

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 45

WCC No. 9302-6686

ANGELA CARMODY

Petitioner

vs.

EMPLOYERS INSURANCE OF WAUSAU

Respondent/Insurer for

DELTA AIRLINES, INCORPORATED

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The trial in this matter was held on October 25, 1993 in Helena, Montana. Petitioner, Angela Carmody (claimant), was present and represented by Mr. Bradley J. Finn. Respondent, Employer's Insurance of Wausau (Wausau), was represented by Mr. P. Mars Scott. Claimant was sworn and testified. Exhibit No. 1 was admitted. Exhibit No. 2 was objected to and refused. The parties agreed that the following depositions are to be considered a part of the record: Clarisse Landry, Dick Mogensen, Darlene Keene, Dr. Donald Harrell, Dr. Jeffrey Hansen, Angela Carmody and Patricia Hink (taken on October 19, 1993 and November 8, 1993 and attached to the Duplicate Original Hink Deposition filed November 23, 1993).

The issues presented concern claimant's entitlement, if any, to wage supplement and vocational benefits, attorney fees and costs.

Having considered the Pretrial Order, the testimony presented at trial, the demeanor of the claimant, the depositions and the exhibit, the Court makes the following:

FINDINGS OF FACT

1. At the time of trial claimant was 29 years of age. She was born in Great Falls, Montana and graduated from Broadwater High School in Townsend, Montana in 1983.
2. In 1984 claimant attended three months of schooling at the Air Academy in Vancouver, Washington, which qualified her for employment as an airline ticket, reservation, and travel agent.

3. On March 11, 1985, she was hired by Western Airlines (Western) as a ramp agent. The duties of her position included checking in passengers and handling cargo and baggage.
4. In her employment application to Western, claimant indicated that she was willing to work "anywhere on Western's system." (Mogensen Dep.; Ex. M.) She was initially assigned by Western to a job in Ontario, California.
5. Claimant transferred to Billings, Montana in October 1985 following the completion of her initial probationary period with Western. Claimant sought the transfer.
6. Delta Airlines (Delta) bought or took over Western in 1987. Western employees, including claimant, were offered continued employment with Delta. Claimant accepted and became a Delta employee. While the insurer argues that claimant was contractually bound to work at any location within Delta's system, claimant denies agreeing to go anywhere outside of Montana. (Tr. at 17-18.) Respondent has not produced any signed employment application or employment agreement between Delta and claimant wherein claimant agreed to accept reassignment outside the State of Montana. I find that claimant did not agree to Delta assigning her a job outside of Montana. I also find that she desired to remain in Montana.
7. After taking over Western, Delta assigned some of the Billings agents to counter positions and others to ramp work. Claimant was designated a counter agent and her primary duties were checking in passengers and passenger baggage. She continued in that position until her employment with Delta was terminated.

Claimant's First Injury

8. On December 22, 1985,⁽¹⁾ claimant injured her right knee while working for Western. She tripped on a ground power cord as she was directing an airplane to its parking position at the Billings terminal. (Uncontested Fact No. 4.)
9. At the time of the 1985 injury, Western was insured by Industrial Indemnity Company, which accepted liability and paid medical and disability benefits.
10. Claimant first sought medical treatment from Dr. Jeffrey Hansen, an orthopedic surgeon, on January 28, 1986. On January 31, 1986, Dr. Hansen performed an arthroscopy "with removal of a displaced mass of fat pad and synovium that was interarticular and lateral compartment". (Hansen Dep.; Ex. A.)
11. For the next several months claimant's knee continued to cause her pain and discomfort. On May 1, 1987, a second arthroscopic examination took place with the excision of synovial plica and a lateral release. The release was particularly significant because it allowed the patella (knee cap) to glide more evenly. (Harrell Dep. at 15-16.) The nature of claimant's injury and condition are further described in Finding No. 22.
12. On June 9, 1988, Dr. Hansen found that claimant had "basically reached maximum medical recovery" and gave a 22% impairment of the right lower extremity, which

translates to a 9% whole person impairment. In discussing this impairment rating the following exchange occurred:

Q. Would it be true, then, that she had really not reached maximum stability on June 9, 1988 because she was still having problems and going through a process of improvement?

A Well, I guess that depends on how you define it. She had reached maximum stability, but she still had a bad knee, and she got as good as she's going to get with a knee that wasn't great, and that's how I would characterize it, more [sic]. The problem with these kinds of things in saying when they're at maximum stability, they have their ups and downs, little episodes, whether it's the weather or sitting for a long period of time or whatever can aggravate it, but I think at that point in time it would be reasonable to call it at maximum stability, although not perfectly healed and asymptomatic, you know.

(Hansen Dep. at 38.)

13. Claimant was off work for approximately three months following the second surgery. (See Hansen Dep.; Ex. A.) She returned to work and thereafter worked continuously until February 17, 1991. The office notes of Dr. Hansen, who treated her knee injuries throughout, indicate that he did not examine or treat her between November 1, 1988 and February 21, 1991. (*Id.*)

Claimant's Subsequent Injuries

14. On February 17, 1991, claimant suffered a second industrial injury while employed by Delta. She reinjured her right knee when she twisted it while carrying two cases of pop up a stairway. (Uncontested Fact No. 5.) At that time Delta was insured by Wausau, which accepted liability and paid medical and disability benefits.⁽²⁾

15. Claimant initially sought treatment at the emergency room. She was seen by Dr. Dennis Tek, who immobilized her knee and prescribed ice and elevation for two days. He also prescribed pain medication and told her to see Dr. Hansen. (Hansen Dep.; Ex. C.)

16. Dr. Hansen saw the claimant on February 21, 1991. He took her off work for a couple of weeks to "let things quiet down." (*Id.*) When she returned to work on March 9th, Dr. Hansen prescribed "light duty for 2 weeks, then return to full duty. . . ." On April 1, 1991, the light duty prescription was extended ". . . until further notice." (*Id.*) On April 1st the claimant complained to Dr. Hansen "that her job is not really allowing her light duty, even though we requested it." In his April 11, 1991 office note, Dr. Hansen wrote, "It is certainly above and beyond our control, but I think doing extremely heavy exertion can be exacerbating to her knee problem." (Hansen Dep.; Ex. A.)

17. In an April 26, 1991 letter to Dick Mogensen, station manager for Delta, Dr. Hansen wrote:

Angela has a knee that is going to bother her off and on forever. ... I think she has a knee that has some difficulty with chronic irritation of the patellofemoral joint and is continuing to be susceptible to injury. Any job that requires her to be on her feet for a long period of time and do lifting, twisting, turning and moving could cause her to have an increase in her symptoms.

(Hansen Dep.; Ex. C.)

18. Dr. Hansen recognized that there was no light duty work for the claimant and requested that she continue with her usual work. He explained his philosophy by saying,

I did tell Mr. Mogensen that I realized that from a realistic standpoint, she really couldn't be light duty, and I thought that, well, if she can tough it out -- I hope that she can, like I mentioned earlier, get used to this, live with it -- that she can do her job.

(Hansen Dep. at 46.)

19. On August 8, 1991, claimant again banged her right knee when, while checking a passenger in for a flight, a back pack rolled off of the conveyor belt "and hit me in the back of the legs and shoved my leg over and twisted it and [sic] into the counter." (Tr. at 22.) The deposition testimony of Darlene Keene, upon which the insurer relies in disputing claimant's version of the incident, was taken three years after the episode and did not comport with a written statement she gave earlier. Moreover, claimant reported the incident to her physician on the next day, and the Court finds her testimony about the incident credible.

20. On August 9, 1991, claimant was seen by Dr. Hansen, who considered the August 8 incident to be a new episode. However, his examination revealed "no fluid in the joint, no major aggravation," and he characterized it as a "minor nuisance/aggravation more than anything." Dr. Hansen recommended conservative treatment and took the claimant off work for five days with instructions to return at her own discretion. (Hansen Dep.; Ex. A) On September 19, 1991, Dr. Hansen again examined claimant. He noted "exquisite tenderness in the lateral facet of her patella," and concluded, "I think the best thing for her would be to change jobs . . . to a position that does not require long term standing, as well as lifting of heavy luggage." (Hansen Dep.; Ex. A) Claimant did not thereafter return to work.

21. Claimant continued to work following the February 1991 aggravation, even though she continued to experience knee problems. (Tr. at 27-28.) Neither party presented medical evidence showing that claimant had reached maximum medical healing following her February 17, 1991 injury. Claimant's testimony that she had been limping a few days prior to her August 8, 1991 injury indicates that she continued to suffer from the effects of the February exacerbation. In her proposed findings, claimant asserts that she had not reached maximum healing prior to August 8, 1991, and the Court so finds.

22. Claimant's knee condition is patellofemoral pain syndrome (Ex. No. 1; Hansen Dep. at 27-28, 32), which essentially describes anterior (front) knee pain in the area of the knee cap, and chondromalacia of the patella (knee cap), which is a softening and

roughing of the articular cartilage of the patella (Hansen Dep. at 31; Harrell Dep. at 11). The latter condition (chondromalacia) is typically caused by either direct trauma to the patella or "traumatic subluxation, which means that the patella is sliding out of the groove laterally." (Harrell Dep. at 11.) The basic diagnosis and condition of claimant's knee has remained unchanged since her second surgery in 1987.

23. A key controversy in this case is whether either or both incidents of February 17 and August 8, 1991 permanently aggravated claimant's preexisting knee condition. Insurer takes the position that any aggravations were merely temporary and that claimant's current condition is due entirely to her December 1985 injury. While the evidence is less than overwhelming, I find that the February 17 and August 8, 1991 incidents permanently worsened and permanently aggravated claimant's preexisting condition. The following facts and testimony were important to me in reaching my conclusion in this regard:

a. Dr. Hansen, while characterizing the incidents as "little" or "minor aggravations" (Hansen Dep. at 40, 63), also testified that they were "new episode[s]" (*Id.* at 47:8) and "minor new injuries on top of an old, existing condition, stimulating recurrence of her symptoms." He also noted that the incidents might have caused a flareup of her symptoms due to irritation produced by a grinding of the knee cap against the femur, and that such grinding could also have caused further physical damage to the articular surface of her patellofemoral joint. (*Id.* at 64, 66.) Pertinent portions of Dr. Hansen's testimony are set out in the margin.⁽³⁾

b. Dr. Harrell characterized the February and August 1991 incidents as subluxations of the patella. (Harrell Dep. at 15-16; 49-50.) While he did not specifically address the aggravation issue in his deposition testimony, in his written report Dr. Harrell states:

It is my feeling that her symptoms have been patellofemoral pain from the very begining [sic] of her history and that this was appropriately treated at her second operation with a lateral release. It is also my feeling that **each of her injuries in which she struck the patella, aggravated the pre-existing patellofemoral arthrosis and are all responsible for her present condition. . . .**

(Ex. No. 1; emphasis added.)

c. Claimant had more than a two year medical hiatus after fully recovering from her second 1987 surgery. She continued working for Delta and did not require medical attention between November 1, 1988 and February 17, 1991. Following the two 1991 incidents, her knee pain increased in severity and constancy.

Termination of Employment

24. Following the August 1991 reinjury, claimant returned for four days and then never returned to her job as a counter agent. (Carmodoy Dep. at 32). On June 16, 1992 Delta terminated her employment due to her failure "to maintain Delta standards for continued

employment." (Mogensen Dep.; Ex. D.) Her supervisor Dick Mogensen recommended the termination because claimant had not returned to work and Delta needed to fill her position. (*Id.* at 62.)

Ability To Return To Time-of-Injury Job

25. The insurer disputes claimant's contention that she was unable to return to her old job as a counter agent.

26. Claimant saw Dr. Hansen on September 19, 1991, at which time she was doing better but still experiencing pain. Dr. Hansen recommended:

Under the circumstances, I think the best thing for her would be to change jobs within the same company to a position that does not require long term standing, as well as lifting of the heavy luggage. I think that that's based more on not absolute medical necessity, but a reasonable approach to her problem on a long term basis. If she were to go back to work, she would most certainly [sic] be re-aggravating the knee, missing time from work and continuing to have a rather disruptive or disrupted work schedule. . . .

(Hansen Dep., Ex. A.) He reaffirmed these observations during his deposition.

27. The claimant last saw Dr. Hansen on June 1, 1992, at which time he indicated that she had reached maximum healing. In a letter to claimant's attorney on June 23, 1992, he opined that the claimant's impairment rating was 9% of the whole person. (The 9% rating was the same rating given after claimant reached maximum healing following her December 1985 injury.) Dr. Hansen further stated that claimant was "employable in any job that does **not** require heavy lifting or prolonged standing or walking."

28. In his deposition Dr. Hansen reaffirmed his recommendation that claimant find lighter employment. He testified that her job would continue to cause flare-ups and new aggravations. However, he characterized his recommendation that she change to lighter work as one involving "reasonable management" rather than a "direct medical decision". He left it up to the claimant to determine whether she could continue to tolerate the job:

Q. You also make a comment that that's not based on an absolute medical necessity but is based upon a reasonable approach to her problem on a long-term basis; is that correct?

A. Right. Exactly. If she said, "Well, my knee bothers me, but I'm going to keep this job. I'm going to keep lifting these suitcases. I'm just going to be careful," I would have had no dispute with it.

If she said, on the other hand, "It's just not working out. I'm not getting along with my employer because my knee doesn't work right, and I'm not comfortable with the way it is. I just don't like what keeps happening," then I would lean the other direction, and I think that's a management issue, like my note says, more than a direct medical decision.

(Hansen Dep. at 50-51.

29. Dr. Donald P. Harrell, a Missoula orthopaedic surgeon who conducted an Independent Medical Examination at the request of the insurer, was asked whether claimant could return to her time-of-injury job. He responded that "if that position required activities exceeding the limits that I placed on her, then I **doubt** that she could." (Harrell Dep. at 57.) In his report and initial testimony he restricted claimant from repeated climbing of stairs, carrying weights greater than 25 pounds up and down stairs or for distances exceeding several hundred feet, kneeling, and deep knee bends. (Ex. No. 1 and Harrell Dep. at 35-36.) However, in cross-examination Dr. Harrell agreed that any job that requires claimant to be on her feet for a long period of time doing lifting, twisting, turning, and moving could cause an increase in symptoms and expose her to further injury. (Harrell Dep. at 53.) He also added a restriction that she not "bend and lift 25 pounds":

Q Is it your testimony, then, that Angela could be employed in a job that involved twisting and turning, provided she did not lift 25 pounds?

A Provided she didn't have to bend and lift 25 pounds or climb stairs carrying anything that weighed over 25 pounds. Normally on flat surfaces you can twist and do that sort of thing without a problem.

(Harrell Dep. at 54.)

30. Claimant's job involved standing for long periods of time, and twisting and turning. It also involved bending up to 50% of the time to handle luggage weighing up to 70 pounds (Hink Dep., Ex. No. 2), therefore exceeding Dr. Harrell's restrictions.

31. The insurer referred this case to Patricia Hink (Hink), MS CRC CRRN, of Nursing & Vocational Consultants to provide rehabilitation services, specifically to "establish what, if any, wage loss this claimant will have." (Hink Dep. at 7.) The initial referral did not ask Hink to determine whether claimant could return to her old job. (Hink Dep. at 7.) When asked if she was satisfied that claimant could not return to her time-of-injury job, Hink testified:

Well, the one thing that we did not have [was] an early disapproval of that job, but it was my perception that given the physical requirements of that, that the physician would in all probability disapprove it. And so I never really got the impression that we were actively pursuing that job.

(*Id.* at 21; and see 42-43.) She also testified that Dr. Harrell's restriction ruled out claimant's return to her old job. (*Id.* at 52.)

32. Based on claimant's testimony concerning her condition and her work, which the Court finds credible, and the testimony recited in the foregoing paragraphs, the Court finds that claimant was physically unable to return to her old job as a counter agent for Delta. Moreover, the insurer did not seriously contend otherwise until this litigation.

Wage Supplement

33. Delta had no positions available in Montana which were compatible with claimant's physical condition and restrictions.

34. Delta did offer claimant a position in Salt Lake City. Claimant believed that this transfer would mean taking a salary cut of as much as \$400 or \$500 per month. At Hink's deposition on **November 8, 1993**, information was given which would indicate that if claimant had accepted the transfer she would have received her old salary. However, prior to Hink's deposition there was no credible evidence verifying that claimant was ever so advised, or to contradict claimant's belief that she would earn approximately \$3.00 less per hour. The insurer conducted a post-trial deposition of Hink to bolster its argument that the transfer to Salt Lake City would not cause a wage loss. Hink's testimony was based on a conversation between Hink and a Delta employee after Hink's first deposition. During the deposition a portion of a Delta letter to insurer's counsel was read into the record without disclosure of the complete letter. This post-trial hearsay is given no weight whatsoever.

35. In any event, claimant was unwilling to accept a position outside the State of Montana and refused the Salt Lake City offer.

36. Claimant's wage at the time of her February 17, 1991 injury was \$2,475.00 per month or \$14.73 per hour. (Hink Dep. at 25.)

37. Ms. Hink undertook labor market research focusing primarily in the Billings area. Based on the claimant's skills and a transferrable skills analysis, she concluded that the post-injury jobs which claimant can perform generally pay "about six dollars fifty cents to eight dollars an hour." (Hink Dep. at 30.) She further testified that even with a four year college degree (other than in nursing), claimant's potential wages would generally not exceed the amount of claimant's Delta wages. (*Id.* at 31.)

38. Claimant married a Canadian citizen on February 1, 1992, and has lived in Canada since that time. She lives approximately a four-hour drive from Montana. Her husband's earnings in Canada are approximately the same as what claimant earned while working for Delta. She and her new husband would have returned to Montana if she had been able to secure employment at her old wage. Since she was unable to do so, she has since obtained a work permit in Canada and found employment as a receptionist for a Ford dealership. She earns \$1,500.00 Canadian, which is approximately \$1,120.00 American. (Claimant testified that the exchange rate at the time of trial was \$1.34 Canadian for \$1.00 American.) She is presently taking night courses in business administration with an emphasis in accounting at a college in British Columbia. Completion of a "certificate in accounting" which is the equivalent to a Certified Public Accountant in the United States, will take approximately six or seven years since it is being pursued on a part-time basis.

39. Claimant has a loss of earning capacity of at least \$6.50 per hour.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over this matter pursuant to section 39-71-2905, MCA.

2. In its proposed conclusions of law, the insurer argues that "[c]laimant has not presented credible evidence that she suffered a compensable injury on February 17, 1991 . . . , " and spends the next two pages arguing that the claimant failed to present satisfactory proof establishing that the February 17 incident met either the definition of injury or the definition of accident under section 39-71-119, MCA (1989). (Respondent's Proposed Findings of Fact and Conclusions of Law at 15-17.) The insurer contends at page 21 that :

Employer-Defendant is not bound by their initial acceptance of claimant's 1991 claim. The overwhelming amount of evidence presented to the Court can only lead to the conclusion that claimant did not suffer a new injury on February 17, 1991 or on August 8, 1991. Claimant received a windfall on temporary total disability benefits from August 8, 1991 until May 1993. . . . Defendant-Employer accepted the claim before all of the evidence in this case had been developed. As the depositions were taken, it became evident that Defendant-Employer should not have accepted the claim initially. During discovery claimant had noticed that the evidence was building that the 1991 injuries never were actually new, independent injuries.

These contentions fly in the face Uncontested Fact No. 2 of the Pretrial Order, which states:

That on February 17, 1991, Claimant suffered an industrial injury arising out of and in the course and scope of her employment with Delta Airlines, Inc. in Yellowstone County, Montana. Claimant injured her right knee when she twisted it as she was carrying two cases of pop up a stairwell for loading onto a flight.

Uncontested Fact No. 5 also informs us that since August 8, 1991, claimant has been paid partial disability benefits at a rate "based upon her February 17, 1991 injury."

The insurer's insistence that no industrial accident occurred on February 17, 1991 is incompatible with the stipulated facts contained in the Pretrial Order signed by the insurer's counsel. Insurer's counsel is admonished that the signing of documents submitted to the Court is certification that "to the best of his knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact." § 39-71-2914, MCA.

The insurer also offers no citation of authority for its position that at this late date it can simply withdraw its previous acceptance of liability. Fraud, mutual mistake of fact, or some similar basis for avoiding the original acceptance is not one of the issues set forth in the Pretrial Order. The statutory requirement that an insurer accept or reject any claim within 30 days, section 39-71-606 (1), MCA, and the insurer's affirmative act of accepting a claim, at the very least preclude the insurer from later contesting liability unless it can affirmatively demonstrate some recognized legal cause for voiding the original acceptance. Fraud and mutual mistake of fact may provide such ground, but these are affirmative defenses which must be affirmatively pled and set out as specific issues in the pretrial order. See Rule 8, Mont.R.Civ.P.; **Fruth v. Devito**, 546 P.2d 1183, (Ariz. 1976) (*holding that a defense based on mistake of fact must be pled affirmatively and that failure to set forth such issue in the pretrial order precludes the trial court from considering the defense*); **Scheitlin v. R.&D. Minerals**, 217 Mont. 8, 13, 701 P.2d 1385

(1985) (*fraud is an affirmative defense which must be set forth in the answer to the complaint*). Fraud, mistake of fact, and other matters in avoidance of an insurer's acceptance of liability are not matters which are fairly considered as within broadly phrased issues such as "[w]hether the claimant is entitled to wage supplement and vocational benefits pursuant to, respectively, Section 39-71-703 and 39-71-1003, M.C.A." or "whether Claimant's disability, if any, is caused by her industrial injury of August 8, 1991," especially when not specifically set forth as contentions or defenses in the insurer's response.⁽⁴⁾ They are also matters on which the asserting party typically bears the burden of proof. ***Bengala v. Conservative Savings Bank***, 250 Mont. 101, 105, 818 P.2d 371 (1991) (*the party asserting fraud bears the burden of proof by a preponderance of evidence.*); ***Archer v. LaMarch Creek Ranch***, 174 Mont. 429, 435, 571 P.2d 379 (1977) (*"the burden of proving an affirmative defense rests on the defendant"*). While the Workers' Compensation Court has not adopted formal pleading rules requiring a respondent to set forth its affirmative defenses (compare with Rule 8(c), Mont.R.Civ.P.), its rules **do** require the response to the petition, as well as the pretrial order, to set forth respondent's contentions. ARM 24.5.302(a) and 24.5.318(f). A contention in the nature of an affirmative defense should be specifically identified in the respondent's contentions and stated as a separate issue in the pretrial order. Lacking such statement, the defense will not be considered by the Court.

Moreover, the credible evidence presented in this case simply does not support the insurer's position. Section 39-71-119, MCA (1989), defined injury and accident as follows:

39-71-119. Injury and accident defined. (1) "Injury" or "injured" means:

(a) internal or external physical harm to the body;

. . . .

(2) An injury is caused by an accident.

(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.

A preponderance of credible evidence shows that the claimant in fact suffered a compensable aggravation to her right knee on February 17, 1991, when going up stairs. She suffered an additional bump of the knee on August 8, 1991. On both occasions she suffered immediate pain and needed medical care. On each occasion there was an unexpected traumatic incident or unusual strain which occurred as a specific event during a single work shift.

3. Claimant bears the burden of proving not only that an industrial injury occurred but that "the injury was the proximate cause of his [or her] disabling condition." ***Eastman v.***

Transport Ins. Co., 255 Mont. 262, 266, 843 P.2d 300 (1992). Claimant has satisfied that burden.

The law concerning work-related injuries which aggravate preexisting injuries is well established and must be followed:

The well established rule in Montana is that an employer takes his employee subject to the employee's physical condition at the time of employment. The fact that an employee is suffering from or afflicted with a pre-existing disease or disability does not preclude compensation if the disease or disability is aggravated or accelerated by an industrial accident. [Citations omitted.]

Robins v. Anaconda Aluminum Co., 175 Mont. 514, 518, 575 P.2d 67 (1978); accord **Shepard v. Midland Foods, Inc.**, 205 Mont. 146, 151, 666 P.2d 758 (1983). If the preexisting disease or condition is "*lit up, aggravated or accelerated* by an industrial injury," the worker is entitled to the benefits provided by the Workers' Compensation Act. **Birnie v. U.S. Gypsum Co.**, 134 Mont. 39, 45, 328 P.2d 133 (1958). This principle applies even in cases where the preexisting condition is the result of a *prior* workers' compensation injury. **Robins**, 175 Mont. at 519-20.

In **Robins** the Supreme Court rejected a contention that the effects of a prior work-related injury must be factored out of the disability determination in a subsequent injury case. In 1964 Mr. Robins suffered broken bones and a head injury in an industrial accident. He suffered a permanent disability but was able to return to work in a less physically demanding job at a lesser wage. In 1973 he fell at work and injured his back. The accident aggravated a congenital back condition and increased his existing disability. The insurer argued that "only the effects of the 1973 injury can be considered" and "that any disability claimant has from the 1964 injury cannot be a factor in determining claimant's current disability." *Id.* at 519. The Supreme Court rejected the insurer's arguments:

The 1964 injury caused claimant to have some disability. However, he was able to return and did return to work. The 1973 injury caused additional disability. After this injury, claimant tried but could not return to work. Thus, this last injury combined with the prior injury **entitles claimant to compensation to the extent he is now disabled. In determining the degree of disability, we conclude that both injuries must be considered.** [Emphasis added.]

Id. at 519-20. In determining claimant's entitlement to benefits, the Court considered claimant's "overall disability" *following* the 1973 accident and affirmed the Workers' Compensation Court determination that claimant was entitled to permanent total disability benefits on account of the 1973 accident.

In **Birnie**, despite suffering preexisting arthritis of his leg, claimant had been able to work. The Supreme Court held that the industrial accident which aggravated the arthritis was disabling and compensable since it resulted in his inability to return to his previous job.

The Workers' Compensation Court and Supreme Court reached the same conclusion in **Shepard**. In **Shepard** the claimant was suffering degenerative arthritis of his knees. The condition had developed over many years. Claimant's weight lifting, obesity and jobs as a general laborer contributed to his condition. He continued to work until February 14, 1980, when he slipped and fell at work, twisting and striking his left knee. The knee became very painful and his physician fitted him with a knee brace. He returned to work for ten days but was unable to continue working. His physician noted that "his knees have collapsed." At trial the claimant's doctor testified that claimant's condition was caused by many small injuries and that his "knee deterioration would have resulted in his forced retirement "within a short period of time" **irrespective** of his injury. Nevertheless, this Court held that claimant was entitled to permanent total disability benefits on account of the February 14, 1980 aggravation. The Supreme Court affirmed, pointing out that the February 14 incident "aggravated his underlying condition of degenerative arthritis, accelerating the approach of his eventual breakdown and total disability." *Id. at 151-2*. Responding to the insurer's argument that claimant's underlying condition would have forced him to retire early anyway, the Court responded that "unchallenged medical evidence establishes that the preexisting condition was aggravated and the degeneration and breakdown were **accelerated** by the many small traumas to his knees caused by Mr. Shepard's work with Midland and also by his February 14, 1980 industrial accident." *Id. at 154 (emphasis added)*.

Clearly then, a claimant who suffers a work-related aggravation to a preexisting condition, whether that condition is caused by a work-related or non-work related disease or injury, is entitled to full disability benefits if the aggravation increases disability and prevents the worker from returning to his or her job. That is what occurred in this case.

Claimant was able to work for nearly five years following her 1986 injury. In mid-1988 she reached maximum healing with respect to that injury. Between November 1, 1988 and her February 17, 1991 injury, she worked without resort to medical care. It was only after the February 17, 1991 and August 8, 1991 incidents that the claimant's knee became too painful for her to continue working. The Court is persuaded that claimant experienced an increase in pain following these injuries and that claimant was unable to continue working as a result of the increased pain. Although pain is subjective, and the ability to bear it varies by individual, its genuineness and impact must be considered on a case-by-case basis. Dr. Hansen's testimony that he left it up to the claimant to determine if she could continue working is not conclusive evidence that claimant was able to return to work. In fact, it supports cessation of work where other credible evidence establishes that claimant could not endure the pain caused by continuing her employment. **See Robins at 521**. Dr. Hansen's testimony merely recognized that individuals differ in their tolerance of pain and that pain tolerance cannot always be accurately assessed by medical practitioners. Moreover, Dr. Harrell testified that claimant should be restricted to lifting 25 pounds while bending, a restriction which was incompatible with her job duties. In this case, the conclusion that claimant is permanently partially disabled is supported by a preponderance of medical evidence. Similarly, a preponderance of all of the evidence establishes that she cannot return to her time-of-injury job.

4. Claimant had not reached maximum medical improvement on August 8, 1991, when she suffered the third injury to her knee. She continued to work after the February 1991 injury. However, she was still experiencing difficulty a few days prior to the August injury, and there was no medical testimony indicating that she achieved maximum medical healing prior to the August 1991 incident. Claimant's current condition is the result of her injury on February 17, 1991. ***Richter v. Simmons Drilling, Inc.***, 241 Mont. 518, 788 P.2d 308 (1990) (for a claimant to receive compensation for a second work-related injury the evidence must establish that claimant reached a medically stable condition **before** the occurrence of the second injury.) (Emphasis in original.)

5. Claimant's job pool is the State of Montana. Section 39-71-1011(7), MCA (1989) provides:

(7)(a) "Worker's job pool" means those jobs typically available for which a worker is qualified, consistent with the worker's age, education, vocational experience and aptitude and compatible with the worker's physical capacities and limitations as the result of the worker's injury. Lack of immediate job openings is not a factor to be considered.

(b) **A worker's job pool may be either local or statewide**, as follows:

(i) a local job pool is the job service office area that includes the worker's residence; and

(ii) the statewide job pool is the state of Montana. [Emphasis added.]

Insurer argues that its job offer of a position in Salt Lake City should be considered in determining claimant's benefits. The evidence is undisputed that at the time she was hired by Western claimant signed an agreement to go anywhere within the Western system. However, she was interested in employment in Montana and immediately transferred to a job in Billings. When Western was purchased by Delta, the claimant did not sign any document which would indicate that she would be willing to transfer within the Delta system. Moreover, the Montana statutes defining the job-pool is plain on its face and does not extend the pool to out-of-state jobs.

6. Claimant is entitled to wage supplement benefits pursuant to 39-71-703, MCA (1989).

39-71-703. Compensation for permanent partial disability - impairment awards and wage supplements. (1) The benefits available for permanent partial disability are impairment awards and wage supplements. A worker who has reached maximum healing and is not eligible for permanent total disability benefits but who has a medically determined physical restriction as a result of a work-related injury may be eligible for an impairment award and wage supplement benefits as follows:

(a) The following procedure must be followed for an impairment award:

. . . .

(v) If a worker suffers additional injury, an impairment award payable for the additional injury must be reduced by the amount of a previous award paid for impairment to the same site on the body.

(b) The following procedure must be followed for a wage supplement:

(i) A worker must be compensated in weekly benefits equal to 66 2/3% of the difference between the worker's actual wages received at the time of the injury and the wages the worker is qualified to earn in the worker's job pool, subject to a maximum compensation rate of one-half the state's average weekly wage at the time of injury.

(ii) Eligibility for wage supplement benefits begins at maximum healing and terminates at the expiration of 500 weeks minus the number of weeks for which a worker's impairment award is payable, subject to 39-71-710. A worker's failure to sustain a wage loss compensable under subsection (1)(b)(i) does not extend the period of eligibility. However, if a worker becomes eligible for temporary total disability, permanent total disability, or total rehabilitation benefits after reaching maximum healing, the eligibility period for wage supplement benefits is extended by any period for which a worker is compensated by those benefits after reaching maximum healing.

(2) The determination of permanent partial disability must be supported by a preponderance of medical evidence.

(3) Notwithstanding subsection (1), beginning July 1, 1987, through June 30, 1991, the maximum weekly compensation benefits for permanent partial disability may not exceed \$149.50, which is one-half the state's average weekly wage established July 1, 1986.

The purpose of the wage supplement is to compensate the injured worker for lost wages resulting from the industrial injury. In this case the claimant was working full-time at a job which paid \$14.73 per hour. As a result of an injury to her knee at work on February 17, 1991 and the further injury on August 8, 1991, she is unable to perform that job. The vocational evidence presented to the Court by the insurer's vocational consultant shows that she can return to work at a rate of pay between \$6.50 and 8.00 per hour, a loss of at least \$6.50 per hour in Montana. The wage supplement benefit is computed by multiplying "the difference between the worker's actual wages (\$14.73) at the time of the injury and the wages the worker is qualified to earn in the worker's job pool" by two thirds (2/3). § 39-71-703(1)(b)(i), MCA (1989). That arithmetic produces \$173.00 a week. However, the statute caps benefits at \$149.50 weekly. Claimant is therefore entitled to wage supplement benefits at the maximum rate of \$149.50 per week for 500 weeks. The insurer is entitled to credit for any impairment award or wage supplement benefits already paid. Accrued benefits shall be paid in a lump sum and the remaining benefits biweekly.

7. In addition to wage loss benefits, claimant requests that the Court award her rehabilitation benefits pursuant to section 39-71-1003, MCA. (Claimant's Proposed Conclusion of Law no. 3.) The section invoked by claimant authorizes payment of

certain vocational rehabilitation expenses "[u]pon certification of the department of social and rehabilitation services [SRS]." Section 39-71-1004 (3), MCA, further provides that disbursements for such expenses can only be made "after approval by the department of social and rehabilitation services. Claimant presented no evidence that SRS has approved payment of vocational expenses or that she has even sought such approval. Her request is **denied**.

8. Claimant's request for attorney fees and costs is governed by section 39-71-611, MCA since this case involves a termination of benefits and the insurer has denied any liability whatsoever for wage supplement benefits. Costs must be awarded where the claimant prevails. Attorney fees, however, can be awarded only if "the workers' compensation court determines that the insurers's actions in denying liability or terminating benefits were unreasonable."

As discussed earlier in these conclusions of law, some of the positions advanced by the insurer in presenting its defense went beyond the pale of legitimate argument. However, the issue of unreasonableness must be considered in the context of the entire case, and cannot be based on one or two of many positions asserted by the insurer in its defense. The termination or denial must be unreasonable. Thus, it must have been without any reasonable basis whatsoever. Two of the issues presented in this case were significant and reasonable, and both arose out of the weak medical support for the claim. First, there was a significant question as to whether the February and August, 1991 incidents amounted to anything more than temporary aggravations to claimant's preexisting knee condition. While the total evidence, and even the medical evidence viewed by itself, ultimately preponderated in favor of permanent aggravation, the medical testimony concerning this issue was in some respects equivocal, and certainly less than overwhelming. Second, the medical testimony concerning claimant's ability to return to work was also less than overwhelming. Only on cross-examination did Dr. Harrell inject a medical restriction incompatible with claimant's job. Dr. Hansen seemed to defer to the claimant and characterized her ability to work as a "management" rather than medical issue. In that light, the insurer's denial of wage supplement benefits was not unreasonable and it was entitled to litigate the matter.

The request for costs is therefore **granted**; the request for attorney fees is **denied**.

JUDGMENT

1. This Court has jurisdiction over this matter pursuant to section 39-71-2905, MCA.
2. Claimant shall recover 500 weeks of wage supplement benefits from Employer's Insurance of Wausau at the rate of \$149.50 per week, less any impairment award or wage supplement benefits already paid claimant with respect to either of her 1991 injuries. Wage loss benefits accruing since the date claimant was last paid benefits shall be paid in a lump sum and the remainder in biweekly payments.
3. Claimant is not entitled to vocational or rehabilitation benefits.
4. Claimant is not entitled to attorney fees.

5. Claimant is entitled to costs in an amount to be determined by the Court. An affidavit of costs shall be submitted by claimant within 20 days of this judgment. Respondent shall file its objections, if any, within 10 days thereafter.

6. The JUDGMENT herein is certified as final for purposes of appeal pursuant to ARM 24.5.348.

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

DATED in Helena, Montana, this 6th day of May, 1994.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Bradley J. Finn
Mr. P. Mars Scott

1. The Uncontested Facts in the PRETRIAL ORDER indicate a date of December 27, 1985, however the evidence and testimony clearly indicate the correct date to be December 22, 1985.

2. In its proposed conclusions of law Wausau argues that "[c]laimant has not presented credible evidence that she suffered a compensable injury on February 17, 1991" (Respondent's Proposed Findings of Fact and Conclusions of Law at 15.) That contention flies in the face of Uncontested Fact No. 2 of the Pretrial Order, and will be discussed further in the Court's conclusion law.

3. Referring to his examination of February 21, 1991, Dr. Hansen testified:

A I thought, for the most part, that it appeared as though she had simply had a little aggravation of that patellofemoral joint, and that's, again, one of those ups and downs we described with a certain event causing a bit of an aggravation, but I didn't think it was anything major.

(Hansen Dep. at 40.) Referring to his August 9, 1991 examination of claimant, he said:

A I'm not trying to distort or muddy the waters here. It's a new episode. Something new happened to a knee that's had aggravation going on on a long-term basis. It's a fragile knee. I guess it's a reinjury or reaggravation. I hate to be dancing away from the question.

(*Id.* at 47.) Referring to both the February and August incidents, he said:

Q And in your professional opinion, did you believe that these new incidences were new injuries?

A I believe they had occurred -- they were episodes of injury, and they caused some aggravation of symptoms, so I would say they're -- and both are relatively minor. They're minor new injuries on top of an old, existing condition, stimulating recurrence of her symptoms.

Id. at 63.)

Q When you say that she could have an increase in her symptoms, you're not saying that if she were required to lift, twist, turn, and move on a job that she could disable herself at that point?

A I didn't specifically refer to disabling or even a further damaging of the knee joint. Anything that increases her symptoms, if it's something that really does cause contact pressure on the kneecap joint, could actually damage the articular surface worse. More likely it would just simply cause a flareup of her symptoms, so I, I don't know if I'm answering the question exactly how you want to hear it, but I, you know, I guess I didn't refer to disabling or disability itself.

(Id. at 64.) Referring to the February incident he testified:

A. I guess I was referring to, when that episode occurred, the sharp pain over the lateral aspect of her knee, did something new happen, a new injury or a new component? I guess my record reflects that I wasn't convinced that something new had happened but that, as we go to the next sentence, that it just aggravated the patellofemoral joint; that is, that was my basic conclusion, that she hadn't sustained, say, a meniscus cartilage tear or twisting tear that tore knee ligaments or anything, but it looks like she just had another episode where she got her knee in the right position, it ground the kneecap against the femur, and caused some irritation.

(Id. at 65-66.) Finally, referring to the August 1991 incident he testified:

A Right. It occurred, and there was some direct, I understand it as, some direct pressure over the kneecap, perhaps -- well, certainly irritating the cartilage on the back as it would cause it to bump against the femur, and that's a surface already aggravated, and, in fact, she also twisted her knee a little bit when that occurred, so that could make the kneecap jump laterally and **aggravate the joint surface as well.**

(Id., emphasis added.)

4. The quoted issues are two of ten set forth in the pretrial order filed in this case. The following is a complete list of the issues therein:

1. Whether Claimant is entitled to wage supplement and vocational benefits pursuant to, respectively, Section 39-71-703 and 39-71-1003, M.C.A.
2. Whether Claimant is entitled to an award of reasonable attorney fees and costs.

3. Whether claimant is entitled to such additional relief as the Court may deem appropriate.
4. Whether Claimant's disability, if any, is caused by her industrial injury of August 8, 1991.
5. Whether Claimant reached maximum healing prior to her industrial injury of August 8, 1991.
6. Whether Claimant is permanently partial[ly] disabled.
7. Whether Claimant is entitled to further compensation benefits and, if so, the amount and nature.
8. What is Claimant's "job pool".
9. What is the first appropriate rehab option, if any, under Section 39-71-1012., MCA.
10. Is the Claimant a "disabled worker" within the meaning of Section 39-71-1011(2), MCA.

Nowhere in the insurer's response is there an allegation that claimant did not suffer an industrial accident on February 17 or August 8, 1991, or that its acceptance of those claims was improvident.