, Italy, Dr. Taddeo Alderotti. He called collections of case reports, "Consilia". It is in this frame of reference that the following case reports are being presented. [(17)] **These reports <u>do not prove causation</u> but when they are considered with numerous similar case reports in the literature they may stimulate** physicians to give pause when a patient presents with an adverse event that followed a hepatitis B vaccination.

(Waisbren Book at 29, bolding and underlining added for emphasis.) Thus, his own prior statements concerning the value of case studies undermines his reliance on those studies as supporting his opinions in this case.

¶94 In 2002, the Institute of Medicine completed and published a review of possible connections between the hepatitis B vaccine and demyelinating neurological disorders. As noted earlier in footnote 16, The Institute of Medicine (IOM) is one of four national, non-profit academies of distinguished scientific and medical scholars. (*Immunization and Safety Review: Hepatitis B Vaccine and Demyelinating Neurological Disorders* at iv.) The review was at the behest of the Centers for Disease Control and Prevention. (*Id*. at ix.)

¶95 After reviewing medical evidence, the IOM concluded:

> There is a theoretical basis for the hypothesis that vaccines, including the hepatitis B vaccine, could cause demyelinating disorders. A review of the scant and indirect evidence that biological mechanisms could operate in humans in response to the hepatitis B vaccine to produce disease provides weak support of this theory. However, the committee found that the epidemiological evidence (i.e., from studies of vaccine-exposed populations and their control groups or of patients with these diseases and their control groups) favors rejection of a causal relationship between the hepatitis B vaccine in adults and multiple sclerosis. The evidence was inadequate to accept or reject a causal relationship between the hepatitis B vaccine and all other demyelinating conditions.

(*Id*. at 1.) In other words, the evidence is against a conclusion that the vaccine may cause MS and is inadequate to demonstrate that it causes other demyelinating diseases.

¶96 One of the studies cited by the IOM is a 2001 study found at Exhibit 21 by Asherio and others which was peer reviewed and published in the prestigious New England Journal of Medicine. [(18)] (Ex. 11 at 40-44.) The study found "no association between the hepatitis B vaccination and the development of multiple sclerosis." (Ex. 21 at 2.)

¶97 Dr. Waisbren criticized the Asherio Study. In his book, as well as his testimony, he points out that "absence of proof is not proof of absence." (Waisbren Book at 46.) He also criticizes the Asherio Study because it was funded by the drug company (Merck) manufacturing the hepatitis B vaccine, a criticism that ignores the fact that the study was not only funded by Merck but also by three grants from the National Institutes of Health. (Ex. 21 at 10.) Dr. Waisbren further criticizes the Asherio report because it was "underpowered," i.e., because it reviewed an insufficient number of cases. (Waisbren Dep. at 44-45.) Dr. Waisbren is not a statistician and the statisticians he said he consulted did not testify. Even if his point is well taken, the fact that the studies may be inadequate to *disprove* his theories does not transform them into *proof* of his theories: To paraphrase Dr. Waisbren, an absence of disproof is not proof.

¶98 Dr. Waisbren could not point to *any* peer reviewed, published epidemiological or scientific study that proves that "the hepatitis B [vaccine] causes an autoimmune response resulting in central nervous system demylenization." (Waisbren Dep. at 81.) He did cite two French studies as indicating a link between the vaccine and multiple sclerosis. (*Id*. at 83.) However, the Asherio study characterizes those studies as reporting "a nonsignificant increase in the risk of multiple sclerosis among vaccinated as compared with unvaccinated subjects." (Ex. 21 at 2.) The IOM report also discusses the French studies and notes that they found "no strong association between the receipt of hepatitis B vaccine and the occurrence within two months of a first demyelinating episode in adults. However, the authors noted that "because of the low statistical power, the study cannot exclude the possibility of a small increase in risk." (Ex. 11 at 43.)

¶99 Dr. Montanaro testified on behalf of Liberty. Dr. Montanaro is board certified not only in internal medicine but also in allergy and immunology with a further sub-specialty certification in rheumatology. (Montanaro Dep. at 5.) He summarized demyelinating disease as involving the destruction or loss of the myelin sheath surrounding nerves. (*Id*. at 11.) "The acute form is the classic Guillain-Barre syndrome with the chronic or elapsing form, one of these diseases is multiple sclerosis." (*Id*.) The claimant does not suffer from Guillain-Barre and has not been diagnosed with MS; she does, however, suffer from some sort of demyelinating condition. In any event, Dr. Montanaro agreed with Institute of Medicine conclusions concerning causation and disagreed with Dr. Waisbren. (*Id*. at 21.)

¶100 Dr. F. Blaine Hollinger testified on behalf of Liberty. Dr. Hollinger is a professor of medicine, virology and epidemiology at the Baylor College of Medicine in Houston, Texas. (Hollinger Test. at 9.) He is also director for the Eugene B. Case Hepatitis and HIV Research

Center and Diagnostic Laboratory. (*Id*.) He is board certified in internal medicine. His Curriculum Vita lists 246 publications he has authored or coauthored. Significantly, 71 of those publications have been after 1992. (*Id*., attachment to transcript.) In contrast, Dr. Waisbren lists 135 publications but only 5 of those are after 1992. [(19)] (Ex. 1 at 186-194.) Moreover, only two of Dr. Waisbren's post-1992 articles concern hepatitis, while thirty-eight of the articles listed by Dr. Hollinger are, just based on their titles, hepatitis related. (Hollinger Test., CV attachment.)

¶101 Dr. Hollinger's expertise concerning hepatitis and hepatitis vaccines is respected in the medical community. He has been an invited speaker at recent national and international symposiums concerning hepatitis and liver disease. [(20)] (Hollinger Test. at 11-12.) He has also recently served as chairman of the Blood Products Advisory Committee for the Food and Drug Administration. (*Id*. at 74.) He is on the editorial board of two medical journals; one of them is the Journal of Viral Hepatitis. He is also a consulting editor for eleven medical journals, including the New England Journal of Medicine. (*See* his CV, which is attached to a transcript of his testimony.)

¶102 Dr. Hollinger has been involved in hepatitis research since 1970. (Hollinger Tr. Test. at 18.) He has been involved with the national program for hepatitis vaccination from the beginning, including some of his own original research and in clinical trials for the Recombivax HB vaccine which claimant received. (*Id*. 76-78.)

¶103 He continues to be actively engaged in research and teaching. He has taught classes in epidemiology and liver disease. (*Id*. at 16.) He treats patients, limiting his practice to liver disorders, including hepatitis B and C. (*Id*. at 17.) He is conversant in the differences between the initial vaccine, which was serum based, and the subsequent recombinant vaccine marketed by Merck and given to the claimant. (*Id*. at 18-19.) Dr. Hollinger pointed out that some of the case studies referenced by Dr. Waisbren were related to the initial, serum-based vaccine. (*Id*. at 24.)

¶104 In finding a causal relationship between the hepatitis B vaccine and autoimmune diseases, Dr. Waisbren cited a *possible* explanation based on molecular mimicry (MAMA). (Waisbren Book at 47 *and* ¶ 91.) Dr. Hollinger disagreed with Dr. Waisbren's MAMA model. (*Id*. at 33.) He noted that the studies of MAMA were inapposite since they were based on mimicry by whole proteins present in vaccines, whereas the recombinant vaccine received by claimant did not have whole proteins, rather it is based on surface antigens. (*Id*. at 32-33.)

¶105 As did Dr. Montanaro, Dr. Hollinger agreed with the conclusions of the Institute of Medicine regarding the lack of evidence to demonstrate a connection between the hepatitis B vaccine and the onset of multiple sclerosis or multiple sclerosis relapse.

¶106 Dr. Hollinger reviewed the claimant's medical records and history. He opined that her skin condition could be caused by the claimant's hepatitis C and not be lichen planus at all. [(21)] (Hollinger Tr. Test. 60-61.) He noted that there have been only ten to twelve reports of lichen planus following the hepatitis B vaccine, a very small number giving the millions of vaccinations in the United States.

¶107 Dr. Hollinger did confirm that anaphylactic reactions occur in a small percentage of patients receiving the hepatitis B vaccination -- approximately 1 in 600,000. (Hollinger Tr. Test. at 64.) However, it has not been determined whether the reaction is due to the vaccine itself or to chemicals used in the vaccine, especially Thimerosal. (*Id*. at 65.) Because of suspicion concerning Thimerosal, it was removed from the vaccine in 2000. (*Id*.)

¶108 Dr. Hollinger also noted, importantly, that anaphylactic shock symptoms -- e.g., difficulty breathing and tingling -- are acute and transient; they do not persist for weeks or even for days. (Hollinger Tr. Test. at 66.)

¶109 Dr. Hollinger testified in person at trial. I found his testimony credible and persuasive. I want to add here, however, that even though Drs. Waisbren and Montanaro testified by video conferences, I have not given Dr. Hollinger's testimony any additional weight just because he testified in person. I found the video-conference testimony effective and probative. The in-person testimony by Dr. Waisbren would not have resulted in a different assessment of the medical testimony or a different outcome.

¶110 The claimant asserts that the product insert for the hepatitis B vaccine supports her contention that her conditions were caused by the vaccine. I have reviewed the product insert. Any support it provides is of the weakest sort and does not rest on any scientific studies. Short-term effects such as nausea, headache, and malaise were reported in clinical trials. (Ex. 5 at 2 *and see* Belleville Tr. Test. at 60-61.) The insert does set out "additional adverse reactions [which] have been reported with use of the marketed vaccine," but goes on to note, "In many instances, the relationship to the vaccine was unclear." (Ex. 5 at 2.) Among the "reported" conditions listed in the insert are "anaphylaxis and symptoms of immediate hypersensitivity reactions;" Guillain-Barre Syndrome; multiple sclerosis, myelitis including transverse myelitis, peripheral neuropathy, including Bell's Palsy, radiculopathy; herpes zoster, migraines, muscle weakness hypesthesia. (*Id*.) Dr. Hollinger pointed out that drug companies are required to record all reported reactions that possibly could be related to the drug. (Hollinger Tr. Test. at 71.) The listing of a possible reaction therefore does not constitute scientific proof or evidence of a causal relationship between any given condition listed in the insert and the vaccine.

¶111 Possible adverse reactions are also reported to the Center for Disease Control through a program called VAERS, however, the reports are anecdotal: the system is passive and all reports of possible reactions are listed. (Hollinger Tr. Test. at 62-64.) The listing of

reported reactions, i.e., conditions that occur following vaccination and which the reporting individuals suspect may be related to the vaccination.

¶112 In considering the causation of the claimant's medical conditions, I also note that the claimant's hepatitis C provides an explanation for most of her conditions other than the demyelinating disease. As found earlier, symptomatic hepatitis C causes chronic fatigue, myalgias, and arthralgias. Dr. Waisbren never adequately explained why he disregarded the hepatitis C as the cause for those conditions.

¶113 The claimant's attorney made a point about the failure of Drs. Montanaro and Hollinger to examine the claimant. I am unpersuaded that actual examination of the claimant makes any difference. The question is one of causation which does not depend upon examination. The claimant's medical conditions are well documented and that documentation was available to all of the physicians who testified in this case. Indeed, Dr. Waisbren examined the claimant on only two occasions, the latest when this litigation was "heating up" and obviously in anticipation of the litigation. Importantly, he paid little if any attention to the claimant's medical records. Drs. Montanaro and Hollinger, on the other hand, reviewed the records before reaching their opinions.

¶114 The claimant's attorney repeatedly emphasized in his examination of the physicians testifying in this case that much of medicine is still an art rather than a science, and that the cause of many conditions are still poorly understood or unproven. This conclusion was endorsed by the physicians who testified and is abundantly apparent from the medical testimony I have heard over the past ten years. I do not disagree. But in questions of causation of the sort which is at issue here, opinions must be based on more than surmise or suspicion, on more than anecdotal case reports, and on more than challenges to negative epidemiological studies. A lack of disproof of the claimant's hypothesis, or her doctor's hypothesis, is not proof of the hypothesis.

¶115 The burden of proof and persuasion is on the claimant to prove that some or all of her conditions were caused by the hepatitis B vaccinations she received in January and March 1996. She has failed to carry her burden.

¶116 I do find that the claimant has been totally disabled from working since May 1999. However, to award benefits I must find that her disability is due to her hepatitis B vaccinations. Since she has failed to carry her burden of proof in that regard, her disability does not entitle her to benefits.

¶117 In finding that the claimant failed to carry her burden of proof with regard to causation, I do not determine that the medical evidence in this case conclusively proves that none of her disabling conditions were caused by the hepatitis B vaccine. As Dr. Waisbren testified, the immunity systems of individuals differ. (April 2, 2003 Tr. at 12.) Those differences could conceivably result in different reactions to the vaccine. As Dr.

Hollinger testified, further study and vigilance are warranted and necessary. (Hollinger Tr. Test. at 79-80.)

¶118 Finally, I address the claimant's contention that Liberty acted unreasonably in denying her claim. As should be clear from the recitation of evidence in the foregoing findings of fact, and without regard to my ultimate determination, Liberty did not act unreasonably in denying this claim.

CONCLUSIONS OF LAW

¶119 The only evidence concerning causation is that of Dr. Waisbren, who testified that the claimant's first vaccination on January 30, 1996, caused the medical conditions upon which her current claim is based. On January 30, 1996, the 1995 version of the Montana Workers' Compensation Act was applicable since that was the law in effect at the time of the claimant's industrial accident. *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

I. Workers' Compensation Act Applicable

¶120 As an initial matter, this case falls under the Workers' Compensation Act. Dr. Waisbren's, testified that the claimant's condition arose from a single shot on January 30, 1996. (22) Since it was a single event on a single day, the injury and accident definition of section 39-71-119, MCA (1995), (23) is satisfied.

II. Affirmative Defenses.

¶121 Liberty, which insured the claimant's employer at the time of her vaccinations, denies liability on the merits of the claim but it also raises defenses based on the notice and claim filing requirements found in sections 39-71-603 and -601, MCA (1995). I consider its affirmative defenses first.

A. Timeliness of Notice to Employer

¶122 Section 39-71-603, MCA (1995), required that the claimant notify Shopko of her alleged injury within thirty days. The section provides:

> **39-71-603. Notice of injuries other than death to be submitted within thirty days.** (1) A claim to recover benefits under the Workers' Compensation Act for injuries not resulting in death may not be considered compensable unless, within 30 days after the occurrence of the accident that is claimed to have caused the injury, notice of the time and place where the accident occurred and the nature of the injury is given to the employer or the employer's insurer by the injured employee or someone on the employee's behalf. Actual knowledge of the accident and injury on the part of the employer or the employer's managing agent or superintendent in

charge of the work in which the injured employee was engaged at the time of the injury is equivalent to notice.

(2)If a sole proprietor, partner, manager of a manager-managed limited liability company, member of a member-managed limited liability company, or corporate officer covered under this chapter is injured in an accident, the sole proprietor, partner, manager, member, or corporate officer or an appointed designee shall, within 30 days, notify the insurer of the time and location of the accident and the nature of the injury.

The thirty-day notice requirement is mandatory, thus a failure of the claimant to comply with the requirement bars her claim. *Reil v. State Compensation Ins. Fund,* 229 Mont. 305, 308-09, 746 P.3d 617 (1987).

¶123 However, the thirty-day notice requirement does not commence running until the claimant recognizes that a work-related event may require medical care or may be compensable. *Whitlock v. Fremont,* 2002 MTWCC 12, ¶30, *and see Killebrew v. Larson Cattle Co.,* 254 Mont. 513, 521, 839 P.2d 1260, 1265 (1992). In *Whitlock* I held that where a worker experienced a fleeting sting between her neck and shoulder and thereafter suffered mild aching which did not affect her ability to work or require medical care, the thirty-day period did not begin to run until more significant, ominous symptoms arose. In *Killebrew* the claimant was involved in a tractor accident, which he reported to his employer, but did not believe that he had been injured and therefore did not report that he was injured. Later, he discovered that he had suffered a rotator cuff injury and reported that injury within thirty days of his learning of his injury. The Supreme Court held that the thirty-day reporting requirement did not commence running until he learned that he had suffered an injury.

¶124 The claimant's initial report to her employer was that she "felt strange." I am unpersuaded that at that time she felt anything more than "strange" or that she felt any need for medical care. Later on, however, at least by September 1997 when she was seen at the University of Washington Medical Center, she clearly believed that her serious medical conditions were caused by the hepatitis B vaccinations. She could and should have reported that belief at that time. I have no evidence that she did so. The evidence I have is that she made no report claiming an association between her medical condition and the vaccinations until late February or early March 1999. Her notice was untimely and therefore barred under section 39-71-603, MCA (1995).

B. One-Year Claim Filing Requirement

¶125 The claimant was also required to file her written claim for compensation within one year. Section 39-71-601, MCA (1995), provides;

39-71-601. Statute of limitation on presentment of claim — waiver. (1) In case of personal injury or death, all claims must be forever barred unless signed by the claimant or the claimant's representative and presented in writing to the employer, the insurer, or the department, as the case may be, within 12 months from the date of the happening of the accident, either by the claimant or someone legally authorized to act on the claimant's behalf.

(2)The department may waive the time requirement up to an additional 24 months upon a reasonable showing by the claimant of:

(a) lack of knowledge of disability;

(b)latent injury; or

(c)equitable estoppel.

The claimant filed her claim on May 21, 1999, more than three years after her vaccinations.

¶126 Under enumerated circumstances, section 39-71-601(2), MCA (1995), permits a waiver of the limitations period for an additional twenty-four months, thus allowing up to a three-year period in which to file a claim. The provision for a waiver based on a lack of knowledge of disability has been a part of the section since 1973. 1973 Mont. Laws, ch. 264, § 1. However, the case law added latent injury and equitable estoppel as grounds for tolling the one-year-limitations period. *See, e.g., Bowerman v. Employment Security Commission,* 207 Mont. 314, 673 P.2d 476 (1983) (latent injury)'; *McCoy v. Mike Horse Mining and Milling Co.,* 126 Mont. 435, 252 P.2d 1036 (1953) (equitable estoppel). Those additions were codified in 1989. [(24)]

¶127 The cases concerning latent injuries and estoppel did not limit the period of tolling. However, the codification of the two doctrines expressly limited any extension of time to an additional twenty-four months. The Court cannot extend that twenty-four-month limitation. § 1-2-101, MCA ("In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted.") Thus, even if the claimant were able to prove good cause under any three of the grounds listed in section 39-71-601(2), MCA, the period of time for filing of her claim could be extended only to three years. Her claim was filed more than three years after her vaccinations, therefore it is time-barred.

¶128 Moreover, there is no good cause for extending the limitations period under any of the exceptions. The claimant bore the burden of filing her claim; the employer was not required to do so or to solicit her claim. *Wassberg v. Anaconda Copper Co.,* 215 Mont. 309, 320, 697 P.2d 909 (1985). By September 1997 the claimant firmly believed that her various maladies were due to the vaccinations, and by that time she had incurred substantial medical expense for the treatment of her condition. Thus, she was aware of both disability

and injury long before the penultimate three years allowed in section 39-71-601(2), MCA (1995). As to estoppel, she has not argued that ground and in any event has presented no evidence that the employer or insurer prevented her from filing an earlier claim.

III. Merits of Claim

¶129 Even though I have found that the claim is time-barred, I will address the merits of the claim. On the merits, there are two issues. First, did the claimant receive the vaccinations in the course and scope of her employment? Second, was the claimant injured by either or both vaccinations, and if so to what extent? The claimant bears the burden of proving with respect to both issues. *See* Ricks v. Teslow Consolidated, 162 Mont. 469, 512 P.2d 1304 (1973); Dumont v. Wicken Bros. Construction Co., 183 Mont. 190, 598 P.2d 1099 (1979).

A. Course and Scope of Employment

¶130 Section 39-71-407, MCA (1995), provides for compensation only for injuries "arising out of and in the course and scope of employment." In *Pinyard v. State Compensation Ins. Fund,* 271 Mont. 115, 894 P.2d 932 (1995), the Supreme Court parsed the requirement, holding as follows:

> The language "in the course of employment," generally refers to the time, place and circumstances of an injury in relation to employment. . . . The phrase "arising out of" is related to the concept of causation.

271 Mont. at 119-120, 894 P.2d 932 (citations omitted).

¶131 The overall test of whether an injury is work-related is the four-factor test set out in *Courser v. Darby School District No. 1,* 214 Mont. 13, 692 P.2d 417 (1984). The factors are:

> (1)whether the activity was undertaken at the employer's request; (2) whether employer, either directly or indirectly, compelled employee's attendance at the activity; (3) whether the employer controlled or participated in the activity; and (4) whether both employer and employee mutually benefitted in the activity. The presence or absence of each factor, may or may not be determinative and the significance of each factor must be considered in the totality of all attendant circumstances.

214 Mont. at 16-17 (citations omitted).

¶132 The four tests are plainly met in this case. Initially, the claimant obtained the vaccinations at her employer's request and urging. While she could have opted out, Shopko's video, as well as the federal regulations which required Shopko to offer the vaccinations to its at-risk employees, plainly preferred and urged the vaccinations over opting out. Second, while the employer did not require the shots as a condition of

continued employment, the discussion in *Courser* makes it clear that the employer need not require the activity but need only encourage it. 214 Mont. at 17-19. In *Courser* the Supreme Court held that injuries suffered by a claimant school teacher while traveling to attend college courses required for a master's degree in education were compensable where the school district had urged, but not required, him to obtain the advanced degree so he would be eligible to become a school principal. Third, Shopko participated in the activity: It made the arrangements for the shots and paid for the shots. Fourth, and finally, Shopko benefitted from the vaccination program by ensuring that at-risk employees would be immune to a potentially disabling disease, thus assuring their continued productivity and employment.

¶133 I therefore conclude that the claimant's vaccinations were within the course and scope of her employment and that Liberty, as Shopko's insurer, is liable for any adverse reactions to the vaccinations.

B. Injury and Causation

¶134 The claimant must still prove that in fact she was injured by one or both vaccinations. She must also prove the nature and extent of the injuries: An insurer is not liable for medical conditions or disability which was not caused by the industrial accident. §§ 39-71-119, -407, -701, -702, -703 and -704, MCA (1995). "Causation is an essential element of benefit entitlement." *Hash v. Montana Silversmith*, 265 Mont. 252, 257, 846 P.2d 981, 983 (1993).

¶135 The merits of the causation issue rest on my evaluation of the medical testimony in this case and the facts on which that testimony was based. In assessing the medical opinions I take into consideration, among other things, (1) whether the opining physician reviewed the claimant's medical records before reaching his or her conclusions; (2) in cases where actual examination of a claimant is important, whether the physician physically examined the claimant; (3) the professed or obvious biases of the physician; (4) the specific areas of expertise of the physician; (5) peer reviewed articles authored by the physician, particularly in the subject area in which opinions are rendered; (6) the physician's standing among peers in the specialized medical area involved in the opinions; (7) the physician's specific analysis in the case; (8) the physician's consideration and evaluation of other explanations for the claimant's condition; (9) the accuracy of the facts upon which the physician's opinions are based; and (10) medical and scientific literature brought to the Court's attention which tends to support or contradict the physician's conclusions. Ultimately the claimant proved to the Court's satisfaction that she suffered anxiety reactions to the two vaccinations. Those reactions, however, were transitory. Her claim for benefits rests on her contention that the vaccinations caused a demyelinating disease, chronic fatigue, myalgias, arthralgias, mental confusion and memory loss. I am unpersuaded. I found the testimony of Dr. Waisbren -- the only physician providing opinions

supporting the claim -- unconvincing, while finding the testimony of Drs. Montanaro and Hollinger persuasive.

IV. Attorney Fees and Penalty

¶136 The claimant seeks attorney fees and a penalty. She must first prove liability and has failed to do so. For that reason alone, her request fails.

¶137 However, even if her claim is compensable she is not entitled to either attorney fees or a penalty. Both require proof that the insurer acted unreasonably in denying her claim. §§ 39-71-611, -2907, MCA. Even if I am wrong in my conclusion that her claim is not compensable, it should be abundantly clear from my decision in this case that Liberty did not act unreasonably in denying her claim.

JUDGMENT

¶138 The claimant suffered an anxiety reaction when vaccinated for hepatitis B in January 1996, however, the reaction was transient and caused her no permanent harm, medical expense, or disability. She has failed to demonstrate a causal relationship between her disabling conditions and her vaccinations and is not entitled to benefits. Moreover, her claim is time-barred. Her petition is therefore **dismissed with prejudice**.

¶139 This JUDGMENT is certified as final for purposes of appeal.

¶140 Any party to this dispute may have twenty days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 27th day of May, 2004.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. Thomas A. Marra

Mr. Larry W. Jones

Submitted: September 5, 2003

1. Rule 803 (18), Mont. R. Evid., excepts learned treatises from the general rule excluding hearsay, providing:

> (18) Learned Treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

The objection to Exhibit 21 was to its consideration altogether. The article in question was published in the New England Journal of Medicine and was peer reviewed. Thus, the foundation objection is without merit. Moreover, Rule 803(18) allows pertinent portions of the article to be read into evidence; the claimant did not make such a request, instead objecting to its consideration altogether. Finally, the article was discussed extensively by Drs. Waisbren, Montanaro and Hollinger without objection to that discussion. In any event, since this is a bench trial, there is no harm in receiving the article itself rather than have it read into the record, especially in a trial in which the parties have had all testimony transcribed. Moreover, the parties have submitted a number of medical journal articles without objection. The objection is overruled.

2. This issue was presented by way of a motion for summary judgment filed by respondent on February 20, 2003. On February 26, 2003, the Court denied the motion without prejudice because it was apparent that the issue was fact driven and could be resolved just as expeditiously by trial as by tortuous briefing. The issue was reserved for a decision through trial. (Order Denying Summary Judgment Motion Without Prejudice.)

3. The "National Academies" consists of The National Academy of Sciences, The National Academy of Engineering, The Institute of Medicine, and The National Research Council. (Ex. 11 at iv.) The Institute of Medicine, which did the study, was organized by the National Academy of Sciences, which in turn is congressionally chartered by Congress to advise it on scientific and medical matters. (Id.)

4. They married on September 2, 2000.

5. The mandated declination form reads:

> I understand that due to my occupational exposure to blood or other potentially infectious materials I may be at risk of acquiring hepatitis B virus (HBV) infection. I have been given the opportunity to be vaccinated with hepatitis B vaccine, at no charge to myself. However, I decline hepatitis B vaccination at this time. I understand that by declining this vaccine, I continue to be at risk of acquiring hepatitis B, a serious disease. If in the future I continue to have occupational exposure to blood or other potentially infectious materials and I want to be

vaccinated with hepatitis B vaccine, I can receive the vaccination series at no charge to me.

Appendix A to Section 1910.1030--Hepatitis B Vaccine Declination (Mandatory)

6. A written Shopko policy (Stephens Dep. Ex. 10) cited by the claimant in paragraph 23 of her proposed findings of fact does not specifically identify optical department employees or managers as at risk for hepatitis. That policy was written in 1993. The video which was shown in 1995 does specifically identify opticians as high-risk employees subject to the vaccination policy.

7. Dr. Martin also noted the claimant had pain across her posterior shoulders. Claimant had previously received treatment for muscle aches and pain in her back, including her trapezius area. From 1992 onward she had been treated by three physicians for myofascial neck and back pain and had been diagnosed as suffering myofascial pain syndrome and possible fibromyalgia. See records of Drs. Tacke, Root, and Stephens from April 29, 1992 to October 12, 1995, which are in chronological order in Exhibit 1.

8. The claimant's report of two weeks duration is further confirmation that her memory of an almost immediate onset of symptoms following the second shot is faulty.

9. I am also troubled by the claimant's insistence that she vomited daily. While medical records report complaints of vomiting later on, there is no indication of vomiting in the May and June 1996 period.

10. Dr. Waisbren testified that the Epstein-Barre virus is often an ancillary finding in cases of "chronic fatigue syndrome, fibromyalgia and other diseases of unknown etiology that probably fit into the autoimmune category." (April 2, 2003 Tr. at 23.) Interestingly, he also noted a recent epidemiological study published in the Journal of the American Medical Association indicating an increased risk of multiple sclerosis among persons exposed to the Epstein-Barre virus, (id.), but did not consider the Epstein-Barre in his analysis as the cause of the claimant's conditions.

11. It is unnecessary for purposes of this decision to go into further detail regarding her exposures.

12. "A & P" is an abbreviation for "assessment and prognosis."

13. Waisbren Dep. at 65.

14. The two conditions implicated in this case are some sort of demyelinating condition and chronic fatigue syndrome.

15. Dr. Bruce Bellville conducted an examination of the claimant at the request of Liberty. He is board certified in both occupational medicine and family practice. (Belleville Tr. Test. at 8.) He also has a master's degree in public health with an emphasis in epidemiology. (Id.) He described "epidemiology" as the "study of disease . . . across large groups of people." (Id. at 9.) Such study includes the "investigation into the causes of certain diseases and conditions." (Id. at 10.)

16. The Institute of Medicine is one of four national, non-profit academies of distinguished scientific and medical scholars. (Immunization and Safety Review: Hepatitis B Vaccine and Demyelinating Neurological Disorders p. iv.)

17. Dr. Waisbren thereafter discusses several case reports, four in which multiple sclerosis was reported following hepatitis B vaccinations.

18. study was based on a survey of 240,000 nurses in the United States who had been part of two large health studies. Most had received the hepatitis B vaccine. A statistical comparison showed "no association between hepatitis B vaccination and the development of multiple sclerosis. (Ex. 17.)

19. Dr. Hollinger, who reviewed Dr. Waisbren's bibliography, noted that most of Dr. Waisbren's published articles were related to infections diseases. "Almost all of them were either on gram negative sepsis, which is bacterial; gram negative shock, septic shock, bacterial infections, fungal infections, and there were some burn things because he was in a burn unit for a while." (Hollinger Test. at 67.) He noted that although Dr. Waisbren has authored a book and four journal pieces regarding the hepatitis B vaccine, none were peer reviewed. (Id.) He pointed out that Dr. Waisbren's published pieces regarding the hepatitis B vaccine were letters to the editor, not peer reviewed articles. (Id.)

20. In 2003 Dr. Hollinger was an invited speaker at an international symposium on hepatitis and liver which was held in Sydney, Australia. (Hollinger Tr. Test. at 12.) He spoke regarding "unresolved issues regarding the prophylaxis of B vac -- Hepatitis B prophylaxis, unresolved issues in B prophylaxis." (Id. at 13-14.)

21. He indicated that a biopsy would be required to tell for sure. (Hollinger Tr. Test. at 61.)

22. Dr. Waisbren indicated that the second vaccination on March 11, 1996, may have made things worse. Even if the second shot materially aggravated an already existing condition which sprang from the first shot, the second shot would also come within the injury and accident of the Workers' Compensation Act, it would represent an aggravation and the 1995 law would still apply.

23. Section 39-71-119, MCA (1995), provides:

> 39-71-119. Injury and accident defined. (1) "Injury" or "injured" means:
> (a) internal or external physical harm to the body that is established by objective

medical finding;

(b) damage to prosthetic devices or appliances, except for damage to eyeglasses, contact lenses, dentures, or hearing aids; or

(c) death.

(2) 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.

24. 1989 Mont. Laws, ch. 254, § 1.