

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2003 MTWCC 2

WCC No. 2001-0392

KATHY A. BURNSIDE LUND

Petitioner

vs.

ST. PAUL FIRE & MARINE INSURANCE COMPANY

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Approximately 2½ years after claimant was hit on her hard hat with a five-pound rock, she was diagnosed as suffering from possible thoracic outlet syndrome (TOS), a diagnosis which was subsequently confirmed by the neurologist who had treated her continuously since her accident and a neurosurgeon. An occupational physician, who examined her upon referral by the insurer, questioned the diagnosis. The insurer disputes the diagnosis, disputes any causal connection between the condition and the accident, and has denied payment for medical treatment for the condition. It has also denied permanent partial disability benefits and travel expenses, which the claimant is also seeking.

Held: The claimant established by a preponderance of the evidence that she is suffering from TOS and that the condition is related to her work-related accident even though it was not suspected and diagnosed until 2½ years post-accident. Claimant's treating physician, a neurologist familiar with TOS, was in the best position to determine whether symptoms over the previous 2½ years were indicative of and consistent with TOS and he opined that she suffers from that condition and that it was caused by her work-related accident.

While the case is complicated by the failure of either counsel to call the claimant's long-time treating physician, and the fact that the only physician testifying (by deposition) was the physician who examined claimant once upon referral by the insurer, the Court discounts the testifying physician's testimony. The testifying physician was skeptical of TOS as a valid medical diagnosis despite the condition being acknowledged in the medical text he consulted, he had never treated TOS, his evaluation of claimant indicated his subjective judgment that the claimant's complaints were exaggerated or false, and he was not in as good of a position to judge claimant's complaints over the 2½ years as was her treating

physician. The primary complaint related to claimant's TOS diagnosis - tingling and numbness of her left arm and fingers of the left hand - was present from the get-go, is documented in nearly every medical record, and is a credible complaint.

As to the request for permanent partial disability benefits, that request is premature since claimant's treating physicians have prescribed additional testing and evaluation with a view to possible surgery. Claimant is not at maximum medical improvement and cannot be rated for final impairment and disability until she is.

The travel expense request is denied since the travel expense reimbursement statute in effect on the date of the claimant's injury was limited to travel expenses incurred at the behest of the insurer. Claimant failed to establish that the expenses she seeks met that requirement.

Topics:

Benefits: Travel Expenses. Under the 1997 version of the Workers' Compensation Act, travel for medical care is reimbursed only if the travel is at the behest of the insurer, thus, travel for regular treatment is not reimbursable. § 39-71-704(1)(d), MCA (1997).

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-704(1)(d), MCA (1997). Under the 1997 version of the Workers' Compensation Act, travel for medical care is reimbursed only if the travel is at the behest of the insurer, thus, travel for regular treatment is not reimbursable. § 39-71-704(1)(d), MCA (1997).

Benefits: Permanent Partial Benefits: Generally. A request for permanent partial disability benefits, including an impairment award, is premature where the claimant has not reached maximum medical improvement and further testing and treatment, including possible surgery, is prescribed.

Proof: Conflicting Evidence: Medical. The testimony of a physician designated by the insurer to evaluate claimant is not persuasive even though other treating physicians did not testify where claimant was diagnosed by her long-time treating neurologist, as well as a neurosurgeon, as suffering from thoracic outlet syndrome and the testifying physician was skeptical of TOS as a valid medical diagnosis despite the condition being acknowledged in the medical text he consulted; he had never treated TOS; he indicated his subjective judgment that the claimant's complaints were exaggerated or false; and he was not in as good of a position to judge claimant's complaints as was her treating physician.

¶11 The trial in this matter was held on April 4, 2002, in Helena, Montana. Petitioner, Kathy A. Burnside Lund (claimant), was present and represented by Mr. Timothy B. Strauch. Respondent, St. Paul Fire & Marine Insurance Company (St. Paul), was represented by Mr. Joe C. Maynard. A trial transcript has been prepared and is cited herein.

¶2 Exhibits: Exhibits 1 through 5, 7, 9 through 13, 15 through 18, 19-4 through 19-7, 23, 27, 29, and 33 were admitted without objection. Exhibits 34 and 35 (a hard hat and rock) were admitted for demonstrative purposes but returned to claimant at the close of trial. Exhibits 6, 8, 14, 19-10, 19-11, 20 through 22, 24 through 26, 28, 30, and 36 were admitted over objections. Exhibits 19-1 through 19-3 were refused. Exhibits 19-8, 19-9, and 31 were withdrawn. There was no Exhibit 32.

¶3 Witnesses and Depositions: Claimant and Ken Lilyblad testified at trial. In addition, the parties submitted the depositions of claimant, Terry Boe, Kristie Schultz, Ed Kiernan, and Dr. Scott K. Ross for the Court's consideration.

¶4 Issues Presented: The issues as set forth in the Pretrial Order are:

¶4a Whether Dr. Scott Ross is a treating physician within the meaning of § 39-71-116(36), MCA.

¶4b Whether Petitioner is entitled to permanent partial disability benefits as provided by § 39-71-703, MCA.

¶4c The extent of St. Paul's liability for medical care as provided by § 39-71-704, MCA.

¶4d The extent of St. Paul's liability to pay travel expenses as provided by § 39-71-704(d)(1), MCA.

¶5 Respondent objected to the inclusion of issues 1 (¶4a) and 4 (¶4d). At trial I overruled the objection to issue 1 (¶4a) since a determination of whether Dr. Ross was a treating physician is integral to an assessment of the weight given his testimony. In any event, it is plain that he was not a treating physician. The dispute over his status arises only because of the hyper-technical, literal approach that counsel have taken in pretrial proceedings; it has no substantive basis. (See ¶ 28.)

¶6 The objection to issue 4 (¶4d) was based on a failure to mediate the travel expenses issue, however, as I pointed out to counsel at trial, the issue is within the umbrella of claimant's mediation request with respect to medical expenses. I cannot determine if in fact it was mediated without abrogating the prohibition on disclosure of the actual mediation proceedings, § 39-71-2410, MCA. The issue is therefore considered.

¶7 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

I.

¶18 Claimant is 35 years old and has a high school education. Her prior employment includes work as a bartender, farm helper, and mail delivery person. (Tr. at 40.)

¶19 In July 1998, claimant went to work for The Industrial Company (TIC) as a tool operator and transport driver. (Ex. 9; Lund Dep. at 14.) As a transport driver, claimant drove a bus, ferrying workers between Columbus, Montana, and the Stillwater Mine at Nye. (Lund Dep. at 14.) As a tool operator, she inspected tools for safety. (Tr. at 44.)

¶110 On September 1, 1998, while cleaning up kegs of nuts and bolts in a building at the mine site, a five pound rock from an overhead conveyer belt fell approximately 45 feet and hit claimant on her head. (Tr. at 41; Lund Dep. at 15.) At the time, she was wearing a hard hat. The force of the impact threw her head backwards and caused her to drop to her knees. (Tr. at 42; Lund Dep. at 17.) She did not lose consciousness. (Ex. 23 at 2; Lund Dep. at 16.)

¶111 At the time of the accident, TIC was insured by St. Paul. A claim for compensation was submitted and St. Paul accepted liability for the accident.

¶112 Claimant testified at trial and in her deposition that she experienced the following symptoms immediately or within a day or so of the accident, and that most of these symptoms have continued to affect her.

Ringling in her ears	Tr. at 42; Lund Dep. at 16, 20.
Neck pain	Lund Dep. at 16, 20.
Swelling of her neck	Tr. at 42, 177; Lund Dep. at 16, 18, 83.
Numbness and tingling of left arm	Tr. a 42; Lund Dep. at 19, 20, 57.
Constant pain of left arm	Lund Dep. at 33.
Dizziness	Tr. at 42.
Nausea	Tr. at 42; Lund Dep. at 16, 19.
Terrible, daily headaches	Tr. at 42, 119; Lund Dep. at 19, 20, 23.
Shooting pain in her left shoulder	Tr. at 99-100; Ex. 6-86; Lund Dep. at 72.
Inability to lift left arm over her head	Tr. at 110, 177; Lund Dep. at 57, 83, 84.
Blurry vision	Tr. at 109; Lund Dep. at 16, 20, 57.

Visual disturbances involving spots and zigzags	Tr. at 109; Lund Dep. at 16.
Discoloration of her skin	Tr. at 113; Lund Dep. at 81.
Cold left hand	Tr. at 115; Lund Dep. at 82.
Swelling of left hand	Tr. at 116; Lund Dep. at 83.
Low-back pain	Lund Dep. at 20.

However, as pertains to the dispute over TOS, her critical complaints were her arm and finger numbness. (See ¶¶ 13, 20, 21, 25, 29, 30, 33, 34, 35, 41, 50, 52.)

¶13 Shortly after her accident, claimant was taken by other TIC personnel to see Sheri Spuhler (Spuhler), a Physician's Assistant. Ms. Spuhler's office note of September 1, 1998, reported claimant's complaints and symptoms as follows:

- Neck discomfort, especially "posterior spine lower C7 area."
- Aching in left elbow.
- Tingling in fourth and fifth fingers of the left hand.
- "[U]pper trapezius spasm, bilateral, left worse than right."

(Ex. 23-2.) Cervical x-rays were taken but read as normal. (*Id.*) Spuhler's assessment was, "[c]ervical contusion with paraspinal muscular spasm." (*Id.*)

¶14 Spuhler saw claimant again on September 4, 1998. At that time claimant's complaints and symptoms were as follows:

- Back spasms (unspecified where).
- Neck spasm.
- Left hand numbness.
- Dizziness and nausea following her taking Ibuprofen and which she attributed to the Ibuprofen.
- Weaker grip in left hand.
- Loss of vibratory sense in fourth and fifth fingers of the right hand.

(Ex. 23-1.)

¶15 Spuhler saw claimant a final time on September 10, 1998. She noted claimant's complaints and symptoms as follows:

- Decreased sensation in left arm.

- Decreased range of movement of her neck.
- "[P]araspinas muscle spasm." Decreased sensation in 4th and 5th fingers of the left hand.

(*Id.*)

¶16 Because of concern that claimant might have a C8 radiculopathy, Spuhler referred claimant to Dr. Arturo Echeverri, a neurologist practicing in Billings. (*Id.*; Ex. 6-91.)

¶17 Dr. Echeverri first examined claimant on September 11, 1998. He has cared for her since that time and is her primary treating physician.

¶18 On September 11, 1998, Dr. Echeverri reported the claimant's complaints and symptoms as follows:

- Neck pain.
- "[P]ain, weakness and numbness on the medial aspect of the left arm, forearm and numbness down to the fourth and fifth ring fingers."
- "[M]ild weakness of the left abductor pollicis brevis and adductor digiti quinti."⁽¹⁾
- Decreased sensation in fourth and fifth fingers of the left hand.

(Ex. 6-2, 20-4.) Dr. Echeverri suspected C8 radiculopathy and thereafter ordered both an MRI and a CT myelogram. (Exs. 6-3, 6-5, 20-5, 20-6.) Both were done and both were normal, thus essentially ruling out a cervical radiculopathy. (Exs. 6-4 to 6-7, 24-1 and 24-2.)

¶19 Dr. Echeverri examined claimant again on September 14, 1998. At that time her symptoms and complaints were:

- "[P]aresthesias down the median aspect of the arm, forearm and ends in the fourth and fifth fingers."
- Pain shooting down the arm when claimant moved her head to the right.
- Tenderness on palpitation of the cervical spinal muscles mostly at C7-C8 area and more generally in the cervical spinal muscles.

(Ex. 6-5.)

¶20 On October 2, 1998, Dr. Echeverri noted that claimant had a headache following the CT myelogram. (Ex. 6-7.) This is the first mention of headache. Her other symptoms were:

- Pain at the base of her neck and tenderness in the lower cervical area.
- Numbness and tingling in the arm and fingers, as before.

(Ex. 6-8.) Dr. Echeverri ordered a bone scan to rule out a compression fracture in the cervical spine. (*Id.*) The bone scan was normal, although it "showed diffuse increased uptake throughout the cervical spine . . . [which] can be seen in trauma or inflammation." (Ex. 6-9, 10.) Dr. Echeverri then prescribed physical therapy.

¶21 Dr. Echeverri saw claimant again on October 28, 1998. At that time, although better, she was continuing to complain of neck pain and paresthesias in her left arm and fingers. (Ex. 6-36.) On examination he noted tenderness to palpation in the "cervical, mid thoracic spinal muscles, trapezius and Rombergs." (*Id.*) He ordered an EMG (*id.*), which was thereafter done. The EMG was normal. (Ex. 6-39, 40.)

¶22 On November 15, 1998, claimant fell on her wrist. This incident is a red herring introduced by the insurer to suggest a subsequent injury or aggravation. The injury was diagnosed as a sprain (Ex. 26-1) and no medical testimony or records indicate that it is the cause of the claimant's present thoracic outlet symptoms or materially aggravated her September 1, 1998 work-related injury.

¶23 Dr. Echeverri next saw claimant on November 19, 1998. His office note indicates that claimant was participating in physical therapy and was using a TENS unit previously prescribed on November 13, 1998. (Exs. 6-43, 6-41.) Her neck pain and paresthesias were better. (Ex. 6-43.)

¶24 On December 7, 1998, claimant returned to Dr. Echeverri. At that time he noted that her neck pain was "somewhat better" and her left arm/hand paresthesias were "about the same," but that she was suffering persistent headaches. (Ex. 6-46.) This is Dr. Echeverri's first mention of headaches other than the post-CT myelogram headache.

¶25 Over the next few months, Dr. Echeverri saw claimant on January 7, 1999, February 10, 1999, March 5, 1999, April 14, 1999, and June 2, 1999. (Exs. 6-52, 6-55, 6-56, 6-57, 6-63; Ex. 20-28.) Claimant's complaints of headaches and paresthesias continued, although their reported severity waxed and waned. The only additional symptom reported by Dr. Echeverri was depression. (Ex. 6-56; Ex. 20-28.)

¶26 Meanwhile, in February 1999, claimant returned to work at TIC in a lighter duty position as a security guard. (Tr. at 51.) Dr. Echeverri approved her return to work in that capacity. (Ex. 6-55.)

¶27 On June 2, 1999, Dr. Echeverri found claimant at maximum medical improvement (MMI) but indicates she could not return to her time-of-injury job.⁽²⁾ (Ex. 6-63.) He noted that lifting increased her pain and commented that she was going to continue to have "pain off and on especially when she tries to lift heavy objects and also if she tries to do a lot of driving." (*Id.*) He recommended that she be referred to Occupational Medicine for an evaluation of "what kind of occupation she can perform." (*Id.*)

¶128 Following Dr. Echeverri's recommendation, the insurer referred claimant to Dr. Scott Ross, a board certified specialist in occupational medicine. The parties have wrangled over whether Dr. Ross was a treating or an IME physician. They have made a proverbial mountain out of a molehill in arguing the matter, wasting both their time and my time. Dr. Ross was selected by the insurer. Whether characterized as an IME physician or simply as a physician selected by the insurer for a further evaluation as suggested by Dr. Echeverri, he saw claimant once to evaluate her and never was a treating physician.

¶129 Dr. Ross saw claimant on July 30, 1999. He noted her complaints as neck pain, headaches, and paresthesias which "start in the left periscapular [sic] area and extend along the triceps left, ulnar aspect of the forearm into the fourth and fifth digits." (Ex. 22 at 3.) However, he determined that her complaints were "without objective correlation" and "myofascial in nature." (*Id.* at 5.) He found her at MMI and released her to "regular work duties without restriction," including "work as a laborer at T.I.C. [her time of injury employer] effective immediately." (*Id.* at 6.) It is apparent to the Court that Dr. Ross did not believe claimant's complaints of pain, including her complaint that her pain increased when lifting, and did not credit Dr. Echeverri's opinions that lifting would aggravate claimant's pain.

¶130 Dr. Ross' opinions did not change matters. Claimant returned to Dr. Echeverri on August 2, 1999, complaining of a "lot of headaches, neck pain, tingling in the left arm" and mood swings. (Ex. 6-64.) On August 27, 1999, she reported that she had been laid off by TIC following her inability to lift 80 pounds. (Ex. 6-65.) She reported that when she tried to lift the 80 pounds "instantly she had neck pain and numbness in the arms." (*Id.*) He recommended limiting her lifting to 50 pounds.

¶131 After being laid off by TIC, claimant found work at Michael's, which is a retailer in Billings.

¶132 On October 21, 1999, claimant suffered a minor work injury when boxes fell on her while working at Michael's. Dr. Echeverri saw her the same day and noted that she had a mild soft tissue injury bruising "her left chest wall, also her left buttock . . . knee and right elbow." (Ex. 6-66.) He approved her return to work. When queried later about the injury in relation to the present case, Dr. Echeverri replied on February 4, 2002, that "I do not believe that [injury] contributed in any manner to her present symptoms. That was a minor injury which I would just forget about, as it has not contributed at all to any of her symptoms." (Ex. 6-100.) Even Dr. Ross was persuaded that the October 21, 1999 injury was insignificant. (Ex. 22-21.) There are no contrary opinions. I therefore find that the October 21, 1999 injury did not permanently aggravate claimant's prior condition or cause her current condition.

¶133 Over the next year and a half claimant continued to have virtually the same complaints as before - neck pain, headaches, and paresthesias in her left arm and fourth and fifth fingers of her left hand. (Exs. 6-65, 6-70, 6-73, 6-74, 6-80.) As Dr. Echeverri had predicted,

her symptoms waxed and waned, but never totally subsided. On January 10, 2000, he referred her to Dr. Karlene Berish, a chiropractor, because of the persistence of her symptoms. (Ex. 6-67.)

¶134 On April 17, 2001, almost two and a half years after claimant's industrial injury, Dr. Echeverri noted a new symptom. On that date, Dr. Echeverri noted: "[T]he main thing that bothers her . . . lately is the inability to abduct⁽³⁾ her left shoulder." (Ex. 6-83.) In his office note of that date he indicated that claimant continued to have neck pain, arm and hand paresthesias, and headaches; he noted the "possibility of thoracic outlet syndrome [TOS];" and he recommended further evaluation by an orthopedic surgeon. (Ex. 6-84.) Regarding the relationship of the "new symptom" and possible TOS to claimant's 1998 industrial injury, Dr Echeverri contemporaneously wrote: "**This has nothing to do with her work related injury . . .**" (*Id.*, emphasis added.)

¶135 At the request of the claimant's attorney, Dr. Ronald Peterson, who specializes in occupational and sports medicine, evaluated claimant on June 27, 2001, and rendered an impairment rating with respect to her 1998 industrial injury. (Exs. 6-85 to 6-90.) Claimant told him about her neck pain, headaches, and left arm/hand paresthesias. She also reported left facial numbness with headaches and ringing in her ears, "worse with headaches," and low-back pain which developed within two days of her industrial accident but which no longer bothered her other than her left leg "may feel weak if I sit for more than an hour." (Ex. 6-86.)

¶136 Dr. Peterson's report sets out claimant's complaints concerning her left shoulder, as: numbness over her left should blade area, which is a constant sensation with "shooting pain" of the left shoulder blade area with picking up objects in front of her at arm's length, or trying to lift things about her shoulder level on the left. (*Id.*)

¶ 137 He examined claimant's shoulder and reported:

Tenderness throughout the left trapezius muscle with banding palpated, but no trigger points. On repeated use of digital inclinometer, maximum flexion is found to be 110°, extension 36°, abduction 128°, adduction 43°, internal rotation 51°, external rotation 83°, all with end point of increased pain throughout the left trapezius muscle and left medial parascapular muscles

(Exs. 6-87, 6-88.) However, he did not diagnose TOS. Rather, in line with Dr. Ross' diagnosis, he characterized her complaints - neck, shoulder, and low back - as myofascial but indicated her complaints were all were due to her industrial accident. (Ex. 6-89.)

¶138 Dr. Peterson rated claimant's impairment as 11% for upper extremity "range of motion deficits of the left shoulder" and 3% for headaches. (Exs. 6-89, 6-90.) He found zero (0%) impairment for her lower back. (Ex. 6-90.)

¶139 On November 6, 2001, claimant returned to Dr. Echeverri complaining not only of numbness in her left arm and fourth and fifth fingers of the left hand but also in the shoulder and the back of her neck. (Ex. 20 at 46.) She also complained of heaviness of her arm and discoloration of her left arm and hand. (*Id.*) These latter complaints were new, never having been reported in previous medical records.

¶140 Dr. Echeverri, as before, suspected TOS. (*Id.*) He ordered an "ultrasound of the subclavians [to be] followed by a consultation with Dr. Moseley." (*Id.*) An ultrasound was done on November 15, 2001, and showed evidence of "bilateral thoracic outlet arterial compression." (Ex. 27-1.)

¶141 Claimant was then seen by Dr. John Moseley, a neurosurgeon. He saw her on December 26, 2001, and noted that claimant was unable to raise her arm to even comb her hair. (Ex. 6-93.) In addition to her usual report of neck pain and left arm/hand paresthesias she told Dr. Moseley she "had chronic weakness in her left grip. . . . Her left hand swells frequently and is often cold." (*Id.*) Dr. Moseley further noted she was "numb over the left shoulder and upper left portion of her chest." (Ex. 6-95.) He diagnosed left TOS and recommended an additional, "SER test to complete her thoracic outlet work-up", then a referral to Dr. John Cook for possible surgery. (*Id.*)

II.

¶142 St. Paul has denied liability for claimant's TOS diagnosis, challenging both the diagnosis and its relationship to the claimant's industrial injury.

¶143 Before assessing the evidence for and against TOS and causation, I take note that neither party saw fit to call either Dr. Echeverri or Dr. Moseley as witnesses, either at trial or by deposition, or for that matter to call Dr. Peterson, whose impairment rating is at issue. The only medical witness called and subjected to cross-examination was Dr. Ross. Dr. Ross, however, admitted that he was not an expert in TOS and has never treated a TOS case. (Ross Dep. at 72,79, 82-83). He expressed skepticism concerning the validity of TOS as a diagnosis and in addressing the TOS question he relied on an emergency medicine text and a journal article. (*Id.* at 55-57, 73; Exs. 37 through 39.) Even though neither Dr. Echeverri nor Dr. Moseley were deposed, and I do not have a history of the education, training, and experience in treating TOS, it is clear from their medical records that they are familiar with the condition, recognize the condition, prescribe diagnostic testing for the condition, and evaluate patients for the condition. Moreover, both acted in treating physician capacities. Therefore, even though I allowed Dr. Ross' testimony on TOS despite objections concerning its relative lateness in the case, I give his testimony concerning TOS little weight. Indeed, in view of his long treatment of claimant and his personal observation of her symptoms virtually from the get-go, it is Dr. Echeverri's opinions which are persuasive.

¶44 Moreover, with respect to the TOS diagnosis, Dr. Ross did not testify that it is an invalid diagnosis, only that it is somewhat controversial. Obviously, from the medical treatise he consulted prior to testifying, it is recognized by a significant portion of the medical community. (Ex. 37.) Indeed, the treatise he consulted discusses the rare, arterial type of TOS diagnosed in this case.

¶45 Dr. Ross also did not testify that claimant did not have TOS, only that he questioned the diagnosis based on the testing done so far. (Ross Dep. at 76, 78-80.) He recommended further testing. (*Id.* at 79.) Significantly, he offered no alternative diagnosis to explain claimant's current symptoms and no explanation of claimant's persistent arm symptoms.

¶46 As noted earlier, both Dr. Moseley and Dr. Echeverri provided written opinions regarding the causal connection between the claimant's 1998 industrial injury and her TOS complaints. Both agree she has TOS arising from her industrial injury.

¶47 Dr. Moseley implicitly opined in a December 26, 2001 letter to Dr. Echeverri that claimant's TOS was related to her industrial injury. (Ex. 6-95. See second paragraph under Recommendations.) In a subsequent, February 12, 2002 letter to counsel for St. Paul he was more explicit: "In my opinion, the thoracic outlet syndrome was caused by the work setting and injury on 09/01/98." (Ex. 6-97.)

¶48 As noted earlier, on April 17, 2001, Dr. Echeverri referred to claimant's inability to abduct her shoulder and commented: "This has nothing to do with her work related injury." (Ex. 6-84; and see ¶ 34 above.) Initially, I read this note, along with Dr. Echeverri's reaffirmation of the note in latter correspondence, as indicating an opinion that claimant's TOS is unrelated to her industrial injury. However, after carefully reading and re-reading his letters of January 14, 2002 and February 4, 2002 (Exs. 6-101 and 6-99), it is apparent that his comment related only to the claimant's inability to abduct her shoulder and not to TOS or symptoms indicative of TOS. The Court does not understand counsels' decision in this case not to depose Dr. Echeverri and make the matter more clear, especially as Dr. Echeverri has treated claimant continuously since her industrial injury. Failure to depose him makes my job more difficult and gives rise to a greater potential for an erroneous decision.

¶49 With that said, I turn to Dr. Echeverri's January 14th and February 4, 2002 letters. The January letter was in response to inquiries by St. Paul's attorney and must be read in the context of those inquiries. Those inquiries were as follows:

¶49a Per your April 17, 2001 note attached, you indicated the shoulder problems were something new and had nothing to do with a work related injury. Has your opinion changed?

¶49b Was the suspected thoracic outlet syndrome caused or aggravated by Ms. Burnside Lund's industrial injury?

¶149c If the injury caused or aggravated the thoracic outlet syndrome, please explain with particularity how it occurred. If the injury caused or aggravated the thoracic outlet syndrome, please explain why there were two to three years of delay.

¶149d Did the injury of October 21, 1999 (your note attached) cause or aggravate the condition?

¶149e Is the injury of October 21, 1999 a subsequent intervening event?

¶149f Did the injury of October 21, 1999 substantially or materially alter the underlying condition? If so, was the aggravation temporary or permanent?

¶149g What role has Ms. Burnside Lund's subsequent employment as a bartender, working at Montana Air Cartage, working at Michael's Craft Store, and/or working at the YMCA played in the development of thoracic outlet syndrome?

(Exs. 20-47, 20-48.)

¶150 Dr. Echeverri's reply is as follow, in full:

Dear Mr. Maynard:

I am in receipt of your letter of December 11, 2001. I have reviewed the extensive records and will go ahead and answer your questions.

In regards to the shoulder problem, I have not changed my opinion. I still believe that the pain in the shoulder had nothing to do with the injury of a few years ago.

I am still not sure if this patient has thoracic outlet syndrome, but does basically have a diagnosis of exclusion. She has had, as you know, MRI of the cervical spine, myelogram, and CT scan and they have failed to show any abnormalities.

Over the last years, we have concentrated on treatment of her neck pain and posttraumatic headaches. The paresthesias are something that were worked up and the tests turned out to be unremarkable. The only thing that can explain her persistent numbness will be perhaps thoracic outlet syndrome. Again, the numbness tingling occurred after the injury and they did not occur two or three years later, as you mention on your third question.

As I mentioned above, this thoracic outlet syndrom is a diagnosis of exclusion and, as far as I am concerned, she did not have any symptoms in the left arm prior to her injury. I do not believe that subsequent employments, as you mentioned in your paragraph 7, have contributed to the development of this syndrome. As I mentioned before, those symptoms had been present only since the injury.

Please let me know if you still have any questions.

Sincerely yours,

Arturo Echeverri, M.D.

(Exs. 20-54, 20-55)

¶51 The difficulty I had in reading this letter is that Dr. Echeverri initially reaffirms his opinion that the shoulder problem identified on April 17, 2001, was unrelated to claimant's industrial accident. I initially interpreted this as indicating the TOS symptoms were unrelated. However, Dr. Echeverri's discussion in the fourth paragraph of his letter is in response to Mr. Maynard's questions concerning the causation of TOS or TOS symptoms. In that fourth paragraph, Dr. Echeverri talks about claimant's paresthesias, which without question have been present since her accident, and goes on to state, "**The only thing that can explain her persistent numbness will be perhaps thoracic outlet syndrome. Again, the numbness tingling occurred after the injury and they did not occur two or three years later, as you mention in your third question.**" (Ex. 6-101, emphasis added.) Mr. Maynard's third question, of course, asked why claimant's TOS symptoms appeared two or three years after the accident. Thus, read in context with the question, Dr. Echeverri appears to say that the longstanding paresthesias are her significant symptoms and that her TOS is attributable to her industrial accident. Claimant's difficulty abducting her shoulder thus appears to be a separate, unrelated matter.

¶52 Dr. Echeverri's February 4, 2002 letter makes it clear that was the case. I quote the letter in its entirety:

Dear Mr. Strauch:

This is a letter in regards to the conversation we had over the phone discussing what Ms. Burnside-Lund's symptoms have been over the last few years, since I first took care of her, and you wanted an opinion to distinguish what the shoulder pain or complaint was about as compared to the symptoms of thoracic outlet syndrome which Ms. Burnside-Lund is now experiencing.

This patient, as I mentioned before, has had some shoulder pain which is not related to the neck pain or the thoracic outlet syndrome. The thoracic outlet syndrome symptoms consist of numbness and tingling in the left upper extremity which she has had ever since the injury several years ago. The pain that she had in the left shoulder was more like an impingement syndrome and, as I mentioned in a previous note, that was unrelated to the original symptoms she had before.

We are, therefore, talking about two different symptoms, one is shoulder pain which apparently subsided and that was unrelated to any type of injuries related to her job. The other symptom, which is the thoracic outlet syndrome, consists of a feeling of weakness, numbness, and tingling in the left upper extremity, with some discoloration or changes in the color of the skin. This is from pinching of the subclavian artery at the

level of the supraclavicular area. This, again, is not related to the shoulder complaints she had on one of her visits.

This letter, I hope, clarifies the previous letter of January 14, 2002 to the attorney, Mr. Joe Maynard.

I am confirming today the diagnosis of thoracic outlet syndrome and the fact that she has an abnormal ultrasound which is seen in patients with vasogenic thoracic outlet syndrome.

There was also a question about an injury which occurred in October 1999, when she had a minor injury at work. That note of 10/21/99 is self-explanatory. I do not believe that contributed in any manner to her present symptoms. That was a minor injury which I would just forget about, as it has not contributed at all to any of her symptoms.

I hope this note is helpful to clarify the status of Kathy Burnside-Lund's condition.

Please let me know if I can be of any assistance or if there are still any questions.

Sincerely yours,

Arturo Echeverri, M.D.

(Exs. 6-99, 6-100, emphasis added.) Carefully read, the letter makes it clear that on April 17, 2001, the doctor was talking about the shoulder pain and inability to abduct her shoulder as being unrelated to both her injury and her TOS. In his letter he also arrives at a positive, rather than tentative, diagnosis of TOS based on ultrasound doppler studies.

¶53 As I indicated earlier, Dr. Echeverri is plainly familiar with TOS and its symptoms, has diagnosed and treated the condition, and is in the best position to know whether claimant's TOS symptoms relate back to her industrial accident. I intended to give greater weight to his opinions when I read them as indicating claimant's TOS symptoms are unrelated to her industrial accident. I, therefore, give them greater weight as I now read them, I think correctly, as providing a causal connection.

¶54 As to the claimant's credibility concerning her symptoms, while I am not convinced she immediately reported each and every symptom she claims she had immediately following the accident, or that she had every one of the symptoms from day one as she claims, I am fully persuaded that her neck pain and her arm and hand paresthesias did begin immediately after her accident and her headaches shortly after the accident, and that all of those symptoms have continued to bother her ever since. I note that the symptoms persisted even as she returned to work in various positions. The only physician casting doubt on the veracity of her complaints is Dr. Ross. It was obvious to me from his report, and his facile release of claimant to return to work without restrictions, that he did not credit any of her complaints. Credibility judgments, however, are ultimately the Court's responsibility.

¶155 I therefore find as a matter of fact that the claimant suffers from TOS and that her condition is attributable to her industrial accident.

III.

¶156 In light of my conclusion that claimant has TOS related to her industrial accident, I find it premature to determine her entitlement to permanent partial disability (PPD) benefits. Further testing and consideration of surgery have been recommended by her treating physicians. Until her TOS has been treated and she has reached MMI from that condition, any impairment rating and determination regarding PPD benefits is premature.

IV.

¶157 Claimant also asks for reimbursement of travel expenses. Those expenses are outlined in Exhibit 8. They are expenses for travel to and from her treating physicians. Further discussion of the claim involves application of section 39-71-704(d), MCA (1997), and is therefore deferred to the Conclusions of Law which follow.

CONCLUSIONS OF LAW

¶158 This case is governed by the 1997 version of the Montana Workers' Compensation Act 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).

¶159 Claimant bears the burden of proving by a preponderance of the evidence that she is entitled to the benefits she seeks. *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).

¶160 The principal and determinative issue in this case is whether the claimant is suffering from TOS, or at least TOS-type symptoms, related to her September 1, 1998 industrial injury. An insurer is liable only for medical conditions caused by the industrial accident. "Causation is an essential element to benefit entitlement." *Hash v. Montana Silversmith*, 256 Mont. 252, 257, 846 P.2d 981, 983 (1993); and see *Caekaert v. State Compensation Mut. Ins. Fund*, 268 Mont. 105, 112, 885 P.2d 495, 499 (1994). Section 39-71-704, MCA (2001), which governs medical benefits, expressly provides in relevant part:

39-71-704. Payment of medical, hospital, and related services -- fee schedules and hospital rates -- fee limitation. (1) In addition to the compensation provided under this chapter and as an additional benefit separate and apart from compensation benefits actually provided, the following must be furnished:

(a) After the happening of a compensable injury and subject to other provisions of this chapter, the insurer shall furnish reasonable primary medical services for

conditions **resulting** from the injury for those periods as the nature of the injury or the process of recovery requires. [Emphasis added.]

Thus, claimant must show that her TOS condition is causally related to her September 1, 1998 accident.

¶161 As argued by the respondent, causation is a question of fact. "Proximate cause is a question of fact and for a claimant to recover for an injury from an industrial accident, he must establish by a preponderance of evidence that such injury was the proximate cause of his present condition." *Newman v. Kamp*, 140 Mont. 487, 494, 374 P.2d 100, 104 (1962). The claimant has satisfied her burden of proof as to causation and to her need for further medical treatment.

¶162 While the insurer has suggested claimant's current TOS condition is due to or was aggravated by subsequent injuries, that suggestion is unsupported factually.

¶163 In addition to requesting a determination that her TOS condition is related to her industrial injury and requires additional treatment, claimant is also seeking PPD benefits. Those benefits, however, are available only upon claimant reaching MMI. §§ 39-71-703(1) and 39-71-116(23), MCA (1997). Section 39-71-116(23), MCA (1997), defines permanent partial disability, in relevant part, as follows:

(23) "Permanent partial disability" means a physical condition in which a worker, **after reaching maximum medical healing**: . . . [Emphasis added.]

Claimant has not reached MMI with respect to her TOS since further testing and treatment have been recommended by her treating physicians. Therefore, claimant does not presently meet the definition of a permanently partially disabled worker.

¶164 Finally, I consider claimant's request for her travel expenses in connection with her medical care. Her request is governed by section 39-71-704(1)(d), MCA (1997), which provides:

(d) The insurer shall reimburse a worker for reasonable travel expenses incurred in travel to a medical provider for treatment of an injury **only if the travel is incurred at the request of the insurer**. Reimbursement must be at the rates allowed for reimbursement of travel by state employees. [Emphasis added.]

The bolded words are determinative of the present claim: Claimant has presented no evidence that the travel for which she seeks reimbursement was at the request of the insurer.

¶165 For what it is worth at this point, Dr. Ross was not a treating physician. "Treating physician" is defined by section 39-71-116(36), MCA (1997), which provides in relevant part:

(36) "Treating physician" means a person who is **primarily responsible for the treatment of a worker's compensable injury**. [Emphasis added.]

Dr. Ross was **never** *primarily responsible for treatment of claimant's injury*.

¶166 Since claimant has prevailed in this matter, she is entitled to her costs. § 39-71-611, MCA (1997).

JUDGMENT

¶167 Claimant suffers from TOS which was caused by her industrial accident of September 1, 1998, therefore, the insurer is liable for medical and compensation benefits relating to that condition.

¶168 Since claimant's physicians have recommended further testing with a view to possible surgery for her TOS she is not at MMI. Since she is not at MMI, her claim for an impairment award and other permanent partial disability benefits is premature.

¶169 The claimant is not entitled to the travel expenses she claims.

¶170 The claimant is entitled to her costs and shall file a memorandum of costs in accordance with Court rules.

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

¶172 Any party to this dispute may have 20 days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this day 14th of January, 2003.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Timothy B. Strauch

Mr. Joe C. Maynard

Submitted: April 4, 2002

1. The abductor pollicis brevis is a muscle in the hand extending from the wrist to the thumb. The adductor digiti quinti are apparently in the hand as well.
2. At one point in his office note, Dr. Echeverri says, "I am not sure . . . she will be able to go back to work in her previous occupation." (Ex. 6-63.) However, later on in his note he expresses his skepticism in stronger terms: "Unfortunately, I don't think she will be able to go back to her previous occupation."
3. Abduction of the shoulder involves lifting the arm from the side of the body outward.