IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2000 MTWCC 67

WCC No. 9912-8393

WCC No. 2000-0082

ANN MARIE HOFF,

Petitioner,

vs.

UNINSURED EMPLOYERS' FUND,

Respondent,

and

LAUBACH & LAUBACH LLC, d/b/a YANKEE JIM TRADING POST,

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary of Case: Claimant suffered two back injuries while working as a store clerk for Yankee Jim's, which was uninsured. She established by a preponderance of evidence, but not by clear and convincing evidence, that she notified her employer of the first injury and provided it with a written statement, and that she was assured it would be submitted to workers' compensation. Her formal written claim was submitted more than one year after the accident and denied by UEF as untimely. A timely claim was submitted for the second injury and accepted by UEF, which initially paid TTD benefits. Her treating physician found her at MMI in October 1999. UEF cut off TTD benefits and paid out a 5% impairment award. In this proceeding claimant requests a waiver of the limitations period with respect to the first injury and requests reinstatement of TTD benefits with respect to the second, arguing that she has not in fact reached MMI.

Held: (1) The waiver is denied since estoppel must be proved by clear and convincing evidence and her proof did not reach that level. (2) As to MMI, she has not materially improved since her treating physician rendered his MMI opinion and that opinion is persuasive.

Topics:

Statutes: 39-71-601(2) (1997). While the one-year limitations period for filing a written claim may be waived for estoppel grounds, estoppel must be proved by clear and convincing evidence.

Statutes: 39-71-601(3) (1999). WCC has original jurisdiction over pre-1999 requests for waiver of the one-year limitations period for filing a written claim where neither party elects to have the matter heard by the Department.

WCC Rules: 24.5.317(2). Attorney fees denied claimant's attorney for preparation of affidavits authenticating medical records where claimant supplied the records and failed to verify her responses to discovery despite being requested to do so. UEF was not unreasonable in seeking some type of verification that the records were authentic.

Administrative Procedure: Notice. Procedural due process requires the Department of Labor and Industry to provide the employer, insurer, and/or UEF, as the case may be, with written notice of its determination waiving the one-year limitations period so that those affected parties have an opportunity to request a hearing. Moreover, for the Department's determination to garner any respect, notice should be given to all interested parties prior to any determination.

Attorney Fees: Sanctions. Attorney fees denied claimant's attorney for preparation of affidavits authenticating medical records where claimant supplied the records and failed to verify her responses to discovery despite being requested to do so. UEF was not unreasonable in seeking some type of verification that the records were authentic.

Constitutional Law: Due Process: Procedural Due Process. Procedural due process requires the Department to provide the employer, insurer, and/or UEF, as the case may be, with written notice of its determination waiving the one-year limitations period so that those affected parties have an opportunity to request a hearing.

Jurisdiction: Original. WCC has original jurisdiction over pre-1999 requests for waiver of the one-year limitations period for filing a written claim where neither party elects to have the matter heard by the Department.

Limitations Periods: Claim Filing: Waiver of Time/Estoppel. Estoppel must be proved by clear and convincing evidence.

Maximum Medical Improvement. Treating physician's MMI opinion persuasive where subsequent treatment by other physicians does not materially improve the claimant's condition.

Proof: Conflicting Evidence: Medical. Treating physician's MMI opinion persuasive where subsequent treatment by other physicians does not materially improve the claimant's condition.

¶1 Pending before the Court are two separately captioned matters. The first matter - WCC No. 9912-8393 - involves a request by petitioner, Ann Marie Hoff (claimant), for a waiver of the one-year limitations period for filing a claim. The claim in question was submitted on August 24, 1999, for an alleged back injury occurring on June 8, 1998. The second matter - WCC No. 2000-0082 - is a request for reinstatement of temporary total disability (TTD) benefits for an August 5, 1999 back injury. The two matters have been consolidated for trial and decision.

¶2 A trial was held on September 11, 2000, in Great Falls, Montana. Petitioner, Ann Marie Hoff (claimant), was present and represented by Mr. Lucas J. Foust and Mr. Chris J. Ragar. Respondent, Uninsured Employers' Fund (UEF), was represented by Mr. Daniel B. McGregor. Respondent/Employer, Laubach & Laubach LLC (Yankee Jim's), was represented by Ms. Kimberly D. Evans.

¶3 Exhibits: 1 through 33 and 43 through 51 were admitted without objection. Exhibits 36 through 42 were admitted over the objection of UEF. There were no Exhibits 34 or 35.

¶4 Witnesses and Depositions: The claimant, her husband (Greg Hoff), Sherry Soennichsen, Art Bent, and Bernadette Rice all testified. In addition, the depositions of Ann Marie Hoff, Dr. James C. Simmons, and Dr. John A. Vallin were submitted for the Court's consideration.

¶5 Issues Presented: The final pretrial order sets forth the issues as follows:

- Was the Order Waiving Claim Filing Time issued by the Claims Assistance Bureau constitutionally and procedurally defective for failure to provide the UEF and the Employer notice and opportunity to be heard prior to the issuance of that Order?
- Is the Petitioner entitled to workers' compensation benefits in relation to her June 8, 1998, back injury?
- Is Petitioner entitled to continuing temporary total disability benefits in relation to her August 5, 1999, back injury?
- Is Petitioner entitled to an award of attorney's fees and costs in relation to her claim for benefits for her June 8, 1998, and August 5, 1999, injuries?

(FINAL PRETRIAL ORDER at 3-4.)

¶6 Having considered the final pretrial order, the testimony presented at trial, the demeanor and credibility of the witnesses, the depositions and exhibits, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

¶7 Claimant went to work for Yankee Jim's in 1995 as a clerk. Yankee Jim's is a retail store in Gardiner, Montana, which is owned and operated by Laubach &Laubach LLC. Claimant's job duties while working for the store included waiting on customers, putting merchandise away and cleaning. She worked eight hours a day, initially five days a week and then four days a week.

¶8 In 1998 claimant took on concurrent employment at the Hillcrest Motel in Gardiner, Montana. At that time, the motel owner, Art Bent, hired claimant and her husband to operate the motel during part of the week. The Hoffs were responsible for the motel for two full days during the week and also for evenings on three other days. The motel owners were responsible for managing and operating the motel during the remainder of the week. The Hoffs moved into a unit of the motel which also houses the motel office. Until her back injuries, the claimant, rather than her husband, performed most of the motel work, including cleaning rooms, laundering sheets and towels, answering the telephone, and checking guests in and out.

June 8, 1998 Back Injury

¶9 On June 8, 1998, while at Yankee Jim's, claimant twisted her body stepping off a counter where she had been standing to hang pictures. She immediately felt pain in her back. She went home, took Advil, and had a hot bath.

¶10 At trial, claimant testified that on the day after the accident she told Wade Laubach (Laubach), one of the owners of Yankee Jim's, about the accident and told him it should be reported to Workers' Compensation. According to claimant, he responded by telling her to write out a statement regarding the accident, have Shelly Thomas, a co-employee who witnessed the accident, sign the statement, and put the statement on his desk; thus, he would report it. Claimant testified that she provided him with the written statement he requested.

¶11 Laubach provided the UEF with a statement disclaiming any knowledge of the injury until August 16, 1999. He did not testify at trial. His written statement is not subject to cross-examination and I disregard it in determining whether claimant's testimony is true.

¶12 Claimant's testimony is sufficient to satisfy me by a preponderance of evidence that she provided a written statement to Laubauch, however, it is not clear and convincing. Without regard to Laubach's written statement, I find it less than clear and convincing for two reasons; both affect my assessment of claimant's credibility on this point.

- First, claimant called her close friend, Sherry Soennichsen (Soennichsen), to testify on her behalf about the written statement claimant said she provided Laubach. Soennichsen identified Exhibit 1 at page 2 as that statement. Her testimony was not

credible. While dated June 8, 1998, the statement found at Exhibit 1 at page 2 was plainly prepared later. That exhibit was received by the Department of Labor and Industry (Department) on August 31, 1999, about the time claimant filed a written claim for compensation. Moreover, in the text of the statement, claimant says that she prepared the statement and gave it to Laubach, thus indicating that the statement she gave him was a different one, not the exhibit. The exhibit reads:

> June 8, 1998
>
> I went home that night and crawled into the bath tub with hot water. It helped some but I still had some bad pain.
> I went to work the next day and that is when I told Wade that he needed to report this. He asked me to write a statement and have Shelly sign it and give him a copy of it. **I did.**
>
> Wade never told me to go get checked or that I could not work till [sic] I did. I just went back to work as usuall [sic].

(Ex. 1 at 2, emphasis added.)

- Second, claimant testified that she never sought medical care for her June 8th injury because she did not have medical insurance and could not pay for the care. But she also testified that she told Laubach that "we need to report this to Workers' Comp." Why would she tell him of a need to report it to Workers' Compensation unless she was aware that benefits would be available to her for her injury?

¶13 Claimant's ultimate claim for compensation respecting the June 8th injury was prepared and submitted August 24, 1999, more than one year after the accident.

¶14 At the time of the June 8th accident, Jim Yankee's was uninsured. The claim was therefore forwarded to UEF, which denied liability on the grounds that there were no objective medical findings to substantiate the injury and the claim was barred by section 39-71-601, MCA, for claimant's failure to submit it within one year. (Uncontested Fact No. 3.)

¶15 On October 13, 1999, claimant requested an extension of the time for filing her claim for the June 8, 1998 injury. (Ex. 8.) She submitted her request to the Department pursuant to sections 39-71-601 and 601(2), MCA (1997).

¶16 The Workers' Compensation Claims Assistance Bureau (Bureau) of the Department, which is responsible for processing waiver requests, received claimant's request on October 19, 1999. On that same day it granted a waiver extending the time for filing her claim. order waiving claim filing time. (Exs. 8 and 9.) The waiver was granted without prior notice to either the employer or the UEF.

¶17 On November 16, 1999, after learning of the waiver, the UEF requested a hearing before the Department's Hearings Unit. (Ex. 11.) Two days later, on November 18, 1999, the employer also notified the Hearings Unit that it contested the order waiving claim filing time. (Ex. 12.)

¶18 Meanwhile, the 1999 Montana Legislature changed the jurisdictional provisions to provide that the Workers' Compensation Court, rather than the Department, shall hold the hearing in contested waiver cases. 1999 Mont. Laws, ch. 442 § 16. The change was made with the proviso that either party could request a pending matter to remain in and be heard by the Department, *Id.*, § 31. However, in this case, neither party made such a request and the matter was transferred to this Court for hearing. [DEPARTMENT] ORDER REGARDING JURISDICTION (December 28, 1999.)

¶19 The only evidence that claimant presented to justify a waiver of the one-year limitations period was the evidence concerning her communication with Laubach and submission of a written statement to him. She did not present any evidence that she was unaware of her condition or suffered any disability from the injury.

August 5, 1999 Injury

¶20 Claimant continued to suffer back pain after the June 8th incident. She testified that she experienced pain on a daily basis. (Hoff Dep. at 22-23.) The history she gave to Dr. Vallin more than a year later is somewhat inconsistent with her testimony, indicating that her pain was not as constant or as severe as she indicated at trial. According to the history taken by Dr. Vallin,

She states she treated herself with hot baths and frequent doses of Advil [following the June 8th injury] . . . [and] her symptoms resolved for the most part, two weeks later, though over the last year she has experienced occasional flare ups of low back pain, unassociated with specific trauma."

(Ex. 27 at 1.) In any event, she never sought medical care for the June 8th strain and, by her own admission, also lost no time from work following that injury. (Hoff Dep. at 26.)

¶21 On Thursday, August 5, 1999, the claimant suffered a second work-related back injury. On that date, while moving a counter at the store, claimant felt a pop in her low back. By the following Monday she felt unable to work and was experiencing low-back and leg pain. She called Laubach and reported her injury and told him she was unable to work.

¶22 Thereafter, on August 24, 1999, claimant filed a claim for compensation. Yankee Jim's was still uninsured at the time of the second injury and the claim was forwarded to the UEF, which accepted liability and began paying medical and TTD benefits. (Ex. 18.) In accepting liability, the UEF characterized the second injury as a "temporary aggravation of your pre-existing condition" and indicated that its acceptance was "under a full reservation of

rights." (*Id.*) The reservation was to allow the employer to contest compensability of the claim. (*Id.*)

¶23 Following this injury, claimant's pain compelled her to seek medical care. On August 9, 1999, she went to the Emergency Room of the Bozeman Deaconess Hospital. (Ex. 26.) She was seen by Dr. Steven A. Gipe, who recorded that she had acute low-back pain with radicular symptoms. (*Id.* at 1.) A three view plain x-ray lumbar series showed some mild degenerative changes at the L3-4 disk space, perhaps an old injury, otherwise unremarkable. (*Id.*) Dr. Gipe offered her three treatment options:

> 1) Admission to the hospital for pain control and orthopedic consultation; 2) wait at no additional charge in the Emergency Department for an orthopedic consultation, both Dr. Speth and Dr. Gannon being in the operating room at this time. This was estimated to be up to a 1-2 hour wait, and 3) trial of bed rest at home with pain medication and muscle relaxants, and follow-up in the orthopedic office later this week.

(*Id.*) Claimant elected the third option and returned home with prescription pain medication.

¶24 Following her ER visit, claimant continued to experience back pain and disability. She next saw Dr. John A. Vallin, a physiatrist specializing in non-operative spine care and pain management. (Vallin Dep. at 5.) Her first visit to Dr. Vallin was on August 17, 1999. At that time, claimant reported "constant aching pain in her low back" and "intermittent shooting pain radiating into her thighs and calves, to the ankles bilaterally." (Ex. 27 at 1.) Dr. Vallin's impressions at that time were:

1. Lumbar strain secondary to industrial injury, August 5, 1999.
2. Presumed lumbar strain, June 8, 1998.
3. Mild degenerative disc disease L3/4,L4/5; facet degenerative joint disease L5/S1.

(*Id.* at 2.) Dr. Vallin prescribed physical therapy, an analgesic and a muscle relaxant; he anticipated that claimant would reach MMI in 6-8 weeks, or sooner depending on her response to physical therapy and medications. (*Id.*) He also noted that if claimant continued to have lower extremity symptoms he would recommend an MRI to rule out a herniated disk. (*Id.*)

¶25 Claimant returned to Dr. Vallin on August 31, 1999. He noted her complaints as continuing, constant low-back pain, and "severe sharp stabbing pain in her low back, radiating across the right and left sides, unassociated with radicular symptoms." (Ex. 28.) He noted claimant had only attended three physical therapy sessions since her last appointment with him. (*Id.*) Dr. Vallin felt that claimant's symptoms were "discongenic" (originating in the disk) in origin, without any "focal herniation," but prescribed an MRI to rule out the latter. (*Id.*; Vallin Dep. at 17.)

¶26 An MRI was done on September 8, 1999. It showed mild degenerative disk changes from L3 to S1 with no focal disk herniation, compromise of exiting nerve sleeves, and no spinal stenosis. (Ex. 29.) Dr. Vallin felt claimant's continuing low-back pain was secondary to her degenerative disk disease, particularly at L5-S1, and recommended an epidural steroid injection. (Ex. 29 at 3; Ex. 30 at 1.)

¶27 Claimant received her first epidural injection on September 28, 1999. (Ex. 30 at 1.) On October 8, 1999, claimant reported that she did not experience any significant relief from the injection and had a constant headache following the injection. (Ex. 31.) She reported continuing "diffuse low back pain radiating across her entire low back and into her upper buttocks, aggravated with prolonged sitting and stationary standing . . . . " (*Id*. at 1.) Dr. Vallin concluded claimant had chronic low-back pain and mild degenerative disk disease at L5/S1 and that she had reached maximum medical improvement (MMI) with respect to her injury. (*Id*.) He assigned her a 5% whole person impairment and released her to light physical demand labor, restricting her to lifting up to twenty pounds occasionally and ten pounds frequently. (*Id*.) Claimant was informed by Dr. Vallin that she was capable of returning to work. (*Id*.)

¶28 Based on Dr. Vallin's finding of MMI, on November 16, 1999, the UEF notified claimant that it would pay her an impairment award based on her 5% impairment rating. (Ex. 23.) It advised her that the award would be payable for the period October 8, 1999 through February 7, 2000. While the letter did not mention TTD benefits,[(1)] the UEF converted her benefits from TTD benefits to permanent partial benefits effective October 8, 1999.

¶29 Claimant disputes Dr. Vallin's finding of MMI and seeks reinstatement of TTD benefits retroactive to October 8, 1999. In addition to Dr. Vallin, she has been examined by Drs. Joan C. Murray, James C. Simmons, and Steven R. Speth. She relies on their treatment and opinions in asserting that she has not reached MMI.

¶30 Dissatisfied with Dr. Vallin's treatment, on October 27, 1999, claimant sought a second opinion from Dr. Joan C. Murray, who is a physiatrist and neurologist. (Ex. 36.) Claimant reported her symptoms as "constant low back pain" radiating "from the left lumbar region down the hip and into the thigh, occasionally down to the lateral calf . . . less frequent radiation down her right leg." (*Id*.) Dr. Murray diagnosed lumbar strain and mild degenerative spine disease and commented that claimant's low-back pain was musculoskeletal in origin. (*Id*.) She prescribed a TENS unit and training by the physical therapist as to its use. (*Id*.)

¶31 Claimant next saw Dr. Murray on November 18, 1999. She reported that the TENS unit was helpful. (Ex. 37.) She also reported reinjuring her back when "she lifted her knees." (*Id*.) Dr. Murray recommended that claimant restart more active physical therapy since the Celebrex and the TENS unit were providing her with symptomatic relief. (*Id*.)

¶32 On November 18, 1999, Dr. Murray wrote Bernadette Rice, the claims adjuster for the UEF:

> I am seeing Anne [sic] Hoff for continued back pain. She is continuing to have symptoms and **I am notconvinced that she has yet obtained maximum medical improvement from her August 5, 1999, work related injury**. [Emphasis added.]

(Ex. 38.)

¶33 On January 4, 2000, claimant reported to Dr. Murray that she was continuing to experience "low back pain and left leg pain" but that the TENS unit helped. (Ex. 39.) On the other hand, claimant reported that she had "an exacerbation of her pain after the massage that she was receiving from her physical therapist." (*Id.*) She also reported "still taking hot baths because they relieve the pain," "intermittent back spasms," and difficulty walking at times because of "left leg pain radiating to the heel." Dr. Murray prescribed further physical therapy with a different therapist and commented that if claimant's pain continued she "will reconsider whether she wishes to try another lumbar epidural injection." (*Id.*)

¶34 Claimant next returned to see Dr. Murray on February 3, 2000. Dr. Murray's office note of that date indicates that claimant had been to the ER two and one-half weeks earlier and was supposed to call Dr. Murray the following morning to make an appointment. (Ex. 40.) The ER visit indicates a severe episode of pain. Dr. Murray's office note on February 3, 2000, states that claimant was still using the TENS unit "off and on through the day." (*Id.*) In the IMPRESSION section of her office note, Dr. Murray commented:

> I do not feel that she has a surgical problem but more of a chronic pain problem related to musculoskeletal/ligamentous injury. I will refer her to Dr. Duane Mohr for consultation to see whether he thinks any additional injections might be of benefit.

(*Id.*)

¶35 Dr. James C. Simmons, rather than Dr. Mohr, thereafter saw claimant with respect to epidural injections. On February 16, 2000, he reported that claimant had slipped and fallen coming out of the shower and that her back had been worse since her fall. (Ex. 32.) He proceeded with an epidural steroid injection at L3/4. (*Id.*) Claimant immediately reported considerable relief from her pain. (*Id.*) Dr. Simmons told claimant that if there was inflammation and swelling, the epidural injection should result in considerable improvement, but otherwise it might not help. (*Id.*)

¶36 Twelve days later, on February 28, 2000, claimant returned to Dr. Simmons for a second epidural injection.[(2)] (Ex. 33.) At that time, claimant reported that the previous injection gave her 70% to 80% pain relief. (Ex. 33.) Dr. Simmons proceeded with the second epidural steroid injection at L4/5 and claimant left his office "pain free." (*Id.*, Ex. 41.) At that time, claimant indicated she "would prefer not to undergo further injections." (*Id.*)

¶37 On March 27, 2000, claimant telephoned Dr. Simmons and told him that her pain had returned. (Simmons Dep. at 21.) In her deposition claimant testified that following the February 28th injection her pain was "not as excruciating as it was before." (Hoff Dep. at 55.)

¶38 On May 4, 2000, claimant went to Dr. Steven Speth. Claimant reported her symptoms at that time, as follows:

> "60% LBP [low back pain] and 40% left greater than right leg pain described as a throbbing and a sticking type of pain that is intermittently associated with tingling and numbness located primarily at the lateral buttock and thigh and in the left leg extending into the lateral calf and sometimes into the holo [sic] foot."

(Ex. 41 at 1.) Dr. Speth noted that claimant got some relief from home exercise but that "[a]ny massage seems to worsen her symptoms" and on "several occasions" she had sought "assistance such as helping her off the floor when she couldn't get up due to severe pain." Concerning changes in claimant's symptoms, Dr. Speth noted:

> She also has had a slight change in her symptoms since she has seen Drs. Vallin, Murray and then Simmons which includes pain that seems to extend up to the level of the neck and often feels pain radiating from the midline of her posterior neck extending down to her low back through the legs and into her feet and toes.

(*Id.*) In comparing this note with the notes of other physicians, the changes noted by Dr. Speth represented an increase in the extent of claimant's symptoms.

¶39 Dr. Speth diagnosed mechanical low-back pain, trochanteric bursitis,[(3)] and possible bilateral L5 radiculopathy. (Ex. 41.) Dr. Speth recommended claimant have a bone scan of the lumbar spine, pelvis and proximal femurs, a trochanteric bursa injection either bilaterally or on the left side, and blood tests. (*Id.* at 2.) If claimant did not have improvement with the bursa injection, Dr. Speth recommended a bilateral L5 selective nerve root block. (*Id.*) But, ultimately, Dr. Speth deferred to Dr. John A. Vallin:

> I do not feel the patient is a surgical candidate. I would recommend that she F/U [follow up] with Dr. Vallin as a treating physician. **I would defer decision making to him regarding appropriateness of minimally invasive techniques.** [Emphasis added.]

(*Id.*)

¶40 Claimant returned to Dr. Speth on June 1, 2000. The doctor noted that claimant's bone scan and blood analyses were all normal. (Ex. 42.) In addition, the bursa injection on the left side significantly improved her lateral hip symptoms. (*Id.*) Dr. Speth recommended claimant continue her home exercise program adding in specific exercises for her trochanteric bursa which were evidently absent from her initial program. (*Id.*) He also noted that claimant might benefit from additional trochanteric bursa injections, but reiterated

that she is not a surgical candidate. (*Id.*) He also reiterated that claimant should return to Dr. Vallin for any follow-up treatment.

¶41 Medical depositions were taken of Drs. Vallin and Simmons. Neither Dr. Murray nor Dr. Speth testified.

¶42 At his deposition on August 1, 2000, Dr. Vallin reaffirmed his October 8, 1999 finding of MMI. He based that determination on several factors:

1. He could not objectify any of her subjective complaints;

2. She was not a surgical candidate for inter-discal electro thermal therapy (IDET) since she got worse after she received the epidural injection;

3. He felt there were underlying psychological factors involved in her perception of pain and disability, giving rise to behavioral overlay;

4. Claimant's MRI was relatively unremarkable;

5. She got worse with physical therapy.

(Vallin Dep. at 17-18, 24-25.) Dr. Vallin observed that the fact that claimant was still having low-back pain in June 2000 similar to the pain she had on October 8, 1999, verified his MMI conclusion and that there was nothing more to be done for claimant. (*Id.* at 24, 35, 39.) Dr. Vallin further noted that the TENS unit prescribed for claimant was merely palliating[(4)] her symptoms. (*Id.* at 35.)

¶43 In his deposition, Dr. Simmons did not testify positively that claimant had not reached MMI, only that he agreed with Dr. Murray, who was "not convinced that she [claimant] has yet obtained maximum medical improvement from her August 8th, 1999 work related injury." (Simmons Dep. at 20.)

¶44 At trial, the claimant testified that recently, "in the last few days," she has been having more good days than before, however, she also testified that she has a constant backache, some days so bad she cannot walk.

¶45 After considering all of the medical records, the testimony of claimant, and Drs. Simmons and Vallin, I find that despite treatment after October 8, 1999, her condition has not materially improved. I find Dr. Vallin's opinion as to MMI on October 8, 1999, persuasive. While claimant had three epidural injections she experienced only temporary relief after the second and third injections. She also has a TENS unit which she has used, but it has not improved her underlying condition. Physical therapy has been unsuccessful. Her testimony that within the few days before trial she had been having more good days before does not persuade me that her condition has materially improved since October 8, 1999, or that it will materially improve in the future. Her overall level of function and pain,

while temporarily remediated by such treatment as the TENS unit, remains essentially the same as on October 8th.

CONCLUSIONS OF LAW

¶46 The claimant's June 8, 1998 injury is governed by the 1997 version of the Workers' Compensation Act; her August 5, 1999 injury by the 1999 version of the Act. *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶47 The claimant has the burden of proving by a preponderance of the evidence that she is entitled to compensation. *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).

The 1998 Injury

¶48 Section 39-71-601, MCA, (1997) governs the presentment of a claim for compensation, requiring that a claim to be made in writing within one year of the date of the injury. The time for presenting a claim can be waived under certain circumstances. Subsection (2) provides:

> (2) The department may waive the time limit requirement up to an additional 24 months upon a reasonable showing by the claimant of:
> (a) lack of knowledge of disability;
> (b) latent injury; or
> (c) equitable estoppel.

¶49 Claimant's first report of injury or occupational disease relating to the June 8, 1998 injury was not received by the Department until August 31, 1999, well past the one- year statutory limitation. Thereafter, UEF denied liability on this claim on the grounds that there were no objective medical findings to substantiate the injury and the claim was barred by section 39-71-601, MCA, for failure to timely file a claim for benefits.

¶50 The only matter before the Court with respect to the 1998 injury is the claimant's application to extend the time for filing her claim so that her August 1999 claim will be deemed timely. Whether claimant can satisfy the "objective medical findings" requirement of section 39-71-119(1)(a), MCA (1997), is not at issue and I make no determination in that regard.

¶51 With respect to the request for a waiver, the 1999 amendment to section 39-71-601, MCA, gives this Court original jurisdiction to make a de novo determination concerning claimant's request for the extension of time. Prior to the 1999 amendments to section 39-71-601, MCA, the Department had original jurisdiction over waiver requests. See paragraph 48, *supra*. However, section 39-71-601(2), MCA, was amended in 1999 and a new subsection (3) was added. The two subsections now provide:

(2) The insurer may waive the time requirement up to an additional 24 months upon a reasonable showing by the claimant of:

(a) lack of knowledge of disability;

(b) latent injury; or

(c) equitable estoppel.

(3) Any dispute regarding the statute of limitations for filing time is considered a dispute that, after mediation pursuant to department rules, is subject to jurisdiction of the workers' compensation court.

The amendments were expressly retroactive "unless a party elects, after notification by the department of labor and industry, to remain in the contested case process." 1999 Mont. Laws, ch. 442, §31(1). Neither party elected to proceed with a hearing at the Department level, thus the controversy was transferred to this Court for resolution.

¶52 Since the Court, not the Department, has the original jurisdiction to resolve the dispute, I give no deference to the initial determination made by the Department's Workers' Compensation Claims Assistance Bureau. However, I note here that fundamental due process requires notice and a hearing before any final determination in a contested matter. The Bureau did not give notice to either the UEF or the employer in this matter before issuing its waiver. While its determination was not final, it was nonetheless required, at minimum, to promptly notify both the employer and the UEF of its action so that they had notice of the action and could timely exercise their right to request a contested case hearing. Moreover, if the initial determination is to have even a modicum of legitimacy, all parties must have notice and an opportunity to provide the Bureau with information pertaining to the request. Lacking such notice and opportunity, the Bureau's determination is not entitled to any respect by the parties.

¶53 On the merits, the claimant has presented no evidence showing either a lack of knowledge of disability or a latent injury. There is no evidence of disability following the first injury and the fact and extent of the injury was immediately recognized by claimant.

¶54 Therefore, to succeed, claimant must prove facts giving rise to equitable estoppel. Where the limitations period for filing a workers' compensation claim is raised as a defense by an employer or insurer, the doctrine of equitable estoppel applies where an employer or insurer has taken some positive action which either prevents claimant from filing a timely claim or leads him reasonably to believe he need not file such a claim. *Ricks v. Teslow Consolidated* (1973), 162 Mont. 469, 512 P.2d 1304. Equitable estoppel is a flexible principle which should be applied when an employer or insurer misleads a claimant by foisting onto the claimant a misinterpretation of the Workers' Compensation Act. *Levo v. General-Shea-Morrison* (1955), 128 Mont. 570, 280 P.2d 1086.

Davis v. Jones, 203 Mont. 464, 466-67, 661 P.2d 859, 860 (1983). Six elements must be satisfied for equitable estoppel to apply:

1. There must be conduct amounting to a representation or a concealment of material facts;

2. These facts must be known to the party estopped at the time of the conduct, or at least the circumstances must be such that knowledge of them is necessarily imputed to him;

3. The truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel, at the time when it was acted upon by him;

4. The conduct must be done with the intention, or at least with the expectation, that it will be acted upon by the other party, or under such circumstances that it is both natural and probable that it will be so acted upon;

5. The conduct must be relied upon by the other party, and, thus relying, he must be led to act upon it;

6. He must in fact act upon it in such a manner as to change his position for the worse, in other words, he must so act that he would suffer a loss if he were compelled to surrender or forego or alter what he has done by reason of the first party being permitted to repudiate his conduct and to assert rights inconsistent with it.

Kuzara v. State Compensation Ins. Fund, 279 Mont. 223, 231, 928 P.2d 136, 141 (1996).

¶55 Estoppel must be proved by clear and convincing evidence. *Beery v. Grace Drilling,* 260 Mont. 157, 163, 859 P.2d 429, 433 (1993). Claimant's case for estoppel consists of her and Soennichsen's testimony. I found Soennichsen's testimony incredible. I found claimant's testimony less than clear and convincing. Thus, I find that claimant has not proved by clear and convincing evidence that her employer told her he would take care of the claim or misled her. Element one is not satisfied. Therefore, her request for an extension of the filing period must be denied.

The 1999 Injury

¶56 TTD benefits are governed by section 39-71-701, MCA (1999), which provides in relevant part:

> **Compensation for temporary total disability- exception.** (1) Subject to the limitation of in 39-71-736 and subsection (4) of this section, a worker is eligible for temporary total disability benefits:
>
> (a) when the worker suffers a total loss of wages as a result of an injury and **until the worker reaches maximum healing**; or
>
> (b) until the worker has been released to return to the employment in which the worker was engaged at the time of the injury or to employment with similar physical

requirements.

(2) The determination of temporary total disability must be supported by a preponderance of objective medical findings. [Emphasis added.]

"Temporary total disability" is defined by section 39-71-116(34), MCA, (1999), of the Act as follows:

> "Temporary total disability" means a physical condition resulting from an injury, as defined in this chapter, that results in total loss of wages and exists **until the injured worker reaches maximum medical healing**. [Emphasis added.]

Thus, when a worker reaches maximum medical healing, she is no longer temporarily totally disabled and no longer entitled to TTD benefits.

¶57 I have found as fact that claimant reached maximum medical improvement[(5)] on October 8, 1999, therefore she is not entitled to further TTD benefits.

Request for Attorney Fees for Affidavits Prepared by Claimant's Counsel

¶58 Prior to trial, the UEF objected to medical records of Drs. Murray and Speth on foundational grounds. At trial claimant presented affidavits of office managers for both doctors attesting to the authenticity of the records and the UEF thereupon withdrew its objection. Claimant now asks for attorney fees pursuant to Rule 24.5.317(2), which provides:

> (2) Any party who intends to object to the authenticity or genuineness of any medical record, or to its admissibility pursuant to Rule 803(6) Mont.R.Evid., shall make such objections in writing, identifying each medical record to which an objection is made and the particular objections to the record. The objections shall be served upon the adverse party within 5 business days after the deadline for the final exchange of medical records, or within such other time fixed by the scheduling or other order of the court. Failure to object to a medical record in the manner and within the time specified by this rule shall be deemed a waiver of any objection to the record on grounds of authenticity or hearsay and shall operate as an admission by the party that the record is authentic and admissible pursuant to Rule 803(6) Mont.R.Evid. Where a timely objection under this rule is served, the party offering a medical record to which the objection is made shall comply with provisions of the Mont.R.Evid. relating to foundation and hearsay. However, this rule shall have the same effect as a request for admission under Rule 36 Mont.R.Civ.P., and **a party who thereafter successfully offers the medical record at trial may apply to the court for an order requiring the objecting party to pay reasonable expenses incurred in authenticating the record and/or establishing its admissibility under Rule 803(6), Mont.R.Evid., including reasonable attorney's fees. The court shall**

> **award such reasonable expenses unless it finds that there was a good and substantial reason for the objection**. [Emphasis added.]

¶59 In its defense, the UEF points out that neither Dr. Speth nor Dr. Murray were deposed. Their records were produced by the claimant in response to discovery requests but claimant failed to verify her discovery answers under oath despite repeated requests of the UEF. (*See* Hoff Dep. at 4; uninsured employers' fund's reply to petitioner's motion for costs and attorney fees.) Claimant's deposition reflects the UEF's request and her counsel's agreement to provide the verification, *id*., however, no notarized verification was ever forthcoming. That failure made UEF's counsel suspicious of the records. Under these circumstances, the Court is unable to say that the objection was frivolous or unreasonable. Claimant has not shown that the UEF had independent access to the records, other than Dr. Murray's letter to Bernadette Rice, or that the records were forwarded by the doctors to the UEF. UEF was entitled to some sort of verification of the authenticity of the records. The request for attorney fees is **denied**.

JUDGMENT

¶60 1. Claimant's request for a waiver of the one-year limitations period prescribed by section 39-71-601(1), MCA (1997), with respect to her June 8, 1998 injury is **denied**.

¶61 2. Claimant is not entitled to reinstatement of TTD benefits.

¶62 3. Claimant is not entitled to attorney fees pursuant to section 39-71-612, MCA, or under Rule 24.5.317(2).

¶63 4. Claimant is not entitled to costs.

¶64 5. The claimant's petition is **dismissed with prejudice**.

¶65 6. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.

¶66 7. 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 1st day of November, 2000.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Lucas J. Foust
Mr. Daniel B. McGregor
Ms. Kimberly D. Evans
Submitted: September 25, 2000

1. The full text of the letter read:

Dear Ms. Hoff:

> I have received documentation verifying you have received an impairment rating for your injury. The maximum permanent partial disability benefits you are entitled to is $2,172.97 and is figured as follows:
>
> 5% percentage for impairment x 350 weeks = 17.5 weeks x $124.17
>
> The Uninsured Employers' Fund is unable to pay the award in a lump sum (Section 39-71-503, MCA) so you will receive the award in monthly installments. The next warrant you receive will reflect the first payment of this award. Since you reached maximum medical improvement and were released to return to your time of injury job, your permanent partial disability benefits will be paid from October 8, 1999, through February 7, 2000.
>
> If you do not agree with this decision, you may request mediation. Under section 39-71-520 of the Workers' Compensation Act if you do not appeal this decision within 90 days this determination is considered final. To obtain the appropriate forms, contact the Workers' Compensation Claims Assistance Bureau, Mediation Unit, P.O. Box 1728, Helena, Montana 59624 or call (406) 444-6534.
>
> If you have any questions please contact me.

(Ex. 23.)

2. Dr. Simmons' office note, Ex. 33, incorrectly reports the first epidural as having been given on February 26.

3. Trochanteric bursitis apparently refers to an inflamation of the bursa of the trochanter of the upper femur (upper leg bone). The trochanter is "a rough prominence or process at the upper part of the femur of many vertebrates serving usually for the attachment of muscles and being usually two on each femur in mammals including humans: a : a larger one situated on the outer part of the upper end of the shaft at its junction with the neck -- called also greater trochanter b : a smaller one situated at the lower back part of the junction of the shaft and neck -- called also lesser trochanter." 1997 Merriam-Webster Medical Dictionary (found at www.medscape.com). Bursitis is an inflammation of the bursa. *Id*. The bursa is "a small serous sac between a tendon and a bone." *Id*.

4. "'Pallative care' means treatment designed to reduce or ease symptoms without curing the underlying case of the symptoms." Definitions, §39-71-116 (21), MCA, 1999.

5. "Maximum medical healing" and "maximum medical improvement" are interchangeable terms.