

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2003 MTWCC 13

WCC No. 2002-0677

MONTANA STATE FUND

Petitioner/Insurer

vs.

R.B.

Respondent/Claimant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Insurer (State Fund) petitioned for approval to terminate claimant's benefits for non-compliance with medical recommendations. Evidence presented at trial indicated that claimant, who suffered initial foot injuries which ultimately required partial amputation of her right leg, has failed to follow medical advice and has harmed herself by (1) gaining significant weight (ballooning from 350 pounds to 454 pounds), (2) chewing her fingers despite repeated infections which led to partial amputation of seven fingers, (3) removing bandages from her fingers, (4) attempting to remove IV (intravenous) lines, (5) refusing a necessary IV line until threatened with involuntary mental commitment, (6) refusing x-rays, and (7) refusing infectious care precautions. Dr. Bill Rosen, a specialist in physical and rehabilitation medicine, recommended comprehensive, multi-disciplinary treatment of claimant in Billings, Montana. The treatment team would include a psychiatrist, psychologist, neurologist, pulmonologist, bariatric (weight control) specialist, orthopedic surgeon, and prosthetist (specializing in prosthetics). The treatment regime and specialists recommended by Dr. Rosen are not available in Miles City, Montana, where claimant resides and where she has been residing in a skilled care nursing home for the past two years. Therefore, Dr. Rosen recommended she be transferred to Billings. Claimant refused the recommendation: she insists on staying in Miles City and continuing to treat with Dr. Susan Gallo, a family practitioner who has been claimant's treating physician over the past two and one half (2½) years, even though she has not followed Dr. Gallo's medical advice on many occasions. Dr. Tom Peterson, a psychologist who treated claimant for a few months and was then discharged by claimant, testified that claimant is suffering from mental illness which renders her incapable of making reasoned and rational decisions concerning her own medical care. However, since Dr. Peterson and Dr. Rosen last saw claimant, she has made remarkable improvement, including weight loss of almost a hundred pounds and cessation of her finger biting. At the time of trial on December 3, 2002, Dr. Gallo planned to discharge claimant from the nursing home and testified that it is in claimant's best medical interests for her to remain in Miles City and continue her treatment there. Dr. Gallo has and will continue to involve specialists in claimant's care.

Held: The claimant is presently cooperating in the medical care prescribed by her treating physician and is making good progress. The Court is persuaded she is presently competent to make rational and reasoned judgments concerning her own

medical care and that it is presently in her best interests to continue treating with Dr. Gallo in Miles City. The petition to terminate benefits is therefore denied. However, in light of claimant's history of non-compliance with medical advice, the denial is without prejudice to the State Fund renewing its request should claimant in the future engage in self-destructive conduct or refuses appropriate medical treatment. The Court retains jurisdiction to consider a renewed request in the event the claimant fails to comply with medical advice in the future.

Topics:

Claimants: Duties: Medical Advice. As a general matter, a claimant has a duty to follow medical advice so as to diminish the effects of her injury and minimize disability.

Claimants: Duties: Medical Advice. Section 39-71-1106, MCA (1995), permits an insurer to terminate compensation benefits where a claimant unreasonably refuses medical treatment recommended by a managed care organization or treating physician. The section does not authorize termination of benefits for refusal to submit to treatment recommended by an independent medical examiner.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-1106 (1995). Section 39-71-1106, MCA (1995), permits an insurer to terminate compensation benefits where a claimant unreasonably refuses medical treatment recommended by a managed care organization or treating physician. The section does not authorize termination of benefits for refusal to submit to treatment recommended by an independent medical examiner.

Claimants: Duties: Medical Advice. In addition to the authority to terminate benefits under section 39-71-1106, MCA (1995), for non-compliance with treatment recommendations of a managed care organization or treating physician, an insurer may terminate benefits where a claimant refuses reasonable medical treatment which would improve claimant's condition and disability. *Dosen v. East Butte Copper Mining Co.*, 78 Mont. 579, 254 P.880 (1927).

Cases Discussed: *Dosen v. East Butte Copper Mining Co.*, 78 Mont. 579, 254 P.880 (1927). In addition to the authority to terminate benefits under section 39-71-1106, MCA (1995), for non-compliance with treatment recommendations of a managed care organization or treating physician, an insurer may terminate benefits where claimant refuses reasonable medical treatment which would improve claimant's condition and disability.

Claimants: Duties: Medical Advice. In determining whether a claimant's refusal of medical treatment is reasonable, the Court must consider "a multitude of variables," including claimant's psychological condition. *Small v. Combustion Engineering*, 209 Mont. 387, 681 P.2d 1081 (1984).

Cases Discussed: *Small v. Combustion Engineering*, 209 Mont. 387, 681 P.2d 1081 (1984). In determining whether a claimant's refusal of medical treatment is reasonable, the Court must consider "a multitude of variables," including claimant's psychological condition.

Claimants: Duties: Medical Advice. If a claimant is mentally capable to make rational and reasoned decisions concerning claimant's medical care but disregards medical advice and engages in conduct which undermines claimant's medical care, the insurer may be justified in terminating benefits.

Claimants: Duties: Medical Advice. If a claimant is mentally incapable of making rational and reasoned decisions regarding her medical care, an insurer cannot terminate benefits for the claimant's failure to follow medical advice, however, where the matter is brought to the attention of the Workers' Compensation Court, the Court will refer the matter to State authorities empowered to bring proceedings to protect the claimant.

¶1 The trial in this matter began on December 3, 2002, in Billings, Montana. It continued in Miles City, Montana on December 4, 2002. Respondent, R.B. (claimant), was represented by Mr. R. Russell Plath. Claimant was not present during the Billings portion of the trial but was personally present during the proceedings in Miles City. Petitioner/Insurer, Montana State Fund, was represented by Mr. Greg E. Overturf and Mr. Thomas E. Martello.

¶2 Exhibits: Exhibits 1 through 63 were admitted without objection. Exhibit 64 was provided post-trial.

¶3 Witnesses: Claimant, Dr. Bill Rosen, Tom Peterson Ed.D., and Dr. Susan Gallo testified at trial.

¶4 Issue Presented: This case was specially set. No pretrial order was filed, however, the parties were in agreement as to the issues and both filed trial briefs. The issue presented is whether the State Fund is entitled to suspend benefits on account of claimant's alleged failure to cooperate in her own medical care.

¶5 Having considered the testimony presented at trial, the demeanor and credibility of the witnesses, the exhibits, and the arguments of the parties, the Court entered an oral bench ruling at the conclusion of trial. A transcript of that ruling is attached as an addendum to this decision. The following, written findings of fact, conclusions of law incorporate and expand upon the bench ruling and constitute the Court's final findings of fact, conclusions of law and judgment.

FINDINGS OF FACT

¶6 Claimant has resided in Miles City, Montana all of her life. Her family and friends are in Miles City and she wishes to remain there. I begin this decision with this statement because it is a primary reason claimant has refused recommendations that she be cared for in Billings, Montana. Moreover, the claimant's connection to Miles City has provided her recent motivation to co-operate in her medical care.

¶7 The claimant was injured at work on August 28, 1995, getting into and out of her employer's van while working. (Exs. 1 and 34.)

¶8 At the time of the injury, the claimant's employer was insured by the State Fund. The State Fund accepted liability for her injury and has paid medical and compensation benefits. It continues paying medical and compensation benefits.

¶9 Since claimant's injury she has had multiple medical complications. Liability for those complications is not at issue but the complications give rise to the present controversy.

¶10 One of claimant's overlaying medical problems is obesity, which has contributed to her complications and the difficulty in treating her. On July 2, 1996, Dr. James Elliott, an orthopedic surgeon who saw claimant on referral, reported claimant's height at 5'9" and her weight at 350 pounds. (Ex. 30 at 1.)

¶11 Claimant's initial problem was a fracture of the talus bone of the left ankle. (Exs. 34 at 1 and 5 at 1.) Four months later, a second fracture of the talus bone of the *right* ankle was discovered. (Exs. 34 at 5 and 5 at 4.)

¶12 By July 2, 1996, claimant was "mainly restricted to a wheelchair." (Ex. 30 at 1.) On that date, Dr. Elliott diagnosed a left ankle "fracture . . . with subsequent avascular necrosis [dead bone] and collapse" and probably "peripheral neuropathy, bilateral feet." (*Id.* at 2.) He recommended surgery.

¶13 Left ankle surgery was performed on January 13, 1997. During surgery, significant necrotic (dead) bone was found. The ankle was fused. (Ex. 5 at 16.)

¶14 The fusion was slow in taking. (Ex. 5 at 19 et seq.) Meanwhile, claimant developed cellulitis in both of her lower legs. (Ex. 5 at 21-22, 25-30, 40.) "Cellulitis" is a generic term for inflammation of connective tissue, Merriam-Webster Medical Dictionary, which can be from infection.

¶15 By April 27, 1999, claimant's right ankle had collapsed "with talar avascular necrosis." (*Id.* at 32.) On that date, Dr. Whitney S. Robinson noted that claimant also had an infected finger. The finger infection was one of many which followed.

¶16 In addition to Dr. Susan Gallo, claimant has been treated by numerous other physicians, but Dr. Gallo has remained her primary care physician.

¶17 By December 13, 2000, claimant's right foot and ankle were infected and claimant's right ankle had collapsed. (*Id.* at 38.) Remedial surgery was attempted in December 2000. (*Id.* at 41-45.) The surgery failed and on January 3, 2001, the claimant's right leg was amputated below the knee. (*Id.* at 48-51.)

¶18 Following amputation of claimant's right leg, claimant was admitted to Holy Rosary Extended Care Facility in Miles City, Montana. The facility is a nursing home providing 24-hour skilled medical care. It is attached to the hospital in Miles City.

¶19 Claimant has multiple medical conditions and a complicated medical history. In addition to obesity, claimant suffers from chronic pain, peripheral neuropathy, [\(1\)](#)

asthma, hypothyroidism, and hypertension. Over the past three years claimant has also been diagnosed as having a borderline personality disorder and as suffering from depression and an obsessive-compulsive disorder. (See e.g., Ex. 28, passim.)

¶20 At the time of trial claimant had been in the nursing home for almost two years. During that time she has suffered multiple complications and has engaged in conduct which can only be characterized as self-destructive. The following are examples:

¶20A Claimant was significantly obese at the time of her injury. On June 2, 1996, she was reported as weighing 350 pounds. See ¶ 10. On May 8, 2001, her weight was 368 pounds. (Ex. 28 at 28.) Over the next 16 months, she gained almost 100 pounds; by September 2002, she weighed 454 pounds. For much of her nursing home stay, she refused dietary advice, refused to be weighed, and had food from outside the nursing home brought to her. (See, e.g., Ex. 23 at 183, where the nursing staff at the nursing home recorded that on May 31, 2002, the claimant brought in four (4) cases of coke, six (6) packages of cookies, and twenty-four (24) bags of licorice.) **Claimant's weight gain resulted in compromise of her cardiovascular efficiency and she had to be put on regular oxygen. She continues to require oxygen.**

¶20B Claimant chews on her fingers. As a result of her persistent chewing, she has experienced multiple staphylococcus infections in her fingers. To date seven of her ten fingers have required partial amputations. Dr. Gallo diagnosed claimant as suffering from an obsessive-compulsive disorder and at one point was concerned that claimant might have Munchausen's. (Ex. 28 at 65.)

¶20C Nurses' notes during the claimant's extended stay at the nursing home suggest that on several occasions claimant removed bandages from her fingers, chewed on her sutures, and removed IV lines. (Ex. 23 at 23, 24, 35, 48, 65, 125.) A good history of these events is set out in Dr. Peterson's June 28, 2002 report, which is found at Exhibit 11, beginning at page 4.

¶20D On December 1, 2001, claimant refused to consent to inserting a Groshong line necessary for intravenous therapy. (A Groshong line is a central venous catheter inserted into a major vein.) Dr. Gallo ultimately convinced her to consent to the line. She noted that in discussing claimant's initial refusal,

I also talked to her about the possibility that due to her poor judgment and refusing the treatment, we may need to seek an involuntary commitment to a psychiatric unit to have her further evaluated regarding her obsessive-compulsive disorder, her borderline personality disorder and depression.

(Ex. 28 at 53.)

¶20E On December 13, 2001, claimant refused to wear gloves prescribed to protect her hands from further infection. The therapist's note records:

Patient reported that the gloves don't fit, and that they were too tight across her hand. She stated she wouldn't be able to do anything with the gloves on. She said she wouldn't wear them. . . .

. . . She reports that they would not allow her to do her functional activities, and she expected a very thin fabric. She stated they were too thick, and she couldn't feel her hands. She stated she was not going to wear them. . . .

(Ex. 21 at 2.)

¶20F On March 12, 2002, claimant refused x-rays of her left hip and right hand. The hand x-ray was to check for osteomyelitis. According to Dr. Gallo's note, 'She [claimant] states that "I do not like the x-ray department."' (Ex. 28 at 64.)

¶21 In July 2000, claimant sought psychological counseling from Dr. F. Tom Peterson, a clinical psychologist. Dr. Peterson first saw claimant on July 31, 2000. Claimant's primary complaint at that time was "mood swings," however, Dr. Peterson also noted she chewed her fingernails and fingers:

In a most pronounced fashion she chews her fingernails. She has chewed most of her fingers to the point where the fingernail is gone and she is chewing on the flesh. In recent times she developed a very serious infection on her left hand middle finger. She was operated on by Dr. Brooks, orthopedic surgeon. She is currently taking massive antibiotics. Home health comes to her house twice a day to treat the infection. She continues to bite her fingernails and/or the flesh.

(Ex.11 at 2.) Dr. Peterson's impression was "significant depressive disorder in combination with an impulsive-control disorder NOS [not otherwise specified]." (*Id.* at 3.)

¶22 Claimant continued seeing Dr. Peterson until April 10, 2001. Most of his visits with claimant were in Miles City, where Dr. Peterson worked under contract with the Mental Health Center serving Miles City. However, he also saw claimant in Billings in January 2001, when her leg was amputated. (Ex. 57 at 5-6). Dr. Peterson was in Miles City one day every week, but testified that he saw claimant only every other week and that he did not always see claimant as scheduled.

¶23 On April 10, 2001, the claimant discharged Dr. Peterson. (Ex. 61.) Dr. Gallo thereafter recommended she seek other psychological counseling but claimant refused. (Ex. 28 at 38, 40, 42)

¶24 Meanwhile, at the request of the State Fund's claims adjuster, claimant was evaluated by Dr. Joseph McElhinny, another clinical psychologist. He evaluated claimant on October 30, 2000, and concluded that claimant was seriously depressed and suffered from a "mixed personality disorder, borderline personality features prominent." (Ex. 15 at 7.) Of significance in the present case, he commented:

I also suspect that she has many inner conflicts about her own independence versus her dependency needs. It almost appears as if she is increasing her dependency status by aggravating/perpetuating her physical disability. **One of the primary ways in which she is aggravating her disability is by causing damage to her fingers. . . .**

(*Id.* at 6-7, emphasis added.)

¶25 On April 22, 2002, claimant was examined by Dr. Bill S. Rosen, a psychiatrist practicing in Billings. After examining claimant and reviewing claimant's medical history, Dr. Rosen made the following recommendations:

This patient would do best if managed at a local nursing home in Billings. She will need to see a variety of providers. At a minimum, I would imagine that she would benefit from neurology, psychiatry, psychology, rehab, ortho, pulmonary, bariatric, prosthetic and primary care. Her neuropathy has never been worked up and this condition needs to be evaluated fully and then possible treatment for this, if treatable, as well as treatment for her neuropathic pain can be pursued. In addition, I would recommend an evaluation by a pulmonologist to maximally optimize her pulmonary care and also care related to her obesity could be provided by an internist or bariatric specialist. Orthopedic and rehabilitation issues could be addressed by her current orthopedist, Dr. Whitney Robinson, and myself. General medical issues could be provided for by her attending physician at a local nursing home. I will discuss her case with both her attorney, Russ Plath, as well as Patricia Boege. I believe that this patient's only hope of an improved medical quality of life is to move from Miles City to Billings where multiple specialists can participate in her care needs. **Most significantly, we will need to provide her with the care of a psychiatrist and psychologist.** At any rate, I will be discussing her case in the near future with Patricia Boege and present her with these recommendations. I did discuss these as well with Ms. R.B. and she had virtually no interest whatsoever in moving to Billings at this time. Hopefully, she can be persuaded otherwise.

(Ex. 43 at 3, emphasis added.)

¶26 At the State Fund's request, Dr. Peterson also reevaluated claimant on June 28, 2002. After reviewing claimant's medical history, including nursing notes, his diagnostic impressions were as follows:

DIAGNOSTIC IMPRESSIONS:

Axis 1 312.30 Impulse Control Disorder, NOS-Repetitive Self-Mutilation Disorder (Deliberate Self Harm, Self Injurious Behavior or Para-Suicidal Behavior). This diagnostic impression is broadly defined as a repeated, direct destruction of body tissue without suicidal intent. It involves the recurrent failure to resist impulses to harm one's body physically and directly without conscious suicidal intent. Such impulses are thought to be associated with increasing tension, anxiety and anger or other dysphoric states. The self-mutilating behavior appears to prompt relief of the uncomfortable feelings shortly after the acts of self-harm. The act of self-harm is often associated with the lack of pain and performed secretly.

Repetitive Self-Mutilation often co-occurs with other Axis I and II psychiatric disorders such as: mood substance abuse, eating and borderline personality disorders.

296.90 Mood Disorder NOS - This examiner is impressed the patient may be experiencing a mood disorder of the bipolar type. Her history is suggestive of mood lability and thought disruption not uncommon to major mood disorder. Family history is supportive of this possibility.

307.50 Eating Disorder NOS - Obesity

304.00 Opiate Dependence - Rule Out

307.89 Pain Disorder Associated with Both Psychological Factors and Medical Conditions.

(Ex. 57 at 26.) Among other things, Dr. Peterson recommended "psychological intervention" including " the involvement of a psychiatrist who would consider aggressively medicating the patient for major mood disorder and self-mutilation impulse control disorder." (*Id.* at 27.)

¶27 Both Dr. Rosen and Dr. Peterson testified at trial. Dr. Rosen testified that claimant needs specialized medical treatment not available in Miles City. He recommended that she be evaluated and treated by a neurologist, a pulmonologist, a bariatric (weight control) specialist, a psychologist, a psychiatrist, an orthopedic surgeon, and a prosthetist (specializing in prosthetics). Many of the services she needs are available in Billings but Dr. Rosen noted that a comprehensive treatment program will have to be pieced together and that no ideal program suitable for claimant exists anywhere in the United States. He noted that the biggest problem in finding claimant appropriate care is the lack of adequate psychiatric services in Montana.

¶28 Dr. Rosen was unable to determine if the claimant has the mental capacity to determine what is best for herself with respect to her medical care.

¶29 When questioned whether it would be in claimant's best interest to remain in Miles City if she lost significant weight (60 pounds), controlled her finger biting and weaned herself from antibiotics, and was scheduled for discharge at Christmas by her primary physician, Dr. Rosen agreed that if she could remain independent and is mentally competent, then she should be allowed to make that choice.

¶30 Dr. Peterson testified that claimant has engaged in self-injurious behavior and needs to be placed in a "controlled environment." He opined that she is not competent to make reasoned decisions regarding her medical care and that she may need a medical guardian. (Trial Test.)

¶31 As noted above, Dr. Rosen saw claimant in April 2002. Dr. Peterson last saw claimant in June 2002. Between June 2002 and the time of trial, claimant's circumstances changed dramatically. First, she has complied with dietary recommendations. As a result, her weight dropped from 464 pounds in September 2002 to 397 pounds on November 29, 2002, a remarkable reduction of 67 pounds. Second, her finger biting has subsided. She is off antibiotics and her most recent amputations were almost healed. Her need for oxygen is declining. She walked across the hall to the room where she testified, showing that she is improving in her ambulation. She expressed willingness to submit to psychological treatment.

¶32 Claimant's improvement has been remarkable to the point that Dr. Gallo expected to discharge her from the nursing home and into an independent living apartment at Christmas time. Indeed, in a conference call with counsel approximately two weeks ago,

claimant's attorney confirmed that she was discharged as planned and is living in her own apartment.

¶33 Claimant testified at trial that she intends to comply with medical advice and continue to lose weight. She wishes to remain in Miles City and intends to live independently.

¶34 Dr. Gallo, a family physician, has been claimant's treating physician since May 22, 2000. (Ex. 28 at 1.) Dr. Gallo testified at trial and impressed me as a caring physician who has only claimant's best interests in mind. The physician-patient relationship she has with the claimant is especially strong. She supports claimant's wish to remain in Miles City and continue her treatment there. She has already involved many specialists in claimant's treatment and will continue to do so. She acknowledged the need for psychiatric and psychological care and is attempting to find appropriate specialists.

¶35 I find as a matter of fact that claimant is **currently** competent to make decisions regarding her medical treatment and is complying with medical advice. Her history, however, causes me grave concern as to whether she will continue to comply with medical advice and continue to improve.

CONCLUSIONS OF LAW

¶36 This case is governed by the 1995 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).

¶37 Under the Montana Workers' Compensation Act, the insurer has an obligation to pay compensation and medical benefits. However, the claimant has an obligation to follow medical advice and thereby diminish the effects of her injury and minimize any disability. In line with that obligation, there is specific statutory authority allowing the insurer to suspend benefits to uncooperative claimants. Section 39-71-1106, MCA (1995), provides:

39-71-1106. Compliance with medical treatment required -- termination of compensation benefits for noncompliance.

An insurer that provides 14 days' notice to the worker and the department may terminate any compensation benefits that the worker is receiving until the worker cooperates, if the insurer believes that the worker is unreasonably refusing:

- (1) to cooperate with a managed care organization or treating physician;
- (2) to submit to medical treatment recommended by the treating physician, except for invasive procedures; or

....

¶38 On its face, section 39-71-1106, MCA, authorizes termination of benefits only if claimant fails to cooperate with a managed care organization or cooperate with and follow her treating physician's medical recommendations. In this case, there is no indication that Dr. Rosen and Dr. Peterson are part of a managed care organization responsible for claimant's treatment. They are also not treating physicians, therefore, there is no basis under subsection (1) for terminating her benefits because of her refusal to comply with Dr. Rosen's and Dr. Peterson's recommendations.

¶39 However, under section (2), the State Fund is entitled to stop benefits if claimant does not comply with her treating physician's recommendations. While the section provides termination of benefits upon a 14-day notice, the State Fund sought a declaratory judgment allowing termination rather than unilaterally terminating benefits as allowed by the section. The Court lauds its decision to do so under the circumstances of this case. During the pendency of this proceeding, the State Fund has continued to pay benefits, thus alleviating any hardship on claimant that would have resulted from a unilateral decision to terminate benefits. By seeking a Court determination, the State Fund acted reasonably to obtain an impartial determination as to whether it would be justified in cutting off benefits.

¶40 Under subsection (2), an insurer may cut off benefits if the claimant fails "to submit to medical treatment recommended by the treating physician, except for invasive procedures." Dr. Rosen saw claimant at the specific request of the State Fund, hence his role is that of an independent medical examiner, not a treating physician. While Dr. Peterson did act as a treating psychologist for a time, claimant discharged him long ago. His involvement in this case is at the request of the State Fund, which requested that he re-examine claimant. As with Dr. Rosen, his role is that of an independent examiner.

¶41 The treating physician in this case is Dr. Gallo. Therefore, it is her medical recommendations that I have to consider under section 39-71-1106, MCA. In doing so, it is clear that **in the past** the claimant has refused to follow some of Dr. Gallo's recommendations. She refused Dr. Gallo's recommendations for further psychological treatment and for weight loss. She also resisted treatment of her fingers and continued to chew her fingers, leading to further infections. Claimant's conduct may very well give rise to grounds to terminate benefits. However, it is also clear that **at present** the claimant is complying with Dr. Gallo's medical recommendations.

¶42 In addition to section 39-71-1106, MCA, there is case authority for terminating benefits when claimants refuse reasonable medical treatment which would improve their condition and reduce disability.

¶43 In *Dosen v. East Butte Copper Mining Co.*, 78 Mont. 579, 254 P. 880 (1927), the Montana Supreme Court held that an insurer is absolved from paying compensation where the claimant refused medical treatment recommended by his physicians. The claimant in that case suffered from osteomyelitis (a bacterial infection of the bone) and his physicians recommended amputation. He refused and pursued a claim for permanent total disability (PTD). His request for PTD was granted by a district court but on appeal the Supreme Court reversed, holding that the claimant's refusal to submit to a reasonable medical procedure absolved the insurer of liability. 254 P. at 888-89.

¶44 Based on *Dosen* the Montana Workers' Compensation Manual, section 10.44 sets out the following rule:

"Notwithstanding the fact that the osteomyelitis in his leg will continue, eventually causing the loss of his leg, and possibly his life, claimant always has stubbornly refused to submit to amputation, although little danger is to be apprehended from the operation . . . The board could not order claimant to submit to amputation of the leg, but it could absolve the company from making the payments during the period of claimant's obstinate and unreasonable refusal to submit to the operation advised by the surgeons in this case." 78 Mont. at 606, 254 P. at 888.

That rule was the subject of further discussion in *Small v. Combustion Engineering*, 209 Mont. 387, 681 P.2d 1081 (1984). In that case the Court overruled *Dosen* **but only to the extent** that it failed to consider whether a claimant's refusal to follow his physician's recommendation was reasonable 'in light of the "multitude of variables" appropriate to this complex factual determination . . . ' 209 Mont. at 394, 681 P.2d at 1084.

In *Small* the claimant suffered from a manic-depressive disorder that affected his ability to make a decision regarding surgery. While not overruling the rule that a failure to comply with reasonable medical recommendations relieves the insurer from liability, the Court in *Small* held that in determining the reasonableness of a claimant's refusal to submit to medical care the Court must take into consideration the "claimant's manic-depressive disorder and its effect upon his ability to make a decision regarding surgery." *Id.*

¶45 *Dosen* did not consider whether the medical recommendations had to be from the claimant's treating physician. Putting that question aside, in this case there is ample evidence that the claimant's mental capacity to make decisions regarding her medical care was diminished and, at times, lacking altogether. Under *Small* diminished capacity would preclude the insurer from terminating benefits even though the recommended care is in claimant's best interest and even though her refusal of that care may lead to her premature death.

¶46 On the other hand, if in fact the claimant is mentally incapable of making reasonable determinations regarding her medical care, she may, as suggested by Dr. Peterson, be in need of a medical guardian or even commitment to a mental health facility. In view of the fact that her past conduct may amount to suicide by increments, a substantial question arises as to whether she is mentally capable of making reasoned and rational decisions concerning her own medical care. If she is not capable of making reasoned and rational decisions regarding her own medical care, then her mental condition may require State intervention. In such case, I would be required to refer the matter to the county attorney and other state authorities authorized to initiate proceedings to protect the claimant . This Court has no authority to appoint a medical guardian or order claimant to submit to specific medical procedures. The Workers' Compensation Court's authority is limited to determining whether claimant is entitled to benefits.

¶47 In the future, claimant must follow her treating physician's advice unless she can demonstrate that it is reasonable for her not to do so, as discussed above, or that she is mentally incapable of making reasoned and rational decisions concerning her own

medical care. Her failure to comply with reasonable treatment recommendations may lead to termination of her benefits if she is competent to make reasoned and rational decisions regarding her own medical care.

JUDGMENT

¶48 The State Fund's request that it be allowed to terminate the claimant's benefits is **denied** for the reasons set forth above. The denial is **without prejudice** to the State Fund renewing its request in the event the claimant fails in the future to comply with treatment recommendations of Dr. Gallo or other treating physician.

¶49 Henceforth, the claimant must comply with Dr. Gallo's treatment recommendations or risk termination of her benefits or referral to State authorities authorized to initiate protective proceedings.

¶50 In light of the history of claimant's non-compliance with the medical recommendations of her treating physician, the Court retains jurisdiction to review the State Fund's request anew in the event that the claimant fails to comply with Dr. Gallo's recommendations in the future. If claimant fails to comply with Dr. Gallo's recommendations, and the evidence indicates she is mentally incapable of making reasoned decisions concerning her medical care, then the Court will refer the matter to the State authorities statutorily empowered to bring proceedings to protect claimant.

¶51 Claimant is entitled to her costs and shall file her memorandum of costs in accordance with Court rules.

¶52 The claimant's attorney successfully preserved the claimant's entitlement to benefits and is entitled to attorney fees out of the claimant's future benefits. Pursuant to his fee agreement with the claimant, which was filed post-trial, he is entitled to 25% of those future benefits. Therefore, the State Fund shall make future payments of 25% of compensation benefits to claimant's attorney and 75% of those benefits to claimant. The payments shall be made separately and sole-payee with respect to those amounts.

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

¶54 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 26th day of February, 2003.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Greg E. Overturf
Mr. Thomas E. Martello
Mr. R. Russell Plath

Submitted: January 28, 2003
Attachment

WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

WWC No. 2002-0677

MONTANA STATE FUND

Petitioner/Insurer

vs.

RB

Respondent/Claimant.

BEFORE THE HONORABLE MIKE McCARTER

WORKERS' COMPENSATION COURT

FOR THE STATE OF MONTANA

December 4, 2002

APPEARANCES

For the Petitioner: Mr. Greg E. Overturf
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2

1 MORNING SESSION, WEDNESDAY, DECEMBER 4, 2002

2 (Court convened at 8:03 a.m., with all

3 interested parties present, and the following is an

4 excerpt of the proceedings.)

5 P R O C E E D I N G S

6 RB,

7 being duly sworn, was examined and testified as

8 follows:

9 THE COURT: The question I have right now

10 and I don't want to rehash your whole history. I've

11 been through it, and I've been listening to these

12 doctors testify, and I have a pretty good idea what

13 your history is. My question to you right now is,

14 are you going to comply with what your doctors are

15 recommending for you, including continuation of your

16 weight loss?

17 THE WITNESS: Yes, I will.

18 THE COURT: Will you comply with

19 everything that your doctor is recommending?

20 THE WITNESS: Yes, I will.

21 THE COURT: That's very important. Let's

22 take a short break. I might have some more

23 questions for you, and I'll decide where we want to
24 go from here. Let's take five minutes.

25 (Recess from 10:14 a.m. to 10:30 a.m.)

3

1 THE COURT: RB we were in Billings

2 yesterday and listened to Dr. Rosen and listened to

3 Dr. Peterson and then we listened to Dr. Gallo this

4 morning. I've been through your medical records,

5 and there's a lot of them. I go through medical

6 records a lot, and so I know how to read them.

7 I've talked to your attorney, Russ Plath,

8 as well as to other counsel, and I don't think in

9 light of what I'm going to do with this case that we

10 need to have you testify in this matter any further

11 than what questions I ask you.

12 The important question to me at this point

13 is whether or not you are going to cooperate with

14 Dr. Gallo in your care. My involvement in this

15 matter -- I have what I call limited jurisdiction.

16 I can only determine matters involving benefits.

17 So, I can make a determination as to whether or not

18 the State Fund, which is paying for your care and

19 also your benefits, whether they can cut those

20 benefits off.

21 The statute allows them to cut them off

22 and allows me to order them to cut them off if you
23 don't cooperate in your medical care. Dr. Gallo
24 indicated quite honestly and accurately that in the
25 past you haven't cooperated in your care.

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1 Cooperation means following medical
2 advice. It means she prescribes a special diet,
3 then you need to follow that diet. If she orders
4 that you wear gloves, then you need to wear those
5 gloves, and if she does dressings, you leave those
6 dressings alone, and those sorts of things. It
7 requires all of those. And there is plenty of
8 evidence in this case to indicate that you haven't
9 done that.

10 The biggest issue for me when I was
11 listening to this yesterday was whether or not -- I
12 guess what the medical providers and the
13 psychiatrists and the psychologists call it is
14 whether or not you have decisional capacity. What
15 that means is whether or not from a psychological
16 point of view you are able to make a conscious
17 voluntary choice in those sorts of things.
18 Obviously, you've had a hard time and a
19 difficult time. The illnesses you've had
20 contributes to that and that makes it much harder.

21 I think it is very understandable to become
22 depressed. It's very understandable to become
23 anxious. These situations are very very difficult.

24 And the question in my mind is whether or
25 not you had the capacity to make choices and

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1 basically the capacity to follow your physician's
2 advice. If you have that capacity and you just
3 don't choose not to follow your doctor's advice,
4 then I have the authority to cut the benefits off.

5 THE WITNESS: Right.

6 THE COURT: If you don't have that
7 capacity, then that becomes a matter that is beyond
8 my jurisdiction and then it becomes a State matter.

9 The State can take control of your care by
10 appointing a guardian, for example, and for people
11 who are into self-destructive type of things, there
12 are even provisions to commit people for mental
13 health care. Your case is quite complicated, and
14 you have quite a lot of problems.

15 So, when I left Billings yesterday, the
16 question in my mind was whether or not -- one was
17 whether or not you were cooperating at this point in
18 time, and number two, if you weren't cooperating at
19 this point in time, whether or not you had

20 decisional competency to make voluntary decisions.

21 In listening to Dr. Gallo this morning and
22 looking at your recent history, I think, number one,
23 you appear to be motivated, and you are following
24 the advice. As long as you are following the advice
25 and listening to Dr. Gallo, I don't want to

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1 interrupt that because you are making progress. I
2 don't want to do anything that's going to interrupt
3 that progress. I want you to continue to make
4 progress, and I want you to get better, and I want
5 you to get out of this facility. And you're on that
6 track.

7 THE WITNESS: I'm trying hard to get out
8 of here.

9 THE COURT: Right, and you're on that
10 track. So, I'm not going to do anything with regard
11 to your benefits, and I don't need to make a
12 referral to the State of Montana, as far as
13 questioning your competency, because I'm persuaded
14 right now that you are competent right now, and I am
15 persuaded that you are cooperating with your
16 physician.

17 My greatest concern is that you continue
18 to cooperate. One of the reasons I wanted to talk

19 to Dr. Gallo is to impress upon her, because she did
20 not understand that until I told her, that you have
21 a duty and you have an obligation to cooperate with
22 her. You have to follow her advice or if you don't
23 follow her advice there are consequences. I've
24 explained to you what those consequences are.
25 I wanted to make sure that she understood

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1 that she is in control of your medical care, and
2 that includes where she thinks you should have some
3 other physician help in your treatment, whether it
4 be a neurologist, a physical therapist, a
5 psychologist or a psychiatrist, that you need to see
6 that other physician, and you need to listen to that
7 other physician. Do you understand all of that? Do
8 you understand what I'm saying?

9 THE WITNESS: Uh-huh.

10 THE COURT: So, at this point in time, I'm
11 not going to do anything in this case. I'm going to
12 let you continue under the care of Dr. Gallo. I
13 think Dr. Gallo is a very caring physician, and she
14 wants what is best for you. You have to listen to
15 her, and you have to follow her advice. That's
16 absolutely essential.

17 But because of my concern that you have a

18 pattern here that we talked about, waxing and
19 waning. Because of that, I'm going to retain
20 jurisdiction in this case, which means I am sort of
21 going to supervise it.

22 I'm not going to actively supervise it,
23 but I'll still have this case pending before me, and
24 if something happens that changes things, then I
25 will come back to Miles City and listen to what is

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1 going on and make a decision at that point as to
2 whether or not at that point you're cooperating.

3 If you're not cooperating, then I'll have
4 to make a decision as to whether or not you
5 basically have the capacity to make choices. And if
6 you don't have that capacity, then I'm going to have
7 to refer to the State in deciding if you have that
8 capacity at that point or if you just were being
9 noncooperative. At that point, I would have to say
10 we are going to cut off your benefits until you
11 start cooperating.

12 THE WITNESS: Okay.

13 THE COURT: So, it's essential.

14 Basically, what I'm telling you is, you have to
15 cooperate with Dr. Gallo and get better.

16 THE WITNESS: Okay.

17 THE COURT: Do you understand all that?

18 THE WITNESS: You bet.

19 THE COURT: Do you have any questions?

20 THE WITNESS: No. I feel better since

21 September when I did have that hospital stay.

22 THE COURT: It scared you?

23 THE WITNESS: No, I didn't know what

24 happened. I've been off all my meds except for very

25 few. I don't have high blood pressure pills any

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1 more and several others. And like she said, I did

2 go down on my pain meds and stuff. I feel a lot

3 better. I've been told I even have better color. I

4 look more healthier. So, I'm feeling a lot better.

5 THE COURT: Have you --

6 THE WITNESS: Now, as for the chewing, I

7 have not done that for a long time. I'm chewing gum

8 instead.

9 THE COURT: But it's important that you

10 continue that, that you not relapse.

11 THE WITNESS: Right.

12 THE COURT: It's important that you

13 continue your diet, and I think you'll feel a lot

14 better as you continue to lose weight. That in

15 itself is going to help.

16 THE WITNESS: Yes, I agree.

17 THE COURT: Okay. All right. Russ.

18 MR. PLATH: Judge, I've previously given
19 the clerk Exhibit 63, that is pages 1 through 14,
20 updated medical records from Dr. Gallo that she just
21 photocopied out of her chart. I will also be
22 supplementing as Exhibit 64, mental health treatment
23 records that I can obtain from the Mental Health
24 Center right next door here. I'll have to do that
25 by mail, but I can get those and mail those out
10

1 then.

2 THE COURT: That's fine. Let me ask
3 counsel this, do you want me to write something
4 brief, something extensive or do you want what I
5 said here just to probably transcribe that and enter
6 that?

7 MR. OVERTURF: Judge, I would prefer
8 something written and something that sets out a
9 little bit of the history and sets out kind of what
10 we've decided here today. I'd like something that
11 at least reiterates the importance of the mental and
12 psychological care.

13 THE COURT: Okay. We can do that. We'll
14 do what I discussed yesterday. I'll ask you to get

15 together and sort of agree on the history, your
16 medical history basically from the notes, and I'm
17 just asking for their help to put that together.
18 I've read it but it takes time to put that
19 together so I'm just asking them to help me do that.
20 That will take a little time before we get that out.
21 It doesn't change anything. You know what I've
22 ruled, and you know what you have to do. You have
23 to get better, okay?

24 THE WITNESS: I will.

25 THE COURT: Okay. Anything else?

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1 MR. PLATH: Nothing further.

2 MR. OVERTURF: Thank you, Judge.

3 (The proceedings concluded at 10:40 a.m.)

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1 STATE OF MONTANA)

2) ss. REPORTER'S CERTIFICATE

3 COUNTY OF YELLOWSTONE)

4 I, Cynthia M. Smith, do hereby certify

5 that I am a Certified Shorthand Reporter and Notary

6 Public within the State of Montana; that previous to

7 the commencement of the examination, the witness was

8 duly sworn to testify to the truth.

9 I further certify that this hearing was

10 taken in shorthand by me at the time and place

11 herein set forth and was thereafter reduced to

12 typewritten form, and that the foregoing constitutes

13 a true and correct transcript.

14 I further certify that I am not related to,

15 employed by, nor of counsel for any of the parties

16 or attorneys herein, nor otherwise interested in the

17 result of the within action.

18 In witness whereof, I have affixed my

19 signature and seal this 14th day of January,

20 2003.

21 My commission expires September 20, 2006.

22

23 \s\ CYNTHIA M. SMITH

Cynthia M. Smith
24 2506 Old Hardin Road
Billings, Montana 59101
25 (406) 252-9647

1. "Peripheral neuropathy" is "a disease or degenerative state (as polyneuropathy) of the peripheral nerves in which motor, sensory, or vasomotor nerve fibers may be affected and which is marked by muscle weakness and atrophy, pain, and numbness." Merriam-Webster Medical Dictionary. In claimant it is manifested by neuropathic (nerve type) pain.