

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWCC 56

WCC No. 9407-7090

BOBI JO CARY

Petitioner

vs

LUMBERMENS MUTUAL CASUALTY COMPANY

Respondent/Insurer for

BUTTREY FOOD AND DRUG

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT AS TO ALL ISSUES EXCEPT
CLAIMANT'S REQUESTS FOR A PENALTY
AND ATTORNEY FEES

Summary: Grocery store checker had a history of back injuries and strains. Lumbermen's accepted liability for a 1992 low back injury and paid various medical and compensation benefits. After reaching MMI, claimant suffered a nonwork-related incident when she slipped and fell in a college parking lot. Citing section 39-71-407(5), MCA (1993), the insurer argued the nonwork-related fall relieved it of liability for claimant's back condition. The insurer also refused to pay for services rendered by a chiropractor and sought reimbursement from claimant related to various TTD and rehabilitation benefits.

Held: Where the nonwork-related incident caused only a temporary aggravation of claimant's back condition, the insurer was not relieved of liability for future treatment that remained "caused" by her work-related injury. The insurer was liable for the chiropractic bills where claimant proved the services were part of a treatment plan formed in conjunction with her treating physician.

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: section 39-71-407(5), MCA (1993). The statute relieves an insurer from further liability for claimant's condition only if claimant's nonwork-related injury amounted to a permanent aggravation of her condition. If the aggravation is permanent, then

future disability and treatment is “caused” by the nonwork-related injury within the meaning of the statute. If the nonwork related incident caused only a temporary flare-up of symptoms of her underlying condition, further treatment and any future disability is still caused by the work related injury for which the insurer remains liable.

Benefits: Medical Benefits: Chiropractic. Under 1993 statutes, claimant proved that adjunctive therapy provided by chiropractor was part of a treatment plan formed in conjunction with her treating physician and thus was authorized, compensable medical services.

Causation: impact of nonwork-related incident. Section 39-71-407(5), MCA (1993) relieves an insurer from further liability for claimant’s condition only if claimant’s nonwork-related injury amounted to a permanent aggravation of her condition. If the aggravation is permanent, then future disability and treatment is “caused” by the nonwork-related injury within the meaning of the statute. If the nonwork related incident caused only a temporary flare-up of symptoms of her underlying condition, further treatment and any future disability is still caused by the work related injury for which the insurer remains liable.

Injury and Accident: Subsequent Injury. Section 39-71-407(5), MCA (1993) relieves an insurer from further liability for claimant’s condition only if claimant’s nonwork-related injury amounted to a permanent aggravation of her condition. If the aggravation is permanent, then future disability and treatment is “caused” by the nonwork-related injury within the meaning of the statute. If the nonwork related incident caused only a temporary flare-up of symptoms of her underlying condition, further treatment and any future disability is still caused by the work related injury for which the insurer remains liable.

The trial in this matter was held on February 22, 1995, in Great Falls, Montana. Petitioner, Bobi Jo Cary (claimant), was present and represented by Mr. J. David Slovak. Respondent, Lumbermens Mutual Casualty Company (Lumbermens or insurer), was represented by Mr. Thomas A. Marra. Exhibits 1 through 16 were admitted by stipulation. The claimant, Mark Hertenstein, D.C. and Lee S. Hudson, D.C. testified. The depositions of claimant, Robert Lynch, Dana Headapohl, M.D., Bill Tacke, M.D., and Scott Shawn Fitzpatrick were submitted for the Court's consideration.

Issues Presented: The following issues, as rephrased by the Court, are presented for decision:

- 1) Whether the chiropractic bills for adjunct therapies were reasonable and appropriate.

2) Whether a non-work related slip and fall which claimant suffered in January 1994 relieves Lumbermens from further liability for medical benefits.

3) Whether Lumbermens is liable for a \$220 bill from Dr. Tacke.

4) Whether claimant must reimburse Lumbermens for any of the temporary total and total rehabilitation benefits she received.

Claimant's requests for penalty and attorney fees were bifurcated by an order dated September 23, 1994, and are not addressed herein.

Motion to Strike: Following trial, claimant filed a Motion to Strike Portion of Respondent's Exhibit No. 12 (medical records of bill j. tacke, m.d.). Exhibit 12 was offered by Lumbermens. It consists of the materials reviewed by a medical panel which examined claimant at Lumbermens' request. (See Ex. 11.)

The motion asks the Court to strike pages 323 and 324 of the exhibit. Those pages are part of Dr. Tacke's records and contain underlining that was not part of the Dr. Tacke's original records. Unaltered copies of these pages are found in Exhibit 3 at pages 24 and 25. Unaltered copies are also attached to Dr. Tacke's deposition.

Claimant argues, "Respondent's counsel offered the exhibit [12] with the representation that the exhibit was a truthful and accurate copy of Dr. Tacke's original records when that was obviously not true. The Respondent's effort to highlight or emphasize certain portions of Dr. Tacke's records by underlining the original records is a serious breach of the stringent duties imposed by this Court." (Motion to Strike Portion of Respondent's Exhibit no. 12 (Medical Records of Bill J. Tacke, M.D. at 2.) She asks the Court to admonish Lumbermens' counsel.

The motion is trivial and is **denied**. Claimant did not object to the exhibit at trial. Her counsel had ample opportunity to compare the exhibit with the other exhibits. If he did not notice the underlining, it was due to his own lack of diligence.

Moreover, it does not appear that the offer of the exhibit amounted to a representation that the exhibit was an exact duplicate of Dr. Tacke's original records. It was offered as part of what was reviewed by the medical panel. Who did the underlining is not obvious. The physicians reviewing the records could have done the underlining or the underlining could have been done by Lumbermens' counsel to draw their attention to the particular statement.

Finally, the motion is simply a tempest in a teapot, and another example of both counsel in this case playing hardball and losing their objectivity (see, e.g., Motion to Disqualify Counsel, September 21, 1994, and colloquy between counsel in Cary Dep.). The underlining certainly draws attention to specific parts of Dr. Tacke's report, but counsel are entitled to do that in any event, so counsel for claimant can hardly complain that the Court

has been unduly influenced by the underlining. He could have simply pointed out that the underlining was not in the original so that the Court understood that someone other than Dr. Tacke was drawing attention to the particular statements.

* * * *

Having considered the Pretrial Order, the testimony presented at trial, the demeanor and credibility of the witnesses, the depositions and exhibits, the Court makes the following:

FINDINGS OF FACT

1. At the time of trial the claimant was 31 years old, single and the mother of two sons. She is a high school graduate and has completed one semester of college at the College of Great Falls.

2. In 1979, while still in high school, the claimant began working for Buttrey Food and Drug (Buttrey) as a box boy. Following high school she worked briefly as a waitress, a bartender and a short order cook. (Ex. 16 at 3.) In 1984 she returned to Buttrey as a box boy and worked her way up to the checker position, eventually becoming a checker/part-time front-end manager. She continued to work at Buttrey until her injury in July of 1992, approximately eight (8) years.

3. Claimant liked her work and hoped to advance, perhaps to manager.

Previous Workers' Compensation Claims

4. In June 1984 and March 1990 the claimant suffered injuries to her left shoulder while employed at Buttrey.

5. On November 2, 1987, she suffered a low-back injury and was seen by Dr. Howard I. Popnoe, an orthopedic surgeon. Her condition was diagnosed as "acute strain low back." (Ex. 12 at 80.) On January 16, 1989, she suffered a second injury to her low back and was treated by Dr. Michael Luckett, an orthopedic surgeon, who diagnosed lumbosacral strain. (*Id.* at 85.)

6. Medical and compensation benefits were paid after each of these injuries and the claimant returned to work each time.

July 17, 1992 Injury

7. Claimant's fifth and final work-related injury occurred on July 17, 1992, when she again injured her low back while lifting a heavy watermelon from the bottom rack of a grocery cart.

8. At the time of the fifth injury, Buttrey was insured by Lumbermens, which accepted liability for the injury. Lumbermens has paid various medical and compensation benefits.

9. Following her July 17, 1992 injury, the claimant was treated at the Columbus Hospital emergency room by Dr. M. F. Doubek. (Ex. 12 at 229.) He diagnosed "[l]umbago" and recommended that claimant "see Dr. Mark Hertenstein for manipulation if indicated." (*Id.*)

10. Claimant then sought treatment from Dr. Ronald Peterson, who specializes in occupational medicine. (*Id.* at 234.) She first saw Dr. Peterson on July 27, 1992, and continued to treat with him through February of 1993. During his treatment of claimant, Dr. Peterson prescribed physical therapy. (*Id.* at 267-303.)

11. Initially, Dr. Peterson found that the claimant suffered from "recurrent lumbar strain" and prescribed Robaxisal, which is prescribed for management of discomforts associated with Musculoskeletal Disorders (Physicians' Desk Reference (1994 Ed.), and physical therapy. (Ex. 12 at 234-235.) Dr. Peterson provided her with a modified-duty statement which allowed her to return to work in a modified position for four (4) hours per day. (*Id.*) Claimant attempted to return to work but was unsuccessful. (Ex. 11 at 9.)

12. On September 18, 1992, Dr. Peterson determined that the claimant was suffering from "Possible Dysfunction of the Right Sacroiliac Joint," and in his October 5, 1992 diagnosis, he eliminated the word "possible." (Ex. 12, at 244, 246.) He referred the claimant to Dr. Bradley D. Root, who specializes in physical and rehabilitation medicine, for "further evaluation of mobilization exercises of the SI joint." (*Id.* at 246.)

13. On November 16, 1992, Dr. Root examined the claimant and diagnosed "SI joint dysfunction with probable related pelvic and sacral components" and "myofascial pain syndrome with a component of fibromyalgia." (Ex. 12 at 306.) Dr. Root prescribed various medications, continued physical therapy, and chiropractic "manipulative treatment" by Mark Hertenstein, D.C., on an as needed basis. (*Id.*) He also recommended that claimant consider the use of a TENS unit. (*Id.*)

14. Throughout his treatment of the claimant, Dr. Root adhered to his diagnosis of SI joint dysfunction. He continued to treat claimant through August of 1993, at which time he relocated outside of Montana. Dr. Bill J. Tacke, who is a colleague of Dr. Root and who also specializes in physical and rehabilitation medicine, assumed claimant's care.

15. Claimant underwent a Functional Capacities Evaluation (FCE) on October 4 and 5, 1993. She tested at the sedentary-light physical ability level. (Ex. 12 at 212-216.)

16. Dr. Tacke examined claimant on November 23, 1993. (Ex. 3 at 29-31.) He determined that she had reached maximum medical improvement (MMI), and took the necessary measurements for an impairment rating, however, he did not give an impairment rating. (*Id.* at 30.) His assessment of the claimant's condition was identical to the previous assessments of Dr. Root, i.e., SI joint dysfunction with probable related pelvic and sacral components and myofascial pain syndrome with a component of fibromyalgia. (*Id.*) Dr. Tacke and the claimant discussed a variety of job analyses which had been forwarded to

his office but he did not formally approve or disapprove any job. (*Id.* at 30-31.) He recommended that she perform stretching exercises and join a health club. (*Id.* at 31.) He agreed to see her in the future on an "as needed" basis. (*Id.*)

Chiropractic Treatments

17. In November 1992, Dr. Root authorized chiropractic therapy by Dr. Mark Hertenstein on an as needed basis. (Ex. 12 at 306.) While treating claimant, Dr. Root continued to authorize treatments by Dr. Hertenstein. (*Id.* at 308-311, 315-316.) This was in addition to physical therapy. (*Id.* at 306, 312, 316.) When Lumbermens questioned Dr. Root about his prescribing both chiropractic and physical therapy, the doctor replied:

In regards to the physical therapy in conjunction to chiropractic care, let me explain that more fully. The goal of chiropractic care as generally indicates that Bobi Jo has been of the use of passive modalities and manipulation. In contrast the goal that I was having for physical therapy, even though sometimes modalities may overlap, is more of an active program in which the patient takes part doing active stretching, exercise to increase aerobic capacity instruction and re-emphasize on proper body mechanics, etc. Chiropractic is really not set up to do that and I was hoping that in the case of Bobi Jo that by working together she may have been able to advance past just receiving either one or the other. My goal here was basically to try to avoid the injured worker syndrome and help get Bobi Jo back to work as soon as possible, rather than [sic] have this fester for a long period of time. At this point patient should be working towards chiropractic care, once every two weeks and hopefully that can be weaned to the point where she is no longer dependent on either myself, physical therapy or Dr. Hertenstein, the chiropractor.

(*Id.* at 316.)

18. A number of Dr. Hertenstein's treatments were for flare-ups of claimant's symptoms. Dr. Hertenstein testified at trial:

Q. Based on your own actual management of Bobi Jo Cary's medical course and treatment of her diagnosed conditions, have you actually observed her to have these flare-ups?

A. Yes, on several occasions.

Q. How does she present when she has such a flare-up?

A. Routinely there would be pain and muscle spasm, sometimes swelling in the lumbosacral region as well as over the -- primarily over the right sacroiliac joint region. This would also then cause a fair amount of gluteal or buttock spasm which may then on occasion, and in her case frequently cause leg pain or sciatic symptoms, sciatic nerve symptoms into the leg.

(Tr. at 93.)

19. Chiropractic treatment, as prescribed by Dr. Root, began on an as needed basis (prn) and involved manipulative therapy. (Ex. 5 at 42, 49.) In February of 1993, Dr. Root recommended that chiropractic treatment be expanded to include piriformis counterstrain manipulation. (Ex. 5 at 50, 55.) Dr. Hertenstein kept Dr. Root advised of the treatment being provided to the claimant, including his use of adjunctive therapy. (*Id.* at 55; Tr. at 88.) The adjunctive therapy involved machine massage, electrical stimulation, heat and, on occasion, ultrasound. (Ex. 5 at 55.)

20. By letter of October 20, 1993, Lumbergmens notified Dr. Hertenstein that it would only pay for manipulation therapies. (Ex. 5 at 64.) Dr. Hertenstein replied on October 21, 1993:

[P]lease be advised that associated therapy modalities are not only necessary in the treatment of this patient but are considered standard procedure in the proper treatment of this type of symptom complex.

(*Id.* at 65.) At trial he elaborated on the need for the adjunctive therapies:

Q. The adjunctive therapies that you just mentioned, would those be the therapies that you corresponded with Dr. Root about?

A. Yes. They represent fairly standard physical therapy modalities that are used to basically alleviate pain, swelling, and muscle spasm. That would take the -- it would take the form of typically electrical muscle stimulation, ultrasound, the use of heat or ice on occasion. It would vary depending on the symptoms.

Q. Are we basically talking about two different types of treatment modalities?

A. Those modalities, the physical therapy modalities as separate and distinct from the manipulative therapies are -- they're a separate procedure which are done in conjunction with manipulation routinely to assist the manipulation in terms of not only alleviating the symptoms, but of the flare-up. But also to stabilize the condition after you've done the manipulation to such a point that the flare-up is allowed to calm down. Without it, if you use only manipulation, you very often, and specifically in Bobi's case, would tend to see manipulation not be nearly as effective, wouldn't -- it would not obtain the results that we were attempting to achieve.

(Tr. at 94-95.) Dr. Hertenstein testified that the adjunctive therapy was necessary in the claimant's case "because of the instability that was present and the tendency toward muscle reactions after treatments." (*Id.* at 95)

21. Dr. Lee S. Hudson, D.C., testified on behalf of the respondent as an expert witness but did not examine claimant. He acknowledged that from time to time he uses adjunctive therapy in treating SI joint dysfunction. (Tr. at 169.) He noted that some of Dr. Hertenstein's

treatments extended beyond the low back and involved the neck, but he did not identify which treatments or whether they increased Dr. Hertenstein's billings beyond amounts due for treatment of claimant's SI joint disorder. (Tr. at 149, 153-154, 170.) Lumbermens' counsel did not bother to inquire of Dr. Hertenstein regarding treatments of the neck.

22. Dr. Tacke affirmed the need for the adjunctive therapy. In an April 13, 1994 letter to Dr. Hertenstein, he said:

I agree that Dr. Root did recognize the benefit of the treatment you were providing as a way of assisting Bobi in management of her flare-up condition and that in no way did he specifically intend to exclude the use of physical therapy modalities when being seen for manipulation in your clinic.

(Ex. 5 at 71.) In a medical note of March 9, 1994, Dr. Tacke offered further support for the adjunctive therapy:

I would agree with Dr. Hertenstein that it is medically appropriate that these modalities are used in conjunction with the manual spinal adjustments or manipulative therapy and that certainly it is medically indicated to use them in such context as appropriate treatment of flare-up condition for this patient. I feel that use of these therapeutic modalities in the chiropractic office has been warranted and therefore should be appropriately reimbursed by the insurance provider.

(Ex. 3 at 27.)

23. Based on the foregoing, I am persuaded that Dr. Hertenstein's use of adjunctive therapy was medically reasonable and appropriate.

January 1994 Incident

24. Based on the reports of doctors Peterson, Root and Tacke, the chiropractic records, and the functional capacity exam, it is clear that in late 1993, the claimant continued to suffer from SI joint dysfunction. Although she had reached MMI, the FCE results indicated that she was able to work only in light/sedentary positions and was unable to return to her job at Buttrey.

25. In late January of 1994, the claimant suffered a non-work-related incident when she slipped and fell on her left side in the parking lot at the College of Great Falls. This episode did not result in her going to the doctor. She did go to the chiropractor on January 19, 1994, which may or may not have been after the fall. The chiropractic records from January 19 through early February do not mention a slip and fall as the basis for the treatment. (Ex. 5 at 15, 16, 17, 67; Ex. 12 at 182-187.)

26. Claimant was next seen by Dr. Tacke on March 9, 1994. Dr. Tacke noted that claimant had experienced a fall about a month ago in the parking lot. In discussing the fall, he stated:

"The main symptomatology has been a flare-up of the **ongoing existing problems.**" (Ex 3 at 25, emphasis added.) In his medical note for March 9, he noted that there was **no** new injury:

9. Flare-up of SI joint dysfunction and related myofascial pain syndromes occurring after fall in January of 1994 - **this is not a new injury**. This is a flare-up of the ongoing underlying condition that is a direct result of her original injury 7/17/92. [Emphasis added.]

(*Id* at 26.) He further noted that even though claimant had reached MMI in November 1993, that did not "preclude her from having flare-ups." (*Id.*)

27. Based on Dr. Tacke's note that claimant had slipped and fallen in the parking lot, and despite his statement that there was no new injury, Patrick Stephenson, General Manager for Intermountain Claims of Montana, Inc., which was adjusting the claim for Lumbermens, wrote to claimant's attorney on April 19, 1994, advising:

Pursuant to 39-71-407(5), Lumbermens Mutual Casualty is not responsible for the medical care necessitated by Bobi Cary's most recent injury occurring in January 1994.

. . . .

Based on the above-mentioned Section of the Workers' Compensation Code, the Workers' Compensation insurer will not accept responsibility for the pain management program recommended by Dr. Tacke or any chiropractic care directly resulting from that non-work-related accident.

(Ex. 9 at 2.)

28. Dr. Tacke received a copy of Mr. Stephenson's letter and wrote to him:

I have reviewed your correspondence to J. David Slovak, attorney for Bobi Jo Cary, that was dated April 19, 1994 in which you commented on my medical report of March 9, 1994. I would ask that you again review that report and particularly page three in the assessment column number nine. As you will read there my statement was "this is not a new injury". I was referring specifically to the incident that Bobi Cary described as having occurred in January of 1994. Based on her physical examination it was my medical determination that there was **no new injury**. The SI joint dysfunction that Ms. Cary experiences is an ongoing component of the injury that occurred on July 17, 1992. There have been numerous incidences when she has experience[d] flare-up due to the SI joint dysfunction. Some of these occur when she may move in a more simplistic fashion such as turning over in bed or reaching and bending over. The particular flare-up in January occurred with a twisting and bending motion that was associated with a fall. The flare-up that occurred was not

new but rather the ongoing problem she has experienced as a result of the SI joint dysfunction. There's ligament laxity around her SI joint due to the injury of July 17, 1992. This means that joint can easily sublux, causing increased stress and tension resulting in muscle spasm in the lumbosacral region and flare-up of the underlying ongoing myofascial pain syndromes. *The intensity of the flare-up in January was somewhat greater than some of the flare-ups Ms. Cary has experienced but indeed was still very much the same pattern of problems that has been ongoing since her injury July 17, 1992. I therefore must emphasize that you recognize there is no medical basis for identifying a new injury to this individual and I also must emphasize that her ongoing medical treatment continues to be for the direct care and management of the injury of July 17, 1992.* I also must emphasize that my recommendation for the pain rehabilitation program at Montana Deaconess Medical Center relates specifically to the ongoing care and management of her injury that occurred July 17, 1992. [Emphasis in original; italics added.]

(Ex. 3 at 12-13.)

29. In his deposition, Dr. Tacke further explained the mechanism of claimant's flare-ups:

A. Specifically, I mean **the inflammation, which is kind of an on-going thing**, flares up. The myofascial pain syndromes that she experiences or fibromyalgia is very much a part of that and interrelated with the SI joint dysfunction, and it's really more that condition that tends to flare up. [Emphasis added.]

Part of that, for Bobi Jo specifically, was the inflammation in the piriformis muscle, which is in the gluteal region or buttocks region near the sacroiliac joint. And she was particularly sensitive to recurrent inflammation in that muscle.

But the overall myofascial pain and fibromyalgia tended to flare up whenever the SI joint dysfunction was occurring. It's a physiological change that occurs with flare-up. The term inflammation really does refer to an irritation in tissues. That can be brought on by stress to tissues through overuse on a chronic basis, or it can be brought about on a short-term basis.

Once inflammation is present of that type, then a person tends to be prone to fluctuating levels of inflammations; and sometimes their physical activity can bring on that flare-up. Sometimes just a change in the weather can. With Bobi Jo specifically, we know that whenever her SI joint is out of alignment, then that's a very direct trigger or stimulus for an increased level of inflammation.

Q. Subsequent to the January 1994 incident where she slipped and fell in the parking lot, has Bobi Jo Cary had similar types of flare-ups?

A. Yes, she has.

Q. Does that surprise you?

A. No, it does not.

Q. Why not?

A. The laxity in her sacroiliac joint basically allows that joint to become misaligned quite easily; and each time that occurs, the initial response her body has is that physiological response to increase inflammation. The primary way of trying to reduce that for her is trying to keep that joint from dislocating; and when it has dislocated, trying to get it relocated as soon as possible.

The longer the misalignment is there, the more stimulus there is for inflammation. The pelvis moves with any kind of ambulation. And when a sacroiliac joint is not in good alignment, any walking will tend to stimulate more of the flare-up there.

If the individual is not able to realign that joint themselves, then if there is another available method of realigning it, it's certainly very helpful to have that done as soon as possible to decrease the on-going stimulus for inflammation.

....

Q. Doctor, once a flare-up such as the January 1994 flare-up subsides and resolves itself, does Bobi Jo's condition then revert back to the same condition she has had since her injury of July 17 of 1992?

A. Essentially, yes.

(Tacke Dep. at 14-16.)

30. At Lumbermens' request, the claimant was examined by a medical panel at St. Patrick Hospital in Missoula. The panel consisted of Dana Headapohl, M.D., occupational physician and panel coordinator; Mark Rotar, M.D., orthopedic surgeon; Marty Cheattle, Ph.D., psychologist; and Ethan Russo, M.D., neurologist. The examination took place on November 8, 1994.

31. The panel was asked to respond to specific questions posed by the Lumbermens' adjuster. Asked "whether a slip and fall accident can be sufficiently traumatic to cause an injury or reinjury like SI joint dysfunction," the panel replied: "**Not sufficient to cause permanent injury**; she has recovered from the acute injury and is at maximum medical improvement." (Ex. 11 at 1, emphasis added.)

32. Dr. Dana Headapohl, who specializes in occupational medicine and was one of the members of the Missoula panel, testified by deposition. She did not agree with the SI

dysfunction diagnosis, characterizing it as overly precise, and diagnosed claimant's condition as "mechanical low back pain." (Headapohl Dep. at 14.)

33. The panel limited claimant to light to sedentary work (Ex. 11 at 1), the same restrictions which had been placed on her before the incident in January of 1994. Dr. Headapohl and the panel recommended further treatment in the form of "psychotherapy . . . aimed at helping her deal with her medical status and her altered lifestyle and altered vocational options." (Headapohl Dep. at 47.)

34. During her deposition, when Dr. Headapohl was questioned concerning whether the January 1994 incident represented a flare-up of the July, 1992 injury, the following exchange occurred.

Q: Do you have an opinion that the January 1994 slip and fall represented a brand new injury, distinct and separate from her ongoing problems from July 1992?

A: I don't know.

(Headapohl Dep. at 68-69.) But she testified that the panel "did not feel that it [the January 1994 slip and fall] was sufficient to cause permanent injury." (*Id.* at 66.) She also agreed with Dr. Tacke that claimant's low-back symptoms could flare-up "just through activities of daily living." (*Id.* at 72.) And, she confirmed that "[t]he ultimate recommendations reached by the St. Patrick panel and assessments and opinions would be the same regardless of the January 1994 incident." (*Id.* at 71.)

35. Based on the foregoing, I am persuaded that claimant's slip and fall in January 1994 caused a temporary flare-up of her low-back symptoms and did not cause her permanent harm.

Request for Repayment of Temporary Total Disability Benefits

36. Lumbermens paid claimant temporary total disability benefits up to and including April 19, 1994, at which time it terminated those benefits retroactive to March 16, 1994, and recharacterized the benefits paid subsequent to March 16, 1994, as total rehabilitation benefits. (Ex. 9 at 2.) Termination of temporary total disability benefits was based on Dr. Tacke's report that claimant had reached MMI on November 23, 1993. (*Id.* at 1.) The parties have not provided the Court with a copy of the claim file, although they intend to do so in the penalty phase of this case, so the Court cannot determine when Lumbermens received notice of Dr. Tacke's MMI determination. Based on the Court's experience, insurers typically request and routinely receive the treating physician's office notes.

37. On November 23, 1993, Dr. Tacke determined that claimant had reached maximum medical improvement and discussed various job descriptions with the claimant. (Ex. 3 at 30-31.) In his report he indicated that there were no specific physical restrictions for the positions of video rental clerk and of a motel desk clerk. (*Id.*) He felt that the position of

computer operator/data entry would be contingent on her pacing herself. Although he did not sign any of these job descriptions or respond to the insurer's inquiries regarding the job analyses, it is clear from his office notes that at least two of the jobs were medically appropriate for claimant.

38. At trial claimant's counsel agreed that claimant had in fact reached maximum medical improvement prior to her January 1994 slip and fall. (Tr. at 122.)

39. In its April 19, 1994 letter converting benefits, Lumbermens' claims adjuster referred to the fourteen (14) day notice requirement of section 39-71-609, MCA, and said:

As Ms. Cary is no longer entitled to TTD benefits, based on 39-71-701, MCA, we have converted your client to total rehab benefits, effective 03/16/94, and a copy of the compensation report confirming this conversion is enclosed. If you should argue it is necessary to provide a 14-day notice before converting benefits, as opposed to terminating benefits, for the purpose of any further litigation which may occur, please accept this letter as notice that your client is no longer entitled to TTD benefits, and should the Workers' Compensation Court indicate that a 14-day notice is necessary on a conversion as opposed to a termination of benefits, please understand this notice is our intent to convert your client's benefits within 14 days. Should the Workers' Compensation Court agree that TTD benefits can be converted to total rehab benefits without 14-day notice, please understand that your client's benefits were converted, effective 03/16/94.

(Ex. 9 at 2.)

40. Lumbermens presented no evidence that claimant misled it concerning her entitlement to benefits. While it argues that she should have reported her January 1994 slip and fall as a new accident, her failure to do so was supported by her physician's determination that she did not suffer a new injury. Moreover, the Court has found that she suffered no permanent harm from the fall.

Total Rehabilitation Benefits

41. In March of 1993, the claimant sought the services of the Department of Social and Rehabilitation Services (SRS) for assistance in developing a rehabilitation program. SRS found her qualified for their services and deemed her a disabled worker. (Lynch Dep. at 20.) Through SRS, claimant developed an initial plan to return to school to study micro-computer management, which is a four (4) year program leading to a degree. (*Id.* at 8-11, Dep. Ex. 2.) Claimant attended the College of Great Falls during the Fall of 1993, studying computer programming. (Tr. at 172-173.) She then decided to pursue a degree in teaching, so changed majors and started school again in January 1994. (Tr. at 173.) Claimant was unable to complete the spring semester and dropped out in early February 1994. (Tr. at 174.) She then decided to pursue classes in medical secretarial work. (*Id.*) She began her

classes on August 22, 1994, (Tr. at 175) but by November 23, 1994, she dropped out of school altogether. (Tr. at 175; Ex. 6 at 57.) At the time of trial the claimant was working for the Heritage Inn as a cashier. She works from twenty-five (25) to thirty (30) hours per week, earning \$4.50 per hour. (Tr. at 82.)

42. Pursuant to its April 19, 1994 letter, Lumbermens paid claimant total rehabilitation benefits for the period of March 16 to May 18, 1994. (Ex. 9 at 1-2, 15.) It did not object to the payment of rehabilitation benefits even though it had not been involved in developing the claimant's rehabilitation plan. (Ex. 9 at 1-2.) However, in its letter to claimant's attorney, Lumbermens stated that its agreement to pay the benefits was conditioned on verification of claimant's enrollment at the College of Great Falls. (*Id.*) In fact claimant had already dropped out of school when Lumbermens notified her of the conversion of her benefits to rehabilitation benefits. Nonetheless, she accepted the benefits until they were terminated by Lumbermens effective May 18, 1994. (Ex. 9 at 15.)

43. Lumbermens reinstated total rehabilitation benefits on August 22, 1994 and continued those benefits through December 7, 1994. (See Petitioner's Proposed Finding of Fact, Conclusions of Law, and Judgment at 18.) According to a September 13, 1994 memo of the Court's hearing examiner, on September 12 counsel and the hearing examiner discussed Lumbermens' motion to vacate the trial setting so an IME could be conducted. "Following discussion it was determined that **if the insurer would agree to reinstate total rehabilitation benefits** which may be offset against any future entitlement, the trial would be vacated and reset during the week of October 24, 1994."

The memo further reflects that later on that day "Mr. Marra called and indicated that the insurer would reinstate benefits." Copies of the memo were sent to both counsel, with the following, final admonition: "If the information in this memo does not comport with your understanding, please contact me immediately." Neither counsel replied. Mr. Marra contacted the hearing examiner and a letter of clarification, dated September 16, 1994 was sent to counsel indicating the "reinstatement of benefits would be **until the day of trial.**"

44. Lumbermens' original response filed in this matter did not take issue with the total rehabilitation benefits paid claimant in March, April, and May 1994.

45. Lumbermens designated vocational rehabilitation provider, Mr. Bruce Jeffrey, reported on November 11, 1994, regarding the medical secretary training which had begun in August of 1994:

Considering Ms. Cary's motivation, her current performance at MSU-College of Technology, the results of labor market research, this appears to be an appropriate vocational option for Ms. Cary and she has a good probability of success for completing the program and becoming employed as a Medical Secretary.

(Ex. 16 at 5-6.) Mr. Jeffrey submitted a medical secretary job analysis to Dr. Tacke for his review and recommendations and noted that the doctor would address the job analysis following a future examination.

46. There is no evidence in this record to indicate that either party made any attempt to follow the statutory procedures for rehabilitation as set forth in sections 39-71-1013, -1014, -1032, and -2001, MCA.

CONCLUSIONS OF LAW

1. Relying on section 39-71-407(5), MCA, Lumbermens contends that claimant's January 1994 slip and fall relieved it from further liability with respect to claimant's 1992 industrial injury. Section 39-71-407(5), MCA (1993), provides:

(5) If a claimant who has reached maximum healing suffers a subsequent nonwork-related injury to the same part of the body, the workers' compensation insurer is not liable for any compensation or medical benefits **caused** by the subsequent nonwork-related injury. [Emphasis added.]

Lumbermens argues that it makes no difference whether the January 1994 slip and fall caused a temporary or a permanent aggravation because the statute does not distinguish between them and a Court may not insert such a distinction. Lumbermens' argument ignores the highlighted word "**caused**." The subsection relieves Lumbermens from liability for compensation and medical expenses **caused** by the subsequent injury. Where an incident causes only a temporary flare-up in symptoms of an underlying condition, the insurer is not relieved from future liability for benefits and medical expenses caused by the underlying condition. Overwhelming evidence shows that the slip and fall caused a **temporary** flare-up of claimant's underlying condition and no permanent harm. Under the plain language of the subsection, claimant's current condition and her future medical treatment cannot be attributed to the slip and fall, thus the slip and fall did not relieve Lumbermens from future liability for treatment of claimant's SI joint condition.

2. Lumbermens has disputed portions of a number of chiropractic bills from Dr. Hertenstein. It has paid those portions relating to manipulative therapy but denied liability for adjunctive treatment on the ground that it was not prescribed or necessary.

Claimant has carried her burden of proof that the adjunctive therapy provided by Dr. Hertenstein was part of a treatment plan formed in conjunction with her treating physicians and that the services were authorized. While Lumbermens presented evidence that some of claimant's chiropractic treatments included treatment focusing on her neck, it failed to introduce any evidence that Dr. Hertenstein's occasional extension of therapy to the neck area increased the amounts he charged for claimant's treatment. Dr. Hertenstein testified at trial. Lumbermens' counsel could have questioned him regarding any additional

amounts he might have charged, but he bypassed that opportunity. Thus, there is no basis for cutting back on Dr. Hertenstein's charges.

As noted at the time of trial, the Court will not determine the amount due for these services, although it appears to be approximately \$600. Claimant and Lumbermens shall jointly determine the outstanding amount. The Court retains jurisdiction to determine an exact amount if the parties are unable to agree on what is due.

3. Lumbermens seeks repayment of temporary total disability benefits paid to claimant after February 1, 1994 through April 16, 1994, because claimant failed to advise it of her slip and fall or her withdrawal from school. (Respondent's Proposed Findings of Fact, Conclusions of Law and Judgment at 20.)

Termination of temporary total disability benefits is governed by section 39-71-609, MCA (1993), which provides:

Denial of claim after payments made or termination of all benefits or reduction to partial benefits by insurer -- fourteen days' notice required. If an insurer determines to deny a claim on which payments have been made under 39-71-608 during a time of further investigation or, after a claim has been accepted, terminates all biweekly compensation benefits, it may do so only after 14 days' written notice to the claimant, the claimant's authorized representative, if any, and the department. For injuries occurring prior to July 1, 1987, an insurer must give 14 days' written notice to the claimant before reducing benefits from total to partial. However, if an insurer has knowledge that a claimant has returned to work, compensation benefits may be terminated as of the time the claimant returned to work.

Unless a claimant has returned to work or her benefits are converted to permanent total or total rehabilitation benefits, the insurer is required to give a fourteen (14) day notice of termination. The repayment requested by Lumbermens would have the effect of permitting it to retroactively terminate claimant's benefits without notice and without converting her benefits to permanent total or total rehabilitation benefits.

Moreover, the rationale offered in support of the request is unpersuasive. Claimant's withdrawal from school has no bearing on the termination of temporary total disability benefits. As to the slip and fall, we have found that it caused a temporary flare-up of symptoms but did not cause claimant any permanent harm. The basic criteria for termination of temporary total disability benefits -- maximum healing or a return to work, § 39-71-701, MCA (1991) -- were not affected by the incident. Finally, the maximum healing determination was made on November 23, 1993, but Lumbermens did not get around to terminating temporary total disability benefits until April, 1994. The request is **denied**.

4. Lumbermens seeks repayment of rehabilitation benefits paid April 18, 1994 through May 18, 1994 and August 22, 1994 through December 7, 1994. The two time periods present separate issues.

Total rehabilitation benefits are governed by section 39-71-2001(2), MCA (1993), which permits payment of up to one hundred and four (104) weeks of benefits at the claimant's temporary total disability rate while the claimant is pursuing an approved rehabilitation plan. The statute specifically states, "Rehabilitation benefits must be paid **while the worker is satisfactorily completing the agreed-upon rehabilitation plan.**" (Emphasis added.) The flip side of this requirement is that the benefits are **not** payable when the worker is not satisfactorily pursuing the plan.

At the time Lumbermens commenced the benefits, claimant was no longer in school and was not entitled to them. However, in response to the conversion of benefits, on April 20, 1994, claimant's attorney wrote Lumbermens' claims adjuster a letter advising him that claimant was no longer in school. (Ex. 9 at 4-6). The letter objected to the retroactive conversion of benefits and notified the insurer that the April 19th notice would be treated as a fourteen (14) day notice of termination of claimant's temporary total disability benefits. (*Id.* at 5.) Claimant's attorney also argued that claimant was entitled to continuing temporary total disability benefits. (*Id.* at 5-6.)

Since claimant was not entitled to benefits under section 39-71-2001(2), MCA, it was not improper for the claimant's attorney to treat Lumbermens April 19th letter as a fourteen (14) day notice of termination of benefits. If Lumbermens had merely terminated benefits, it would have been required to give such notice. § 39-71-608, MCA. Since its request to recoup benefits has the same effect as a termination of benefits on the date of its notice, claimant was entitled to fourteen (14) additional days of benefits.

However, she was not entitled to benefits beyond the fourteen (14) days since she makes no claim in this case for additional temporary total disability benefits and has conceded that she reached maximum healing by January 1994. She must repay the benefits she received for the period of May 4 to May 18, 1994. Since claimant was also not in school after November 23, 1994, she must also repay the benefits she received for the period November 24 to December 7, 1994. The Court retains continuing jurisdiction to determine the manner of repayment if the parties cannot agree to one.

The status of the benefits paid from August 22 to November 23, 1994, presents a more difficult issue. Section 39-71-2001(1), MCA (1993), provides that an injured worker "is eligible for rehabilitation benefits" if a physician certifies that the injured worker is physically unable to work at the job the worker held at the time of injury; and "a rehabilitation plan completed by a rehabilitation provider and **designated by the insurer** certifies that the injured worker has reasonable vocational goals and a

reemployment and wage potential with rehabilitation." Section 39-71-1014, MCA (1993), governs the designation of a rehabilitation provider, stating in relevant part:

- (1) Rehabilitation services are required for disabled workers and may be initiated by:
 - (a) an insurer by designating a rehabilitation provider and notifying the department;
 - (b) the department by requiring the insurer to designate a rehabilitation provider; or
 - (c) a disabled worker through a request to the department. The department shall then require the insurer to designate a rehabilitation provider.

Read together sections 39-71-2001(1) and -1014, MCA, require that the rehabilitation plan be developed by a rehabilitation provider **designated** by the insurer, and that the plan must be completed and certified to entitle the claimant to rehabilitation benefits.

However, in this case both parties have ignored the procedures specified by the statutes. The various rehabilitation plans were developed by a counselor for SRS and not by a provider designated by the insurer. Nonetheless, when Lumbermens learned of claimant's second plan it did not object to it. Rather, Lumbermens' own vocational consultant reviewed claimant's plan and found it reasonable. Based on that review, Lumbermens agreed to pay benefits as long as claimant's enrollment in school was verified. (Ex. 9 at 1-2.)

It is against this factual background that the parties September 12, 1994 agreement respecting additional rehabilitation benefits must be viewed. Obviously, at the time of the agreement Lumbermens had not reviewed or approved claimant's plan to become a medical secretary and no plan had been filed with the Department. If Lumbermens' counsel intended to interpose the lack of prior approval and filing as a defense to the payment of the additional rehabilitation benefits, then his agreement to the resumption of rehabilitation benefits was a sham. The Court declines to assume that was Lumbermens' intent. Rather, in light of its prior handling of rehabilitation benefits, I find that the benefits were contingent on review of the plan by Lumbermens' vocational consultant to determine if the plan was reasonable and appropriate. That review was in fact conducted and claimant's plan to become a medical secretary was determined "to be an appropriate vocational option." With that approval, the parties' agreement entitled the claimant to the further rehabilitation benefits from August 22, 1994, until she dropped out of school on November 23, 1994.

5. While the \$220 owing to Dr. Tacke is listed as an issue in the Pretrial Order, claimant does not address the issue in her proposed findings and presented no testimony regarding the issue. A review of all exhibits in the case discloses an itemized billing summary from Dr. Tacke dated September 7, 1994, indicating a balance due of \$265. The summary is part of Exhibit 1 to claimant's deposition. Lacking any indication if the amounts listed as unpaid are those in dispute, and any other facts regarding the disputed amounts, claimant's request for payment of \$220 is **denied**.

6. Claimant's requests for a penalty and attorney fees were bifurcated. A conference will be scheduled with counsel to determine whether additional discovery is needed with regard to these issues and to set a hearing date.

PARTIAL JUDGMENT

1. The claimant's January 1994 slip and fall does not relieve Lumbermens of liability for present and future medical expenses related to claimant's SI joint or low-back condition.

2. Lumbermens shall pay Dr. Hertenstein's past due bills for adjunctive treatment. The Court retains jurisdiction to determine an exact amount if the parties are unable to do so.

3. Lumbermens' request for repayment of temporary total disability benefits paid claimant from February 1, 1994 through April 16, 1994, is **denied**.

4. Claimant shall repay Lumbermens the amounts she received in total rehabilitation benefits for the periods of May 4, 1994 through May 18, 1994 and November 24, 1994 through December 7, 1994. If the parties are unable to calculate the amounts due and agree on a repayment schedule, the Court will make those determinations. It retains continuing jurisdiction to do so.

5. Claimant's request for payment of \$220 owed to Dr. Tacke is **denied**.

DATED in Helena, Montana, this 7th day of July, 1995.

(SEAL)

/S/ Mike McCarter

JUDGE

c: Mr. J. David Slovak
Mr. Thomas A. Marra