IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2002 MTWCC 15

WCC No. 2001-0471

P. J. EMINETH

Petitioner

vs.

TRAVELERS INSURANCE

Respondent/Insurer for

CONCENTRA MANAGED CARE

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Claimant was injured in a work-related automobile accident and suffered a broken shoulder and a brief period of unconsciousness. The insurer accepted liability and paid benefits. However, following independent medical examinations (IME) it denied payment for further physical therapy and refused to authorize a neuropsychological examination to determine if claimant suffered brain damage. She petitioned the Court from those denials. At trial the insurer agreed to pay the outstanding physical therapy bills and agreed that current ongoing physical therapy treatment is compensable. However, it maintained that a neuropsych exam is premature since claimant's depression has not adequately been treated.

Held: Unrefuted testimony of the IME neurologist establishes that claimant's depression should be more aggressively treated before any neuropsych exam is authorized or done since claimant's inability to concentrate and memory difficulties may be caused by depression and because depression may make neuropsych testing unreliable. Therefore, neuropsych testing is not reasonable at this time. However, it will become reasonable if treatment of claimant's depression does not alleviate her problems.

Topics:

> **Benefits: Medical Benefits: Reasonableness of Services.** Medical services must be reasonable at the time they are rendered.

Benefits: Medical Benefits: Reasonableness of Services. Where a condition that is treatable would interfere with other testing, and potentially render the other testing invalid or unreliable, the treatable condition should be treated before undertaking the additional testing.

Proof: Conflicting Evidence: Medical. Where there are conflicting medical opinions regarding the need for neuropsychological testing, only one of the medical physicians testifies, and the testifying physician testifies that claimant's depression could explain claimant's symptoms and would make the further testing unreliable, and that her depression should therefore be treated, the testimony is persuasive where the recommendations for testing of the other physicians do not address the effect of depression on the validity of the further testing.

¶1 The trial in this matter was held on February 20, 2002, in Helena, Montana. Petitioner, P.J. (Patricia) Emineth (claimant), was present and represented by Mr. Norman H. Grosfield. Respondent, Travelers Insurance (Travelers), was represented by Mr. Kelly M. Wills.

¶2 Exhibits: Exhibits 1 through 29 were admitted by agreement of the parties.

¶3 Witnesses: Claimant testified in person at trial. Dr. Lennard S. Wilson was scheduled to testify by video conference, however, the video was not working. With the agreement of the parties, his testimony was therefore taken by telephone.

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

> 1. Whether Respondent is liable for the neuropsychological testing and physical therapy recommended by Petitioner's treating physician pursuant to § 39-71-704, MCA.
>
> 2. Whether Respondent has been unreasonable in denying either the neuropsychological testing or the physical therapy treatments for Petitioner as recommended by Dr. Brooke Hunter and should be assessed costs, attorney fees, and a penalty.

(Pretrial Order at 2.)

¶5 Resolution of Physical Therapy Issue: At the commencement of trial, the Court engaged counsel in discussion of the physical therapy issue. The claimant has recently undergone surgery and the insurer agrees that she is presently in need of physical therapy. The dispute is over past physical therapy. After discussion with counsel, the Court ascertained that there are approximately three physical therapy sessions which the insurer has not paid. After further discussion, Travelers, through its counsel, agreed to pay for those sessions and claimant agreed to waive her claim for a penalty and attorney fees with respect to that issue.

¶6 The remaining issue is claimant's request for an order directing Travelers to pay for neuropsychological testing, as well as her request for attendant attorney fees, a penalty, and costs respecting that testing. I have limited my findings of fact and conclusions of law to those issues and have not addressed other issues or medical disputes.

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

FINDINGS OF FACT

¶8 In 1986 claimant obtained a degree in nursing and was licensed as a Licensed Practical Nurse. She worked steadily in nursing after that time and went on to obtain a further nursing degree. She was certified as a registered nurse (RN) in 1996. She had a stable job history and no history of psychiatric treatment prior to the industrial accident at issue in this case.

¶9 On January 25, 2000, claimant was working as a registered nurse case manager for Concentra Managed Care (Concentra). (Ex. 6). While driving to Kalispell to meet with a workers' compensation claimant and physician, she hit a patch of black ice and lost control of her vehicle, which rolled over, landing on its wheels. The claimant was thrown about in the accident. She hit her shoulder, breaking her collar bone (clavicle), and hit her head, losing consciousness.

¶10 At the time of the injury, Concentra was insured by Travelers, which accepted liability for the claim and paid various compensation and medical benefits. (Uncontested Fact 2.)

¶11 Since the accident, claimant has undergone two surgeries on her clavicle, the first on October 4, 2000, and the second very recently. Because the remaining issue does not involve medical treatment or liability for claimant's shoulder injury, I omit recitation of her medical history in this regard.

¶12 In addition to her shoulder injury, claimant experienced headaches after the accident. The first mention of headaches in medical records was made one month after the accident by Dr. Brooke M. Hunter, who is an orthopedic surgeon. Dr. Hunter has treated claimant for her shoulder injury and performed both shoulder surgeries. In his office note of February 25, 2000, he recorded that claimant reported, "She is having headaches at night. She has had these before but the car wreck and possible head bump has made these a problem again." (Ex. 1 at 2.)

¶13 On June 21, 2000, Dr. Hunter noted, "She is having a fair amount of what sounds to be cervical spasm headaches. They start in her neck around her collar bone area and work up towards [her] head and the headaches start." (Ex. 1 at 4.)

¶14 A month later, on July 21, 2000, Dr. Hunter again noted that claimant was continuing to have headaches but his note indicates his belief that her headaches were associated with her broken collar bone:

> PJ is having a rough go of things. Her collar bone has been hurting more than before. She is having more numbness down into the arm. She is taking Bancap again and Fioricet for the headaches that come with this.
>
> EXAM: She is tender in the mid-clavicle. Blunt percussion reproduces the paresthesias into her arm. Head abduction to the opposite side reproduces the same symptoms. No hard neurologic findings.
>
> X-RAYS show what may be a change towards non-union.
>
> We'll get a CT evaluation on this. I've talked to her about electrical diagnostic studies after that if necessary. She obviously has a long standing brachial plexus stretch injury from this accident.

(Ex. 1 at 5.)

¶15 Claimant's shoulder difficulties were thereafter paramount and led to surgery on October 4, 2000. Following surgery the claimant continued to experience pain, as well as tingling in her shoulder and arm. Dr. Ronald K. Hull, a pain specialist who examined her on May 14, 2001, characterized her tingling as a "somewhat of a diffuse pattern of neurologic abnormalities in the left upper extremity and hand." (Ex. 2 at 4.) Among other things, a cervical radiculopathy was suspected but apparently ruled out by MRI. (Ex. 9 at 1-2.) A neurosurgical consultation was done by Dr. Dale Schaefer, a neurosurgeon in Great Falls (exs. 1 at 15 and 9 at 2), but his records have not been furnished to the Court. Dr. Schaefer concluded that claimant had suffered a "brachial plexus stretch injury," a diagnosis in which Dr. Hunter concurred. (Ex. 1 at 15.)

¶16 In any event the next mention of headaches was on April 25, 2001. Dr. Hunter's note for that date says:

> She has had headaches all along, they are being made better with traction. She is now going two or three days a week without headaches at all and that is a marked improvement. (Ex. 1 at 15.)

¶17 Claimant was evaluated by Dr. Hull on May 14, 2001. During the history he took from claimant, she related that "she suffered some degree of closed head injury with loss of consciousness" in the auto accident and that "over time she noticed that she was having problems with the left-sided neck pain and headache, which she has had ever since the accident." (Ex. 2 at 1.) Listed among Dr. Hull's impressions was "[h]istory of chronic left-sided occipital headaches and neck pain," which he related "by history" to claimant's auto accident. (*Id*. at 4.)

¶18 Dr. Hull's report also contains other information relevant to claimant's mental status. He noted that claimant "does express some problems with fatigue and is not able to keep up the level of work that she did before her injury," although he noted she had "missed very little work . . . ." (*Id*. at 2.) He also noted that she had been "taking medication for depression and started on this about two months after the injury." (*Id*.) At trial the claimant testified that antidepressants were prescribed by Francis Guthridge, a nurse practitioner, who was claimant's primary medical provider.

¶19 Dr. Hull recommended a multidisciplinary approach for claimant's ongoing pain, including medications to treat "what seems to be in large part a neuropathic pain problem," a "chronic pain psychologic assessment," and "supportive psychotherapy." (Ex. 2 at 5.)

¶20 At least by late June 2001, the claimant was concerned with what she perceived as an inability to concentrate. At trial she described difficulty in completing multiple tasks and with memory. Following her accident she had returned to work with Concentra but after a few months she found the continued travel difficult on account of her continued shoulder pain. She then secured employment with VRI, and thereafter APS (apparently a successor company to VRI), again as a nurse case manager. (Ex. 5 at 2.) At trial she testified that while working for APS she had difficulty completing her work on time and in writing reports. Her employment was terminated by APS on November 29, 2001, for what claimant described as "unsatisfactory performance." (*Id*. at 3.)

¶21 Claimant was a credible witness. I find that the difficulties she described were real.

¶22 On July 3, 2001, Dr. Hunter recorded that claimant "is continuing to have mental lapses and spacey feeling status post concussion, loss of consciousness etc. at the time of the injury. She doesn't think that is getting any better. She is on Celexa and is receiving counseling." (Ex. 1 at 19.) He recommended that claimant "see Mary Kay Bougimill [a neuropsychologist] with thoughts toward a neuro psych evaluation to help see if there is any organic post concussion component to her mental status and psychological problems." (*Id*.) He noted: "This of course would be related to her head injury etc. as described above." (*Id*.)

¶23 Claimant followed up with Dr. Hull on July 19, 2001. In addition to continuing "neuropathic pain" in her neck, shoulder, and arm, claimant reported concern "about her ability to process things intellectually and having some trouble with forgetfulness." (Ex. 2 at 6.) Dr. Hull recommended trying "some neuromodulation therapy with medications, such as tricylcic antidepressants and/or anticonvulsants." (*Id*.) Given the "jabbing electric come and go sensations," he recommended first trying anticonvulsant medication. Before prescribing such medication, however, he wanted claimant to have "neuropsych testing because she may get some possible cognitive impairment from the anticonvulsant medications." (*Id*.)

¶24 On August 14, 2001, Drs. Lennard S. Wilson and Catherine C. Capps performed another IME, reviewing additional medical records and re-interviewing and re-examining claimant. (Ex. 9.) In addition to her shoulder pain and associated symptoms, in the history claimant gave the doctors she said she suffered frequent headaches. She reported her energy level at zero, and her sleep fitful and not restful. She also told them that she had little pleasure in the last several months and had "difficulty concentrating, rereading both pleasurable and technical material. She seems to work at a much slower level, not able to juggle as many facts as usual." (*Id*. at 3.)

¶25 With regard to claimant's mental status, Drs. Wilson and Capps noted:

> The patient clinically is depressed on very low dose of Effexor. She needs aggressive treatment of her sleep disorder, which has been pre-existing and chronic to some degree, with adequate doses of medication and formal psychiatric evaluation rather than a clinic evaluation.
>
> Improvement in her sleep and energy level would likely make substantial difference in her level of functioning, even in the setting of pain. There is no clinical evidence of brain injury or, in our opinion, necessitating neuropsych evaluation.

(*Id*. at 5.) They went on to say:

> As stated above, the patient is clinically significantly depressed and is likely undertreated or in the process of obtaining adequate treatment. It is impossible to perform any type of neuropsychological testing of any validity in this type of setting, in our opinion. We do not think she suffered a traumatic brain injury, in fact, has conducted complex work in her chosen field in apparently a competent, but slowed manner. This could be entirely consistent with pain and depression. We would strongly encourage formal psychiatric treatment as opposed to County Health Clinic treatment for this significant problem. Any underlying, pre-existing psychiatric issues should be explored on a psychiatric basis, not by neuropsych testing.

(*Id*. at 7.)

¶26 On October 4, 2001, claimant returned to Dr. Hunter for follow-up. (Ex. 1 at 38.) He was aware of the IME report regarding neuropsych testing and noted:

> A neuro psyche test has been recommended but not authorized. Seeing Dr. Hull with a pain clinic approach has not yet been done. I think both of these are important and both of these would help guide further treatment including the use of neuro modulating drugs, such as Neurontin, etc.

(*Id*.)

¶27 The debate over neuropsych testing continued. On October 25, 2001, Dr. Wilson responded to additional questions from the insurer. He explained his general agreement with Dr. Hull's treatment of claimant, commenting "no objection to trying Neurontin for this type of pain, although have suggested that effective treatment of her depression is of primary importance in her recovery and treatment." (Ex. 10 at 1.) He reiterated that claimant's "depression may benefit from further therapy." (*Id*.)

¶28 On November 2, 2001, Dr. Hull also responded to an inquiry from the insurer. (Ex. 2 at 7.) He reiterated his "recommendation for the chronic pain psychologic assessment, with agreement with Dr. Hunter's assessment that she probably would also benefit from some neuropsychiatric testing since she did have a history of loss of consciousness signifying a closed head injury at the time of her accident." (*Id*.)

¶29 On December 20, 2001, at the request of the insurer, the claimant was evaluated by Dean Gregg, Ph.D., a clinical psychologist. (Ex. 5.) Dr. Gregg met with and interviewed claimant, reviewed employment materials, and administered two psychological assessments. (*Id*.) Dr. Gregg noted claimant "has a history of depression, and in July, 2001 began complaining of forgetfulness and poor concentration." (*Id*. at 1.) He noted her physician's recommendation of a neuropsychological evaluation, which was "denied on the grounds that her symptoms were most likely due to depression." (*Id*.)

¶30 Dr. Gregg reviewed treatment notes, beginning in March of 2000, of the nurse practitioner who was claimant's primary care provider. Those notes indicated that claimant had suffered serious depression and was treated with Effexor, an antidepressant. (*Id*. at 3.) He also reviewed the August 2001 IME exam and the finding that she was "clinically depressed." (*Id*. at 5-6.)

¶31 Dr. Gregg's own impression was that claimant was suffering from an "Adjustment Disorder with Mixed Anxiety and Depression…Coping Style Affecting Medical Condition." (*Id*. at 10.) Believing a more serious diagnosis (major depression) may have been appropriate for claimant several months earlier, he noted that her symptoms appeared to have improved. Dr. Gregg attributed claimant's adjustment disorder to her work injury. (*Id*.) He went on to discuss his diagnosis of Adjustment Disorder and its underlying significance and its causes:

> Adjustment disorders are psychological reactions to identifiable stressors. They can last as long as the stressor(s) is present, but by definition will remit within 6 months of the disappearance of the stressor. . . . In this particular case there appear to be 2 stressors separated by a period of improvement. The first was the auto accident of 1/25/00. Between the physical discomfort and the emotional effects of such an incident, there appears to be a period of mental turmoil lasting roughly 3 or 4 months. There then appears to be a significant improvement lasting a little over a year. During this period of time Ms. Emineth reports a noticeable improvement, and

observations by third parties seem to agree (progress notes, satisfactory job evaluation, and so on). The second stressor appears around May, 2001 and takes the form of disagreement about the correct diagnosis and treatment for her condition. While there appear to have been minor complaints of mental inefficiency prior to this, they now became worse. She complains about it to Dr. Hull on May 14, and again to Dr. Hunter on July 3. In November she loses her job.

. . . .

Coping Style Affecting Medical Condition refers to a maladaptive coping style that impedes the treatment of a mental condition. In this particular case it refers to Ms. Emineth's tendency to put on a happy face and tell both herself and others that everything is fine. She may have returned to work too soon. She may have been more physically active than her medical condition could tolerate. The failure or delay in fully addressing the psychological aspects of her condition may have contributed to her problems with concentration and mental disorganization. It is also logical to assume that chronic worry and tension will aggravate her pain, which in turn will aggravate her worry and tension. . . .

. . . .

From Ms. Emineth's perspective she is caught in the crossfire between disagreeing health care providers, insurance carriers, and law firms. This is the single greatest source of stress (and distress) for her, and it would be in her psychological best interests to resolve these disputes as quickly as possible. It is unlikely that her psychological condition will improve beyond it's [sic] present point until this happens. [Emphasis added.]

(*Id*. at 10-12.) He went on to caution:

The fact that Ms. Emineth was recently fired from her job should be cause for the utmost concern by all parties involved in this case. In only 6 months she went from satisfactory performance and being recommended for a raise to being fired for what amounts to incompetence. *Clearly something has gone wrong*. To reiterate, it is in her psychological best interest to resolve the workmans' comp disputes as soon as possible. [Bold emphasis added.]

(*Id*. at 13.)

¶32 Dr. Gregg recommended interim psychological counseling, continued psychotropic medication in the interim, and aggressive treatment for insomnia. (*Id*. at 12.) Regarding neuropsychological testing, Dr. Gregg noted:

Distinguishing between a psychological disorder and *moderate to severe* brain injury is usually not difficult. **However, the symptoms of *mild* brain injury overlap**

> **with symptoms of anxiety and depression, e.g. difficulty concentrating, mental inefficiency, attentional problems, and so on.** I suspect this is what Drs. Capps and Wilson were referring to when they downplayed the usefulness of neuropsych testing. If Ms. Emineth were to obtain normal results on such testing it would strongly imply (although not prove) that emotional factors were responsible for her memory and concentration problems (i.e. it might be useful in ruling out brain injury). **If, on the other hand, abnormal results were obtained it would be difficult to determine *why* they were abnormal; were the test results due [to] emotional factors vs. were the test results due to organic factors.** [However,] [t]he reader should be aware that I am not a neuropsychologist and do not keep up with the literature very well. There may be recent advances in the field that help differentiate between the two. [Bold emphasis added.]

(Ex. 5 at 12-13.)

¶33 On January 11, 2002[(1)], Dr. Gregg responded to a letter from the insurer posing additional questions. He stated that he did not consider himself qualified to answer questions about whether the medical records reflected a brain injury or whether neuropsychological testing was appropriate. (Ex. 26 at 1.)

¶34 Travelers continued to refuse to authorize neuropsych testing, however, it did authorize claimant to seek psychiatric treatment for her depression and anxiety. At trial, claimant agreed to do so, however, she still contends that she should be allowed to proceed with neuropsych testing, at Travelers' expense, without further delay.

¶35 The only medical testimony in this case was provided by Dr. Wilson, who participated in the two IME examinations of claimant. Dr. Wilson is board certified in neurology. His training in neurology also involved some psychiatry. As part of his medical practice he treats head-injured patients.

¶36 Although he does not personally do neuropsychological testing, Dr. Wilson is familiar with the testing and relies upon neuropsych test results in treating patients. He testified that the claimant's psychological symptoms may be explained by her depression, but more importantly that depression interferes with neuropsych testing and makes the results unreliable. In his practice he defers neuropsychological testing of obviously brain injured patients until other medical and psychological issues are addressed and treated. Dr. Wilson said that treatment of claimant's depression by a nurse practitioner would be fine if the antidepressants she prescribed adequately controlled claimant's depression but that in fact claimant's depression was poorly controlled. He recommended she be evaluated and treated for depression by a psychiatrist.

¶37 Neither Dr. Hull's nor Dr. Hunter's office notes or records address whether claimant's depression or adjustment disorder would interfere with neuropsych testing, and neither

physician testified. Dr. Gregg's report indicated his understanding that claimant's depression and adjustment disorder may render neuropsych results unreliable, although he indicated that he may not be current in his thinking. Claimant did not call a neuropsychologist to support her case for prompt testing. Thus, the Court is left with Dr. Wilson's unrebutted testimony and Dr. Gregg's reservations regarding the reliability of neuropsych testing.

¶38 Accordingly, I find that claimant should proceed with treatment for her depression and adjustment disorder, which she has agreed to do, and that neuropsych testing is premature. However, I further find that should her memory and concentration difficulties continue despite that treatment then neuropsych testing at that time is reasonable and appropriate.

¶39 Finally, I find that the insurer has not acted unreasonably in refusing to presently authorize neuropsych testing. Drs. Wilson's and Gregg's reports provided a substantial basis for its refusal, indeed I have found Dr. Wilson's testimony persuasive and sustained the insurer's position.

CONCLUSIONS OF LAW

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

¶41 Claimant bears the burden of proving by a preponderance of the evidence that she is entitled to the benefits she seeks. *Ricks v. Teslow Consolidated,* 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wicken Bros. Construction Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

¶42 Payment of medical benefits is governed by section 39-71-704, MCA (1999). That section provides in relevant part:

> **39-71-704. Payment of medical, hospital, and related services -- fee schedules and hospital rates -- fee limitation.** (1) In addition to the compensation provided under this chapter and as an additional benefit separate and apart from compensation benefits actually provided, the following must be furnished:
>
> (a) After the happening of a compensable injury and subject to other provisions of this chapter, the insurer shall furnish reasonable primary medical services for conditions resulting from the injury for those periods as the nature of the injury or the process of recovery requires. [Underline added.]
>
> Primary medical services consists of "treatment prescribed by a treating physician, for conditions resulting from the injury, necessary for achieving medical stability." § 39-71-116 (26), MCA (1999). While neither party has specifically addressed whether

a neuropsych examination represents primary medical services, claimant's continuing problems and the recommendations for further mental health evaluation and treatment indicate that the services would constitute primary services.

¶43 The more important question is whether a neuropsych exam is "reasonable" at this time. I have found as a matter of fact that it is not. Therefore, claimant's request that the Court order the insurer to approve the exam must be **denied**.

¶44 However, since the record evidences tension and disagreement between the insurer and claimant, I retain continuing jurisdiction in the event a further disagreement ensues as to the success of further psychological treatment or the need for or timing of neuropsych testing. I am persuaded by claimant's testimony and Dr. Gregg's report that the conflict with the insurer is adversely affecting claimant's mental health. By retaining continuing jurisdiction to carry out the ultimate findings set forth in this paragraph, claimant can be assured of speedy access to the Court and a prompt resolution if any further dispute arises concerning her need for neuropsych testing.

¶45 Since the claimant has failed to persuade the Court that a neuropsych evaluation is currently reasonable, her requests for attorney fees, a penalty, and costs must be denied. Moreover, attorney fees and the penalty require proof that the insurer has acted unreasonably in failing to approve the evaluation. §§ 39-71-611, -612, 2907, MCA (1999). As a matter of fact, I have found it did not act unreasonably.

JUDGMENT

¶46 Travelers shall abide by its agreement, made in open court, to pay claimant's outstanding physical therapy bills.

¶47 Claimant's request that the Court order Travelers to approve and pay for a neuropsychological examination is **denied**. However, the Court retains continuing jurisdiction in the event a further disagreement ensues as to the success of further psychological treatment or the need for and timing of neuropsych testing.

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

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

DATED in Helena, Montana, this day of 8th March, 2002.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Norman H. Grosfield
Mr. Kelly M. Wills
Submitted: February 20, 2002

1. The letter (Ex. 26) is dated January 11, 2001, but from context it was written in 2002, not 2001