IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2002 MTWCC 42

WCC No. 2002-0504

MICHAEL CHURCHILL

Petitioner

vs.

ZURICH AMERICAN INSURANCE COMPANY

Respondent/Insurer for

ROSCOE STEEL & CULVERT COMPANY

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: A 22-year-old laborer was guiding a 260 pound welded tubing being moved by a crane when the tubing slipped, struck his right arm on the biceps, then yanked his arm into extension. He suffered serious bruising, swelling, and pain throughout his arm. While most of the pain improved, claimant was left after several months with a subluxing ulnar nerve condition, which he testified caused numbness, tingling, and extreme pain on exertion. The insurer argued the condition, if it existed at all, was congenital and not caused by the accident. A petition was filed asking the Court to find the condition compensable and to order the insurer to pay an 8% impairment award rendered by one physician.

Held: The ulnar nerve condition was caused by the industrial accident and the insurer is liable for it. The insurer is also liable for an 8% impairment award.

Topics:

Benefits: Medical Condition. Where Court credited testimony that subluxing ulnar nerve condition was triggered by an industrial blow to claimant's arm, the insurer is liable for the condition and to an 8% whole-person impairment award. The fact that claimant was congenitally predisposed to condition does not preclude liability where the accident triggered or lit it up.

Causation: Impairment. Conflicting medical opinions regarding impairment resolved in favor of impairment where the doctor rendering the opinion testified and

provided reasonable explanations for his opinion while the other doctors did not testify.

¶1 The trial in this matter was held on July 1, 2002, in Billings, Montana. Petitioner, Michael Churchill (claimant), was present and represented by Mr. R. Russell Plath. Respondent, Zurich American Insurance Company (Zurich), was represented by Mr. Joe C. Maynard.

¶2 Exhibits: Exhibits 1 through 10 were admitted without objection. At the close of trial, the parties agreed it was not necessary for the Court to view the videotape offered as part of Exhibit 9.

¶3 Witness and Depositions: Claimant testified at trial. The parties submitted the depositions of claimant and Dr. Bill Shawn Rosen for the Court's consideration.

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

1. How much of the Petitioner's current medical symptoms in his right elbow are the result of his industrial injury.

2. Whether the Insurer is responsible for payment of an impairment rating.

3. Whether Petitioner is entitled to an award of reasonable attorneys' fees and costs from the Respondent.

4. Whether Petitioner is entitled to the 20% penalty from the Respondent.

(Pretrial Order at 3.)

¶5 Having considered the Pretrial Order, the testimony presented at trial, the demeanor and credibility of the witness, the depositions and exhibits, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

Claimant

¶6 Claimant is 22 years old. He is a high school graduate with work experience as a mechanic. He also worked in restaurants and as a laborer.

Industrial Accident

¶7 On March 26, 2001, claimant was injured while working as a laborer for Roscoe Steel & Culvert Company (Roscoe Steel) in Billings. (Ex. 10; Uncontested Fact 1.) Welded tubing, weighing 260 pounds, slipped from a crane and struck his right arm. (Uncontested Fact 1.) The tubing struck claimant's upper biceps. As the tubing continued falling, it forced his arm straight down and into extension. (Churchill Dep. at 4-5; Trial Test.)

Acceptance of Claim and Nature of the Present Dispute

¶8 At the time of the accident, Roscoe Steel was insured by Zurich. Zurich accepted liability for the injury and has paid medical and temporary total disability benefits, but it contests claimant's allegations that he is entitled to coverage and an impairment award with respect to an ulnar nerve condition. Therefore, the focus of the following findings of fact is on that dispute.

Post-Injury History

¶9 Immediately after the injury, claimant had "[p]ain at the back of the elbow and of the bicep[s] area." (Churchill Dep. at 5.) While he did not initially feel numbness or tingling down his arm, his arm was "painful from about six inches up from [above] the wrist to the upper bicep[s]." (*Id.*)

¶10 Later in the day of March 26th, claimant sought treatment at the Same Day Care Unit of the Deaconess Billings Clinic. (Ex. 1 at 75.) He was examined by Dr. Michael D. Monday and x-rayed. While finding "[n]o real bruising" and "[n]o swelling," Dr. Monday believed claimant's grip strength was impacted. (*Id.*) Claimant reported pain "around the elbow to supination and pronation" and "around the biceps." (*Id.*) X-rays were negative. (*Id.*)

¶11 By the next day claimant's biceps had swelled and he was experiencing some tingling in his fingers. He returned to the Billings Clinic on March 27, 2001, and was examined by Ronald K. Handlos (Handlos), a physician's assistant. (Ex. 1 at 73.) Handlos noted:

Pain is getting worse. **He has some tingling in the 4th and 5th fingers and the swelling is quite significant over the biceps.** There is some discoloration. This patient states he can flex and extend and rotate his shoulder but it hurts a great deal.

(*Id.*, emphasis added.) The swelling was substantial:

> A great deal of swelling over the biceps and its attachment at the elbow, at the short head and long head of the biceps. Flexion and extension of the elbow is limited because of pain and I feel there is some weakness there. **There is so much swelling it is difficult to sense whether there is any defect over the biceps attachments.** Supinates and pronates with a great deal of discomfort.

(*Id.* at 73-74.) Handlos diagnosed sprain of the right shoulder and biceps "with possible tear of both long head and short head. Contusion of forearm and elbow." (*Id.*) He referred claimant to Dr. Steven Fischer, an orthopedist, who examined claimant the same day.

¶12 Upon examination of claimant, Dr. Fischer noted pain as well as some "mild ecchymosis [bruising][(1)]" and "tenderness in the antecubital fossa anteriorly." (Ex. 1 at 71.) He ordered an MRI. (*Id.* at 71-72.)

¶13 The MRI was done on March 29, 2001. At that time claimant was experiencing increased pain, including elbow pain. (Trial Test.) No biceps tearing was disclosed by the

MRI, however, it did show "quite a bit of edema and hemorrhage within the muscle of the biceps . . . ." (Ex. 1 at 70.) Dr. Fischer prescribed anti-inflammatories and physical therapy. (*Id.*)

¶14 Claimant began physical therapy on April 9, 2001. Initial treatment consisted of ultrasound as well as massage and stretching exercises. (*Id.*)

¶15 At the time he began physical therapy, claimant did not notice numbness or tingling in his arm or any popping out of his ulnar nerve. (Churchill Dep. at 9.) However, his arm was still painful and swollen.

¶16 Claimant participated in physical therapy two to three times a week. During that therapy he experienced elbow pain. On April 11, the therapist noted:

> The patient returns to PT on this date noting some improvement with range of motion into his right arm as well as decreased pain. He states that he has been performing his exercises several times per day but has noticed **increased discomfort in the medial aspect of his elbow**.

(Ex. 1 at 34, emphasis added.) In subsequent physical therapy sessions, claimant continued to complain of pain in the medial aspect of his right elbow, specifically in the area of his **medial condyle**[(2)].

¶17 On April 16, 2001, the therapist recorded claimant "continues to have **medial epicondyle pain**." (Ex. 1 at 33, emphasis added.) Physical therapy reports of April 23, 25, and 27, 2001, recorded continuing pain at the right medial epicondyle. (*Id.* at 28-30.)

¶18 On May 15, 2001, claimant was reexamined by Handlos. At that time claimant reported continued "pain on flexion and extension of the elbow, with short head of the biceps that is quite excruciating for him. Even passive flexion and extension are painful." (*Id.* at 60.) Handlos restricted him to lifting 5 to10 pounds with the right arm and avoidance of repetitive twisting of the right elbow. (*Id.*)

¶19 Claimant's arm pain and range of motion continued to improve. In June he still had some pain, particularly at full extension of his arm, but felt he had full range of motion. (Churchill Dep. at 12-13.) He did not recall experiencing numbness or tingling at that time but had begun to notice popping or cracking "[i]nside the elbow joint towards the back of the elbow." (*Id.*12-14)

¶20 On June 12, 2001, claimant returned to work with lifting restrictions of 22 pounds total and 15 pounds for repeated lifting. (Ex. 1 at 59.) His work required him to hold down beams with his right arm. He worked ten hours. By the end of the shift, his pain had increased significantly and his arm felt swollen.

¶21 Claimant returned to work the following day, June 13th, but only worked five hours. He left work and went to see Handlos. Handlos devised an ACE wrap to hold the arm in place and released claimant back to work. (*Id.* at 55.) However, claimant returned to Handlos on June 14th. Handlos recorded that the "pain has really escalated once again, and he is very uncomfortable. (*Id.* at 54.) Following examination, he noted: "Very tender at the head of the radius, supination/pronation very uncomfortable, as well as flexion and extension. There is some crepitus in the area." (*Id.*) Handlos prescribed new medication and instructed claimant to return to Dr. Fischer. (*Id.*)

¶22 Claimant did not thereafter return to work with Roscoe Steel.

¶23 Claimant was next examined by Dr. Fischer on June 19th. Claimant's chief complaint was "pain in the **right elbow**." (Ex. 1 at 51, emphasis added.) Dr. Fischer noted weakness to resisted elbow flexion, but a full range of motion with no swelling. (*Id.*) He recommended claimant continue arm exercises for a six- week period. (*Id.*)

¶24 Claimant returned to Dr. Fischer again on July 31, 2001, still reporting continued elbow pain. Dr. Fischer noted the "patient has pain that is reproduced with full active extension of the elbow" but did not complain of "pain or numbness radiating down to the fingers." (*Id.* at 45.) The doctor was unable to diagnose claimant's condition and referred him to Dr. Richard Lewallen for a second opinion (*Id.* at 45-46.)

¶25 Claimant saw Dr. Lewallen on August 14, 2001. (*Id.* at 5.) In the history taken by the doctor, he recorded that claimant reported "2 episodes of numbness in the ulnar nerve distribution of his right elbow. This occurred after someone palpated the ulnar nerve fairly hard and another time when he hit a door with his elbow." (*Id.*) At deposition and trial, claimant said the first incident occurred when his girlfriend grabbed his arm at the area where the ulnar nerve passes through the elbow. (Churchill Dep. at 18.) He felt "[i]mmediate numbness [in] I guess the third and fourth digits on my right hand and the palm of my hand and through the bottom of my forearm, followed by a very warm burning sensation." (*Id.* at 18.) In the second incident, claimant hit his arm on a door. Claimant testified that neither incident involved a sharp blow to the elbow. (*Id.*)

¶26 Upon physical examination of claimant, Dr. Lewallen found full range of motion and good strength, however, claimant reported discomfort with resisted flexion, primarily over the anterior aspect of his elbow. (Ex. 1 at 5.) Dr. Lewallen also noted "a little tenderness along the posterior aspect of his elbow both along the lateral and medial aspects of the olecranon and some tenderness over the ulnar nerve medially." (*Id.* at 6.) He did not detect "any subluxation of the ulnar nerve with flexion-extension of the elbow." (*Id.*) He concluded that claimant would not benefit from further treatment and should undergo a work-hardening program, followed by a functional capacities evaluation (FCE). (*Id.*)

¶27 After reviewing Dr. Lewallen's evaluation, Dr. Fischer, who was claimant's treating physician, prescribed **six weeks** of work hardening. (Ex. 1 at 44.)

¶28 On August 30, 2001, claimant reported to the Billings Clinic for a work-hardening program supervised by Chad Miller (Miller), a physical therapist. During the first session, claimant reported arm pain of 5 on a scale of 1 to 10 and also "some numbness from his wrist to his pinky finger and ulnar nerve area." (*Id.* at 25.) Miller also noted: "He also has some point to the ulnar groove at the elbow. This is also tender to palpation." (*Id.*) Miller planned a program with "a lot of stretches, a lot of strengthening exercises for biceps, triceps, brachial radialis, and overall conditioning program." (*Id*. at 26.)

¶29 On the second day of work hardening, Miller recorded: "Patient's elbow is a little sore from overworking. No swelling, no edema. No joint effusion today. Minimal complaints. States he feels like he just worked it a little bit." (*Id.* at 22.) Miller wrote:

> He showed up at 8:00 and went until 11:55 continuously with his exercises and program regimen. Instructed to ice over the weekend and continue some stretching, at least over the weekend, as he will not be here over the Labor Day weekend.

(*Id*.)

¶30 On September 4, 2001, Miller recorded:

> SUBJECTIVE:
>
> Patient states he is getting quite a bit of pain, same area, through his ulnar groove and through the bicep[s]. Everything is staying centralized. No complaints down in his hand. Rates it as 7/10 today, which is up 1 scale from last week. No visible swelling effusion through the elbow today.
>
> OBJECTIVE:
>
> He was here starting 6 hours today. We started at 9, he went until 11:45. Returned at 12:45 and went to 4:00. He continued with all of his exercises and work conditioning simulation downstairs, not increasing the weight yet, as it is painful. However, easy for movement through the range. Will start to increase him.
>
> ASSESSMENT:
>
> Does well th[r]ough all of his exercises. Biggest complaint is of pain. Does not look to be in any visible disturbance or pain as he is going through the exercises.
>
> PLAN:
>
> Continue tomorrow 6 hours then will up him to 8 hours.

(*Id.* at 21.)

¶31 On September 5th, claimant continued the work-hardening program, working out, according to Miller's note, "for a full 6 hours today." (*Id.* at 20.)

¶32 The September 6th physical therapy report states claimant fulfilled his six hours of work hardening. In the assessment section, Miller wrote: "Tolerated treatment well. Complains of some soreness. Also states that it hurts worse with the colder weather." (*Id*. 1 at 19.)[(3)]

¶33 The physical therapy record dated September 7, 2001, states claimant called in sick, complaining of "flu-like symptoms." (Ex. 1 at 18.) Claimant testified at trial that he woke up that day feeling light-headed and throwing up. Claimant also testified that he had been using his best efforts in the work-hardening program and that his elbow was very painful, feeling worse and worse. His testimony was credible.

¶34 Miller's physical therapy record for September 10, 2001, states:

> SUBJECTIVE:
>
> Patient showed up at 8:30 this morning. He is here for 8 hours a day. I did tell him to come at 8:00 last week, however, he states he lost his keys and could not find them and that is why he is ½ hour late.
>
> OBJECTIVE:
>
> Patient is here. Continues with his flow sheet. His work hardening program is 8:30 to 11:40. Returned at 12:40 and will be dismissed at 5:00. Still complains of pain through the right elbow. However, as he worked down there, he appears in no apparent distress. **Still complains of being sick, that he is still sick today, that he doesn't feel like he should be here.**
>
> ASSESSMENT:
>
> <u>When he is here</u>, he continues to work and does a pretty good job in his Work Conditioning [P]rogram.
>
> PLAN:
>
> Continue. **We still have 5-6 weeks of work conditioning.**

(*Id*. at 17, bolding and underlining added.)

¶35 The physical therapist's comment about "When he is here" implies that claimant was not diligently attending the work-hardening program. The record to this point does not support the comment, rather it shows that claimant was sick one day and late on another by a half hour, and attended the program on September 10th even though still feeling ill. The therapist's comments as quoted previously, reflect claimant's full participation in the program.

¶36 In the same vein, I also note an earlier comment made the first day by the therapist. It states that claimant would be doing much of his program in the gym and that "we will try to keep a PT or tech down here to keep him closely monitored for his work-conditioning program for full participation." This comment suggests that from the get-go the therapist was suspicious of claimant and did not expect claimant to fully cooperate in the program. Whether this distrust is a universal attitude of the therapist or specific to this claimant based on other communications with the therapist is unknown. In either event the attitude is significant in evaluating what occurred subsequently and in evaluating the insurer's aggressive attack on the claimant's credibility.

¶37 Miller's physical therapy note for September 11, 2001, states:

> SUMMARY:
>
> Michael called me this morning around 8:15 and stated that he is still trying to get over his sickness from last week and will not be in. However, he was in **yesterday but did not complain of any sickness and fulfilled [h]is 8 hours.** I told Michael to call Vicki Fenton, his case worker, and tell her. He said that he would. I then waited until the end of the day. I called Vicki at about 4:15 to make sure that Michael called her. He has not called her whatsoever. I discussed the situation with her. She will follow-up and appreciates my call. I expect Michael to be in tomorrow and I will follow-up with his Work Conditioning Program.

(*Id*. at 16, emphasis added.) Miller's note from September 11th flies in the face of his own note from the prior day. On the 10th, Miller himself recorded that claimant "[s]till complains of being sick, that he is still sick today, that he doesn't feel like he should be here." (*Id*. at 17.)

¶38 Moreover, on September 11th, claimant went to see Dr. Monday on account of his flu-like symptoms. (*Id*. at 44.) He obtained a note from Dr. Monday verifying he had been sick for four days. (*Id*. at 43.)

¶39 That same day, September 11th, after visiting the doctor, claimant received a letter from claims adjuster Carolyn M. Villa (Villa). The letter, dated September 10, 2001, read:

> Dear Mr. Churchill:
>
> It has been brought to my attention that you are not fulfilling your obligations completely for the strength training or work hardening, as required. I was advised that you were absent on Friday, September 7, 2001 and that you arrived late on Monday, September 10, 2001. This is unacceptable.
>
> You are required to be punctual at all appointments, whether with a medical doctor, or other treatment option, such as your current rehabilitation. Should you miss

another session, or arrive late, or fail to fulfill the required sessions, your claim will be closed.

(Ex. 6 at 2.) There is no evidence indicating that the insurer possessed information indicating claimant was not ill on September 7th or 11th, or that in fact he was not ill.

¶40 Claimant called Villa after receiving the letter. He told her he had a note from his doctor regarding his illness. Villa was not interested in the note.

¶41 Claimant reported to work hardening the next day, September 12th. Miller's note reads:

SUBJECTIVE:

Patient still complains of being sick and not feeling well today. Questions me about the letter he got from Vicki Fenton. I told him that he will have to talk to Vicki about it.

OBJECTIVE:

Continue with Work Conditioning Program as per flow sheet dated 09/12/01. He did fulfill a full 8 hours today.

ASSESSMENT:

Tolerated treatment well. Still complains of right elbow pain, however, objective signs show no significant damage or swelling through the elbow.

PLAN

Continue with plan of care. **FCE probable next week.**

(Ex. 1 at 15, emphasis added.)

¶42 What happened to the six-week work-hardening program originally prescribed which was to have taken place prior to any FCE? Suddenly, after less than two weeks of the program, the therapist is setting up the FCE despite Dr. Fischer's prescription for six weeks of work hardening. Something smells, and the smell gets worse with the next letter from the claims adjuster.

¶43 On September 12th, Villa wrote claimant a second letter, this time terminating his benefits: The letter is as follows:

Dear Mr. Churchill:

A letter was sent to you on September 10, 2001, advising you of the consequences of missing or being late for appointments made on your behalf for work hardening. You were absent for the Friday September 7, 2001 appointment. You arrived late for the Monday, September 10, 2001 appointment. You were advised by Vickie Fenton

> Annenberg, a Concentra Rehab Counselor, that excuses would not be tolerated, you were required to make yourself punctually available at all scheduled appointments.
>
> It is my understanding that you did not show up on Tuesday, September 11, 2001. You are hereby notified with this 14 day notice letter, that your TTD payment will cease.
>
> We are requesting that you attend the next doctor appointment, to determine your impairment. You will be paid your impairment percentage, should there be one. It will be in your best interest Mr. Churchill, to attend the next scheduled appointment. Should you have questions concerning this 14 day notice, please do not hesitate to call 245-3575 Ext. 374, or the Employment Relations Division.

(Ex. 6 at 3.)

¶44 There is no explanation in the record for Villa's decision to disbelieve claimant about his illness. There is nothing to contradict claimant's testimony that he had a doctor's excuse for his illness and that he told Villa he had a doctor's excuse. There is nothing to indicate that claimant was not in fact sick or that Villa had facts showing claimant was not sick on the 7th or 11th. The notice terminating benefits was unsupported and unreasonable.

¶45 Claimant reported to work hardening on September 13, 2001. Miller's note reads:

> SUMMARY:
>
> Michael presents to the clinic today at a little after 8:00, ready to work out. He did work until 11:40 and then returned at 12:40 and went all the way to 5:00. He states that he is still sick. He looks like he is not participating fully. He is still working on the same weights that he started with. He has not upgraded yet. Every time I walked through the gym he is either stretching or looking around a machine. I told him today that we are going to up his FCE to next Thursday and he will see Dr. Ross in early October, as per Vicki Fenton's request. Vicki also stopped in today. We talked a little bit and she discussed updating his FCE to next Thursday to Mike. I also asked Mike about his pain level. He states he is still sore with extreme extension, so I had him go through extreme extension. He is actually hyperextending his arm, which is causing him pain. I then assessed this and compared to the other arm. He hyperextends that arm too. I told him he just has a little elasticity in that joint. He should not be going to full hyperextension when he is doing his exercises. He is going to monitor that and make sure that he is not over extending when he is working out through that arm.
>
> Other than that, he participated in his exercises as per flow sheet dated 09/13/01.

(Ex. 1 at 14.)

¶46 Claimant testified he was still not feeling well on September 13th, but went to work hardening anyway. When asked about Miller's reference to his failure to upgrade to other weights, claimant testified he had been told not to upgrade without a note of consent from a therapist and had been instructed not to move to higher weights if his elbow was still causing pain. He had also been instructed to stretch between exercises. As for waiting around machines, he testified the practice in the gym was to wait at a machine between sets of exercises. Miller was not called to testify at trial, leaving the Court with no reason to question claimant's explanation. Claimant's testimony itself on this point was entirely credible and it is significant that prior physical therapy notes indicate his cooperation in the program.

¶47 On September 14, 2001, claimant called Villa about her September 13th letter and was 40 minutes late to work hardening as a result. (Churchill Dep. at 27; Ex. 1 at 13.) He performed seven hours of work conditioning. (*Id.*) Miller also wrote:

> Tolerated treatment well. He did relate to me yesterday on the way out after I already dictated his note that he is having some funny feelings. He points to this median nerve distribution, then he states that nothing in between his forearm and none in his ulnar groove is bothering him. Seemed in no distress. Also, every time I walk down into the gym, as I cannot spend 8 hours standing there watching him, he seems to either be stretching, looking at the clock checking his pulse, or taking a break. He also takes frequent breaks into the bathroom. He does mark that he is doing everything on his chart. **Again, I cannot officially claim that he is not doing it, but I do try to have somebody down there all the time with him. However, this is not always possible.**

(Ex. 1 at 13, emphasis added.)

¶48 By this time claimant was beginning to have numbness and tingling that was different from the pain he had been feeling within the joint. (Claimant's Trial Test.)

¶49 The FCE took place on September 20, 2001, and was administered by Miller. (Ex 1 at 8.) Miller's report indicates that the shortening of the work-hardening program and the acceleration of the FCE was not for medical reasons but in response to the claims adjuster's or case manager's request:

> Mike is a 21-year-old male, referred to me by Dr. Fischer for a Work Conditioning Program, followed by a Functional Capacity Evaluation to determine if he is fit to go back to his job. Mike first came to me on 08/30/01 in which we started a Work Conditioning Program. We did this for approximately 2 weeks, however, he was inconsistent with it. **His case worker wanted to move up the FCE to today's date, 09/20 secondary to him not fully participating and to get the case moved along.**

(*Id.*, emphasis added.) There is no explanation for the comment that claimant was "inconsistent" in his participation, unless Miller was referring to the times claimant was absent, but these absences were excusable.

¶50 During the FCE claimant complained of pain when working through exercises simulating heavy physical labor. (*Id*.) Miller doubted claimant's pain reports based largely on his observation that claimant's use of force through both arms was symmetrical. He was also suspicious of claimant's statement that he could not grip a bin with his full hand. (*Id*. at 10.) Miller believed there was "no objective data or tests that we have done or that the doctors have done that would support him not being able to use a grip through that hand to at least grab the box." (*Id*.) Miller believed claimant demonstrated symptom magnification due to his wincing and pain reports. However, Miller still concluded, that claimant did not qualify for heavy physical work. (*Id*.) He wrote:

> I recommend follow-up with Dr. Ross for release to work as Dr. Ross deems fit. Right now he would qualify for medium level work. I do believe he has symptom magnification, along with poor pain threshold at this time. He also has hyperextension through that elbow, however, it is symmetrical as I check his left elbow also. My biggest concern is the symmetry when he is pulling and pushing through his forces in static lift that his right arm is actually doing more than his left, which does not concur with his subjective complaints. I am not sure of Mike's actual goals; if he would like to return to Roscoe Steel. He did not inform me of any other goals on returning to work, however, I feel that his Work Conditioning Program is no longer warranted, as he has symptom magnification and he is not fully participating. The FCE has been done and I will leave it up to Dr. Ross's discretion, along with Dr. Fischer's recommendations for Mike's return.

(*Id*. at 10.)

¶51 On October 17, 2001, claimant was evaluated by Dr. Bill Shawn Rosen, a board certified specialist in physical medicine and rehabilitation. (Ex. 1 at 1; Rosen Dep. at 3.) Dr. Rosen now practices with the Deaconess Billings Clinic, which is the clinic where claimant received treatment, physical therapy, and work hardening. Dr. Rosen regularly renders impairment ratings using the JAMA Guide. (*Id*. at 4, 5.)

¶52 At the time of Dr. Rosen's evaluation, claimant said "that up to ten times a day he will have pain [that] radiates down the arm into the fourth and fifth digits of the right hand which last anywhere from 2 to 3 seconds to up to 30 seconds. . . . occasionally the pain will radiate from the medial aspect of the elbow into the armpit though this is quite rare." (Ex. 1 at 1.) On examination, Dr. Rosen noted hyperlaxity of claimant's right elbow.

> When Mr. Churchill extends the elbow to full extension and then vigorously contracts the triceps muscles, there is a partial dislocation/laxity noted at this joint.

> This is not noted on the left side. Furthermore, with sequential flexion and extension, approximately 10% to 20% of the time the ulnar nerve can be felt to move medial onto the medial condyle. When this movement of the ulnar nerve is appreciated, Mr. Churchill complains of numbness and tingling symptoms radiating into his hand.

(*Id*. at 2.) Claimant testified that when Dr. Rosen manipulated his arm he could feel the nerve "pop out" with "a sharp, mild numbness type pain you can feel in your fingers and the palm of your hand." (Churchill Dep. at 22.)

¶53 Dr. Rosen was deposed. He confirmed that claimant's right ulnar nerve sometimes pops out of the ulnar groove when he extends and flexes his right elbow. (Rosen Dep. at 8.) Dr. Rosen opined that claimant suffered three injuries in his industrial accident. "He had a biceps contusion, partial biceps tear, and both of those were identified by MRI. And then he had a subluxing ulnar nerve which caused pain." (*Id*. at 13-14.) Dr. Rosen rated claimant's impairment at 8% of the whole person impairment. (*Id*. at 16-17.)

¶54 While Dr. Rosen could not definitively identify the precise mechanism of the ulnar nerve injury, he said that

> probably somewhere in there, it's loosened the ulnar nerve. Or it caused adhesion, so that when it does slide in and out of the ulnar groove, it causes pain.

(*Id*. at 19-20.) He went on to say that while the blow was to the opposite side of the arm as the ulnar nerve

> the medical record attests to the fact that he complained of pain posteriorly throughout the entire course of his treatment, and it's common in medical injuries or conditions to have injuries that occur in one part of the [body] -- or direct blows that occur in one part of the body and yet the injury is somewhere else.

(*Id*. at 20.) He was impressed by

> the fact that he [claimant] was so consistent with his complaints being in the ulnar distribution that led me to believe that either he's read an anatomy book and understands the pathology of the ulnar nerve or that symptoms truly lie in the ulnar never distribution or possibly that he has a shoulder girdle pain syndrome, which often can radiate into the ulnar distribution.

(*Id*. at 40-41.)

¶55 Despite the efforts of insurance counsel at deposition, Dr. Rosen could not be shaken from his opinion that claimant's condition was caused by the injury. He testified:

> Well, given that Mr. Churchill had no pain up until his injury and then he developed pain in the right elbow following the injury in a distribution of the ulnar nerve would

> lead me to believe that it is not just a genetic condition that has caused this. It may have predisposed him to it, but the genetic condition hypermobile elbow joints did not lead to the pain complaints in and of itself, much like if someone is a diabetic and has a beam fall on their foot at work and develops an amputation as a result of that. . . .

(*Id*. at 45.)

¶56 At the time of his examination of claimant, Dr. Rosen placed claimant at maximum medical improvement (MMI). (Ex. 1 at 2-3.) He also recommended physical therapy and counseling. The latter recommendation was based on his observation that claimant had "definite difficulties coping with his right upper extremities dysfunction." (*Id*. at 3.) He restricted claimant to sedentary to light work with the right arm, though he believed claimant could perform medium work with his left arm. (*Id*.)

¶57 When asked at deposition if he would change any of his conclusions after reviewing claimant's medical records, Dr. Rosen stated he would refer claimant for a surgical consultation, based on his understanding that other recent patients with similar conditions have had good results from surgery. (*Id*. at 18-19.)

¶58 Following receipt of Dr. Rosen's report, insurance counsel wrote to Dr. Lewallen, asking whether he had noted the recurrent ulnar nerve dislocation found by Dr. Rosen. On November 14, 2001, Dr. Lewallen responded:

> In answer to your specific questions, I did not note the partial recurrent dislocation of the ulnar nerve as found by Dr. Rosen. I specifically tested for this. I noted in Dr. Rosen's report that he noted this with sequential flexion/extension of his elbow only 10% to 20% of the time. It is not something that happens every time the patient flexes and extends his elbow.
>
> It is my opinion that the occasional dislocation of the ulnar nerve in Mr. Churchill was not caused by the industrial injury. The finding can be and is seen in individuals who are asymptomatic. Mr. Churchill did not have any ulnar nerve innervated intrinsic muscle weakness in his hand nor did he have any sensory deficits in the ulnar nerve in his hand. I think that this phenomenon of movement of the ulnar nerve in flexion on the medial aspect of the elbow is related more to the patient's anatomy than a specific injury.

(Ex. 1 at 4.)

¶59 Dr. Lewallen did not testify either at trial or by way of deposition.

¶60 In addition, the insurer referred claimant to Dr. Randall P. Graff, a specialist in occupational medicine, for evaluation. (Ex. 1 at 39.) Dr. Graff examined claimant on December 14, 2001, confirmed claimant's injury to the right biceps muscle, and also

confirmed "[i]ntermittent mild subluxation of the ulnar nerve which is present on both elbows, but more symptomatic on the right." However, Dr. Graff did not feel that claimant's ulnar nerve condition was "clearly related to his accident, or certainly not **entirely** related to his accident since he has this on the opposite side, but is asymptomatic [on that opposite side]." (*Id.* at 40d, emphasis added.) Dr. Graff's report also indicates he read the work-hardening program notes, which he credited as showing claimant was "non-compliant" with the program (ex. 1 at 40a), a conclusion which I previously found was unsupported and unjustified. Ultimately Dr. Graff concluded that claimant had no residual impairment from his industrial accident and had reached MMI. (*Id.* at 39, 40d.)

¶61 Dr. Graff did not testify at either trial or by way of deposition.

¶62 The insurer has vigorously attacked claimant's credibility, going so far as to state in its pretrial contentions, "Petitioner is a fraud." (Respondent's Contention 8, Pretrial Order at 8.) The accusation made by the insurer is unfounded and beyond the bounds of legitimate advocacy. The insurer misreads records concerning claimant's cooperation in the work-hardening program. Its litigation posture is a continuation of the adversarial and unfounded position taken by its claims adjuster, who ignored claimant's illness and evidence which would have supported his claim that he was ill. Its reading of the work-hardening records has been selective and without regard to the apparent bias and misstatements of the physical therapist. It relies on insinuation and innuendo to suggest that post-injury claimant was "working up a storm." (Respondent's Contention 21, Pretrial Order at 6.) Contrary to respondent's claim that this is "frivolous litigation" (*id*.) for which respondent should be entitled to a penalty, the litigation is meritorious. It is the extreme statements of the insurer and its counsel that should warrant sanction.

Resolution

¶63 I am persuaded that claimant's current elbow condition was caused by the March 26, 2001 industrial accident. This conclusion follows in part from my finding that he was a credible witness, but is also supported by the record as a whole. For instance, although the insurer suggested repeatedly that claimant's reports of numbness and tingling arose only long after the injury, the record from March 27, 2001, **the day after the injury**, documents "some tingling in the 4th and 5th fingers." (Ex. 1 at 73.) Claimant complained of pain at the medial condyle very early on. The medial condyle is where the ulnar groove is. From his own review of the medical record, Dr. Rosen cited the consistency of claimant's reports as one of the reasons he believed claimant had the pain he described and that it was caused by the accident. Also persuasive is Dr. Rosen's testimony that claimant's report of sensation followed the ulnar nerve distribution such that claimant was either having actual numbness and tingling relating to the ulnar nerve or had read an anatomy book. (Rosen Dep. at 41.)

¶64 Whether claimant has ulnar nerve laxity in both arms, as indicated by Dr. Graff, and whether that laxity is congenital, also as indicated by Dr. Graff, Montana law has long provided that a workers' compensation insurer takes a claimant as it finds him. *Satterlee v. Lumbermen's Mutual Casualty Co.*, 280 Mont. 85, 929 P.2d 212 (1996). There is no evidence that claimant suffered the popping out of his right ulnar nerve before the accident or that he had pain and numbness in the right ulnar nerve distribution prior to his industrial injury.

¶65 Neither Dr. Lewallen nor Dr. Graff testified. Their reports are insufficient for me to disregard the testimony of Dr. Rosen, which was well reasoned and subjected to vigorous cross-examination. I therefore conclude that as a result of his March 26, 2001 industrial accident, the claimant suffers from a right ulnar nerve condition evidenced by the nerve popping out of its groove at the elbow, pain, and some numbness. I further adopt Dr. Rosen's impairment rating of 8%, his evaluation of claimant's condition, and his recommendations for further treatment.

¶66 Finally, I conclude that despite insurer's unreasonable conduct it was not unreasonable for it to litigate the issues raised in this case. The medical opinions were conflicting, and the opinions upon which the insurer relied were not so beyond the pale of legitimacy that the insurer was unreasonable in relying upon them.

CONCLUSIONS OF LAW

¶67 This case is governed by the 1999 Workers' Compensation Act since that was the law in effect at the time of claimant's March 16, 2001 injury. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶68 Under the 1999 Workers' Compensation Act, and, for that matter, under other versions of the Act, an insurer is liable for medical conditions which were caused or aggravated by the industrial injury. A condition made symptomatic by an industrial accident is compensable, even if it may not have arisen but for a congenital condition. Montana law has long provided that a workers' compensation insurer takes a claimant as it finds him. *Satterlee v. Lumbermen's Mutual Casualty Co.*, 280 Mont. 85, 929 P.2d 212 (1996).

¶69 Based on the foregoing findings of fact, the claimant has proven that his current arm condition, in particular his ulnar nerve condition, is related to his industrial accident. The insurer is responsible for that condition, including the medical treatment recommended by Dr. Rosen and any and all other medical treatment that may be appropriate.

¶70 Claimant also seeks an impairment award. That award is governed by section 39-71-703, MCA (1999), which provides in pertinent part:

> (1) If an injured worker suffers a permanent partial disability and is no longer entitled to temporary total or permanent total disability benefits, the worker is entitled to a permanent partial disability award if that worker:

(a) has an actual wage loss as a result of the injury; and

(b) has a permanent impairment rating that:

(i) is established by objective medical findings; and

(ii) is more than zero as determined by the latest edition of the American medical association Guides to the Evaluation of Permanent Impairment.

(2) When a worker receives an impairment rating as a result of a compensable injury and has no actual wage loss as a result of the injury, the worker is eligible for an impairment award only.

¶71 Section 39-71-711, MCA (1999), addresses impairment evaluations, providing in pertinent part:

(1) An impairment rating:

(a) is a purely medical determination and must be determined by an impairment evaluator after a claimant has reached maximum medical healing;

(b) must be based on the current edition of the Guides to Evaluation of Permanent Impairment published by the American medical association;

(c) must be expressed as a percentage of the whole person; and

(d) must be established by objective medical findings.

¶72 Dr. Rosen rendered an 8% whole person impairment rating. The insurer argues against Dr. Rosen's impairment on two grounds. The first is factual -- that the claimant's condition is not related to his injury. The second is based on opinions of Drs. Lewallen and Graff that he suffered no impairment. I have found Dr. Rosen's opinions the more persuasive. He testified and was subjected to vigorous cross-examination. Drs. Lewallen and Graff did not testify and I have only their reports. Those reports, without more, provide an insufficient basis for me to reject Dr. Rosen's testimony.

¶73 Somewhat more troubling is the insurer's argument that Dr. Rosen's impairment rating is not properly based on the Guides. An impairment rating must be based upon the current edition of the Guides. But while the insurer questions Dr. Rosen's rating, it has not presented expert testimony that Dr. Rosen's reasoning is **not** permitted under the Guides. In contrast, Dr. Rosen testified at deposition that he has received training in interpretation of the Guides and believes that the impairment he rendered flows from the Guides and the training he has received. In this case, I am satisfied with that testimony.

¶74 As a final matter, claimant requests both attorney fees and a penalty. To award either or both, I must find that the insurer has acted unreasonably in denying liability for the benefits sought by the claimant. §§ 39-71-611, -612, and -2907, MCA (1999). Although the

insurer has acted unreasonably in some matters, it was not unreasonable for it to dispute and litigate the specific issues raised in this case.

JUDGMENT

¶75 Claimant's right arm condition, in particular his right ulnar nerve condition is related to his March 26, 2001 industrial accident and is compensable. He is entitled to medical benefits for treatment of his right arm condition, including but not limited to the treatment recommended by Dr. Rosen.

¶76 Claimant is entitled an 8% impairment award rendered by Dr. Rosen, which respondent shall pay.

¶77 Claimant is not entitled to a penalty.

¶78 Claimant is not entitled to attorney fees but is entitled to costs. Claimant shall file his memoranda for costs in accordance with the rules of this Court.

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

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

DATED in Helena, Montana, this 22nd day of August, 2002.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. R. Russell Plath
Mr. Joe C. Maynard
Submitted: July 1, 2002

1. Ecchymosis is a "small, haemorrhagic spot…in the skin…forming a nonelevated, rounded or irregular, blue or purplish patch." 1998-2002 On-line Medical Dictionary. http://cancerweb.ncl.ac.uk/cgi-bin/omd?ecchymosis

2. The medial epicondyle is part of the distal (elbow end) knuckle of the humerus. As will be discussed later in this decision, the claimant's ulnar nerve pops out of the ulnar groove at the elbow. That groove is at the medial condyle. (Rosen Dep. at 10.)

3. The photocopied record provided to the Court (Ex. 1 at 19) contains in handwriting: "was hurt late March -- we have NOT had cold weather YET!" (*Id.*) The note appears written as a comment to the physical therapy report, suggesting it was a comment of the adjuster.