IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2002 MTWCC 65

WCC No. 2002-0536

PAMELA ANN HAND

Petitioner

vs.

ROYAL INSURANCE COMPANY OF AMERICA

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

APPEAL DISMISSED WITH PREJUDICE 12/2/03

Summary: 43-year old claimant with preexisting degenerative arthritis and stenosis of the cervical spine stepped backwards from garage to ground approximately one foot lower, jarring herself. She felt pain in her mid-back, followed by other symptoms she attributed to the injury. Approximately two months later, she underwent neck surgery. Her doctor opined that the work incident may have slightly increased her pain, but that her symptoms and the need for surgery pre-existed the injury. Appearing pro se, claimant sought unspecified benefits, evidently including medical and wage loss benefits.

Held: The uncontradicted medical evidence and medical opinion demonstrates that claimant's condition and need for surgery preexisted the jarring she suffered when stepping off the garage and caused both the surgery and any disability.

Topics:

> **Causation: Medical Condition.** Where uncontradicted medical evidence and opinion indicated claimant's underlying, preexisting cervical stenosis caused both her neck surgery and disability, she was not entitled to additional benefits relating to work incident involving jar to her body when she stepped backwards off a garage onto ground approximately one foot lower.

¶1 The trial in this matter was held on June 28, 2002, in Helena, Montana. Petitioner, Pamela Ann Hand (claimant), was present and represented herself. Respondent, Royal Insurance Company of America (Royal Insurance), was represented by Mr. Robert E. Sheridan.

¶2 Exhibits: Petitioner's exhibits 1 through 3, 6, 9,13, and 15 were admitted over respondent's objections. Petitioner's exhibits 4, 5, 7, 8, 10 through 12, 14, and 16 through 21 were admitted without objections. Petitioner was queried regarding exhibit 18, and she then supplied various documents for that exhibit. The documents were admitted without objection except as to a patient brochure regarding neck surgery, which appears to be interesting but irrelevant to the issues in the case. Respondent's exhibits 1 through 4, 6 through 10, 12, 20, and 22 were admitted over objections of the petitioner. Exhibit 5 was determined not to be the medical records of the petitioner and were ordered by the Court to be removed from the Court's exhibit notebook and destroyed. Each party was also directed to do the same. Respondent's exhibits 11, 13 through 19, 21, 23, and 24 were admitted without objections. After reviewing the exhibits, I have determined that petitioner's exhibits 1 through 3 are documents pertaining to procedural matters in this Court. As such they are irrelevant to the merits of the petition.

¶3 Witnesses and Depositions: Claimant, her mother (Virginia Hand), and Sandy Scholl testified at trial. In addition, the parties submitted the depositions of claimant and Dr. Allen M. Weinert to the Court for its consideration.

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

> 1. Whether Petitioner/Claimant current medical condition and disability are a result of her July 2, 2001 work related injury.
>
> 2. Whether Petitioner is entitled to reinstatement of temporary total disability benefits beyond the time when they were terminated pursuant to notice from Respondent.
>
> 3. Whether Petitioner is entitled to payment for the expenses associated with the surgery performed by Dr. Rizzolo in Billings, Montana in August of 2001.
>
> 4. Whether Petitioner is entitled to receive travel reimbursement for her trips to Billings for evaluation and surgery by Dr. Rizzolo.

(Pretrial Order at 2.)

¶5 Having considered the 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

¶6 Claimant is presently 43 years of age and is a high school graduate.

¶7 In December 1999 claimant went to work for Washington Inventory Services (Washington) as an inventory specialist. (Hand Dep. at 14-15.)

¶8 On July 2, 2001, claimant was working in Lewistown, Montana on an inventory job for Washington. (*Id*. at 15.) While working that day, and while in the course of her employment for Washington, she stepped backwards from a garage where she was conducting an inventory onto an area of an unfinished driveway approximately one foot lower than the garage. (Uncontested Fact 1; Hand Dep. at 18-19.) She landed on her feet and did not fall. (*Id*. at 19.) As she put it, "I just kind of went "clunk."' (Hand Dep. at 19.) She continued working after the incident but felt pain in her mid-back. (*Id*. at 19-20.) Later on that day, claimant felt tightness in her back and experienced difficulty breathing. (*Id*. at 20-2; Ex. 7 at 18.)

¶9 Upon finishing work that day, claimant drove home to Helena. (Hand Dep. at 23.) She never returned to work.

¶10 Upon her return to Helena, claimant went to the emergency room of St. Peter's Hospital, where she was seen by Dr. Mark Ibsen. (Ex. 18 at 8.) Dr. Ibsen's note indicates that she reported she had stepped backwards and down about a foot. (*Id*.) Her complaints were of "some pain in her mid back and right lower chest area." (*Id*.) X-rays were taken but were negative. (*Id*.) His impression was vague: "Back pain from fall." (*Id*.)

¶11 At the time of the incident, Washington was insured by Royal Insurance. Washington reported the July 2nd incident to Royal Insurance (Ex. 5 and Ex. 6 at 34) and on August 3, 2001, Royal Insurance agreed to pay claimant temporary total disability benefits under a reservation of rights pending its completion of an investigation into the claim. (Ex. 6 at 6). It thereafter paid benefits retroactive to July 10, 2001, and commenced paying biweekly benefits. (Ex. 6 at 5, 32.)

¶12 On August 23, 2001, claimant underwent surgery on her neck. (Uncontested Fact 2; Trial Test.) The surgery was done by Dr. Steven Rizzolo, a neurosurgeon practicing in Billings. (Uncontested Fact 2; Weinert Dep. at 22.) He performed an anterior discectomy and fusions at the C5 through C7 levels. (Weinert Dep. at 23-24.)

¶13 On September 4, 2001, Royal Insurance's adjuster queried Dr. Weinert about claimant's condition and surgery. (*Id*.) On September 6, 2001, Dr. Weinert wrote back that claimant's need for "[neck] surgery preexists her injury of 7-2-01, although that injury may have caused a slight aggravation." (Ex. 7 at 17.) After receiving Dr. Weinert's response, Royal Insurance notified claimant on September 10, 2001, that it was terminating her temporary total disability benefits because her need for surgery antedated her July 2, 2001 injury. (Ex. 6 at 23.) It also denied liability for the expense of her surgery. (*Id*. at 44.)

¶14 Claimant is seeking benefits. While she has not identified the specific benefits she is seeking, it is clear that she is alleging that her surgery and her disability during recovery are related to her July 2, 2001 injury, thus she is seeking at minimum temporary total disability and medical benefits related to her surgery.

¶15 The only opinions concerning causation are those of Dr. Weinert and Dr. Rizzolo. Dr. Weinert testified. Dr. Rizzolo did not but did express his opinion in writing.

¶16 As noted earlier, Dr. Weinert had been treating claimant prior to July 2, 2001. His treatment goes back at least to September 11, 1992, when he evaluated claimant and diagnosed fibromyalgia, TMJ dysfunction, lumbar strain, and anxiety neurosis. (Ex. 7 at 86-88.) He saw her numerous times over the next nine years, including six times in 2000 and five times between January 1, 2001 and July 2, 2001. (Ex. 7 at 20-43 and exhibits to Weinert Dep.)

¶17 Dr. Weinert saw claimant on June 26, 2001, just a week prior to the July 2nd incident. His office note for that date is found in the exhibits to his deposition but does not appear to have been included in the exhibit notebook proffered at trial. Insofar as the cervical spine, the note reflects his prior diagnosis of "C-5-6 and C6-7 disk disease" as demonstrated by x-ray. (Weinert Dep. Ex. 11, June 26, 2001 office note.) On June 26th claimant reported "arm numbness" and that "her neck and arm symptoms are getting worse." (*Id*.) His impression was "[i]ncreased neck pain and symptoms of arm numbness of uncertain etiology. Rule out cervical disk herniation." (*Id*.) He ordered an MRI of the neck. (*Id*.)

¶18 Dr. Weinert's records reflect prior reports of arm or hand numbness and pain. For example, in February 1999 she was complaining of bilateral hand numbness and an EMG was done to rule out carpel tunnel syndrome. (Ex. 7 at 73.) On August 30, 1999, she complained of right arm and hand numbness. (Ex. 7 at 52.) A comprehensive review of her arm and hand complaints is unnecessary and is not undertaken here.

¶19 In any event, claimant returned to Dr. Weinert on July 5, 2001, which was three days after the work-related incident. On that date the claimant complained of "right lower rib pain, which is worse with deep breathing," as well as left low back pain. (*Id*. at 18.) These complaints were consistent with what she reported to the ER physician on July 2nd. In addition, she complained of neck pain "with bilateral arm numbness and tingling digits four and five." (*Id*.) Dr. Weinert noted that he had already scheduled an MRI of her neck for the next day, July 6th. (*Id*.) Insofar as the July 2nd incident is concerned, he noted, "Exacerbation of preexistent fibromyalgia with cervical, thoracic and lumbar region myofascial region pain, secondary to work injury of 7-2-01." (*Id*. at 19.)

¶20 The MRI was done on July 6th as scheduled. It disclosed

> prominent arthritic change with posterior osteophytic spurring and moderate to severe spinal canal stenosis at C3-4 and C5-6 levels with disk bulges at C4-5 and C6-7 levels. There appeared to be some left sided lateralization at the C4-5 level impinging on the left C5 nerve root.

(*Id*. at 14.)

¶21 On July 11, 2001, when claimant next saw Dr. Weinert, she was continuing to complain of arm numbness. (*Id*.) He noted the MRI results and ordered an EMG and nerve conduction studies. (*Id*. at 15.) He also referred her to Dr. Rizzolo "regarding her significant cervical spinal stenosis evidenced on MRI." (*Id*.)

¶22 Dr. Rizzolo saw claimant on August 15, 2001. (Ex. 9.) The exhibit notebook contains his office note for that date (which appears incomplete), a note dated September 7, 2001, and his September 7 and September 31 [sic], 2001 letters to Royal Insurance's claims adjuster. (*Id*.) Lacking are Dr. Rizzolo's other medical records, including his operative report, although the operative report was available to Dr. Weinert during his deposition. (Weinert Dep. at 11.)

¶23 Dr. Rizzolo's assessment of claimant's neck condition on August 15th was "[c]ervical spinal stenosis with myelomalacia" and "[p]robably early myelopathy correlating with her stenosis." (Ex. 9 at 9.) "Myelomalcia is a condition where there's actual loss of neurologic elements; in other words, there is atrophy or thinning of the [spinal] cord." (Weinert Dep. at 24.) As noted earlier, Dr. Rizzolo thereafter (August 27, 2001) operated on claimant's neck.

¶24 Dr. Rizzolo was asked for his opinion of the relationship between claimant's cervical condition and surgery and her July 2nd accident. On September 7, 2001, he reviewed at least some of her medical records from Dr. Weinert. (Ex. 9 at 5.) Noting that claimant had been scheduled for an MRI prior to July 2nd he wrote, "The question that arises is whether or not the myelomalacia that was seen on her study of 7/6/01 was caused by her injury on 7/2 or whether it was a preexisting condition." (*Id*. at 6.) He demurred to Dr. Weinert for an opinion, writing:

> I believe the ultimate judgement on this depends upon Dr. Weinert's opinion. He is in the best position to determine whether or not the patient's symptoms changed dramatically. If in fact the symptoms did change dramatically in that she developed substantial bilateral arm numbness and tingling with coughing and sneezing then it is my opinion then that it is certainly possible that a fall from one foot could have caused the spinal cord contusion which necessitated her surgery. On the other hand if she had preexisting symptoms, I do not believe the surgery was a result of the fall.

(*Id*.)

¶25 As noted earlier, on September 6, 2001, Dr. Weinert wrote to Royal Insurance's claims adjuster, opining that claimant's condition and surgery were not related to the July 2nd incident and that the incident merely "caused a slight aggravation of her symptoms." (Ex. 7 at 17.) His full letter reads as follows:

> September 6, 2001

Sandy Scholl
Putman and Associates
321 SW Higgins
Missoula, MT 59803

Re: HAND, PAM

CLAIM # 2S023481

Dear Ms. Scholl,

I am in receipt of your letter of 9-4-01 and will address your questions accordingly:

1. Ms. Hand suffers from significant degenerative arthritis with posterior osteophytic spurring at C3-4 and C5-6 levels, causing corresponding spinal canal stenosis with additional disk bulges at C4-5 and C6-7 levels. It is felt that the significant arthritic change and spinal stenosis was a preexistent condition, as Ms. Hand has been complaining of numbness and tingling in the upper extremities for quite some time despite normal EMG and nerve conduction testing. Therefore, I do believe that Ms. Hand's need for surgery preexists her injury of 7-2-01, although that injury may have caused a slight aggravation to her symptoms.

2. It would appear that Ms. Hand require surgery prior to July 2, 2001, as the large osteophytic spurs, no doubt, were a preexistent condition to her 7-2-01 injury and spinal stenosis was preexistent.

3. The MRI was indicated for Ms. Hand's persistent symptoms of bilateral arm numbness and tingling, as well as chronic neck pain and upper back pain.

4. Ms. Hand complained of increased neck and arm pain, as well as intractable headaches and bilateral arm numbness prior to her arm injury of 7-2-01.

If you have questions or concerns regarding this letter, please do not hesitate to contact me.

Sincerely,

Allen M. Weinert, M.D.

(*Id*.)

¶26 Dr. Rizzolo reviewed Dr. Weinert's letter and concurred, writing:

I recently reviewed the September 6, 2001 correspondence form Dr. Weinert to yourself [the claims adjuster]. I believe he is in the best position to determine what the patient's pre-injury symptoms were. Based on his recent correspondence, it is

my opinion the patient's symptoms are not work-related, they are in fact related to her preexisting degenerative changes.

(Ex. 9 at 4.)

¶27 In his deposition, Dr. Weinert testified that neck surgery would have been required absent the July 2nd incident. (Weinert Dep. at 28.) He noted that pre-July 2nd the claimant had significant stenosis which put her at risk for spinal cord injury. (*Id*. at 27.) He was asked whether the July 2nd incident aggravated her condition and indicated that she did suffer some increased pain following the incident. (*Id*. at 32.) When asked further about the aggravation, he testified as follows:

> A. It's difficult to say. We know that people with spinal stenosis are at risk for spinal cord injury if they suffer a trauma. In other words, if someone with spinal cord -- cervical spinal cord stenosis were to go skiing and suffer a hard fall, obviously, they're more susceptible to injury to the spinal cord than someone that doesn't have that because they have very little room for that cord to move, and it's much more susceptible to contusion of the cord or bruising or injury; and, in fact, high risk for becoming quadriplegic.
>
> So with a significant trauma, they are at risk for injury that a normal person without that condition, the condition being spinal stenosis, would not be at risk for.
>
> **Q. But you note in paragraph 4 that her increased neck and arm pain, as well as her intractable headaches and bilateral arm numbness had increased before she was injury on July 2 of 2001.**
>
> A. Correct.
>
> **Q. So can you say, to any reasonable degree of medical certainty, what effect, if any, the Lewistown incident had on that condition?**
>
> A. I would concur with my opinion that those symptoms had escalated prior to the injury. I can say that she as at risk for -- a greater risk for increasing her symptoms because she had that condition with the fall, where she fell a foot, but I can't say definitively whether any damage actually occurred or any permanent change in her symptoms occurred with that fall.
>
> . . . .
>
> **Q. And it is your opinion, I take it from your letter to Sandy Scholl and what you said previously here today, that she would have required this surgery even in the absence of any incident that occurred on July 2, 2001?**

A. Yes. The decision had already been made to further diagnostic testingbecause of her increase in symptoms, so we were already pursuing down the diagnostic and potential therapeutic intervention course prior to her injury.

. . . .

Q. Is it your opinion that it was a temporary aggravation of the preexisting condition.

A. It was an aggravation of the preexisting condition. I can't tell you whether -- I mean, the bottom line is she underwent a surgical intervention that eliminated the stenosis.

So to say whether it was temporary or not, I guess I don't know, because she quite rapidly underwent a surgical intervention that eliminated the problem, so to know whether she would have gotten back to her baseline -- Although her baseline was not a level baseline prior to her injury, it was an escalating baseline. In other words, her pain levels were getting worse, her symptoms were getting worse. She had this aggravation, or this fall, whatever you want to call it, step off the curve or something, and her symptoms continued to escalate.

I can't tell you whether the slope of that symptom curve really changed, as it was already escalating prior to her work injury.

Q. Okay. As you've said earlier, she would have required the surgery even in the absence of any event that occurred in Lewistown?

A. Correct. We had already gone down on a diagnostic path to work up her stenosis prior to her injury.

(Weinert Dep. at 27-28, 32-33.)

¶28 Dr. Weinert did take claimant off work following the July 2nd incident. He did so on account of her spinal stenosis. (Weinert Dep. at 30.) He was asked if the July 2nd incident "changed her fibromyalgia condition in any way?" He replied that it did not. (*Id*. at 29.)

¶29 Claimant presented no medical evidence showing that her July 2nd incident materially aggravated her underlying neck condition or caused or materially accelerated her need for surgery. She presented no medical evidence that she was taken off work, or needed to be taken off work, following the July 2nd incident for any reason other than her spinal stenosis.

CONCLUSIONS OF LAW

¶30 This case is governed by the 2001 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).

¶31 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).

¶32 Claimant must show that her medical care and her disability are causally related to her July 2, 2001 incident. "Causation is an essential element to benefit entitlement." *Hash v. Montana Silversmith,* 256 Mont. 252, 257, 846 P.2d 981, 983 (1993); and *see Caekaert v. State Compensation Mut. Ins. Fund,* 268 Mont. 105, 112, 885 P.2d 495, 499 (1994). Section 39-71-704, MCA (2001), which governs medical benefits, 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. [Emphasis added.]

Section 39-71-701, MCA (1997), which governs temporary total disability benefits, provides in relevant part:

> **39-71-701. Compensation for temporary total disability -- exception.** (1) Subject to the limitation 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 . . . . [Emphasis added.]

¶33 In the present case the claimant has failed to show that her surgery or disability are consequences of her July 2, 2001 incident. The insurer has shown that her underlying, preexisting cervical stenosis caused both the surgery and her disability. Claimant was already on a downward slide symptomatically prior to the July 2nd incident, and her surgery was inevitable. Other than to somewhat increase her existing symptoms, Dr. Weinert was unable to say whether the July 2nd incident contributed to her condition and claimant has offered no medical evidence showing on a more probable than not basis that the incident materially altered the course of her care and disability. She has further failed to prove that the incident caused or aggravated any other condition which was disabling or requires additional medical treatment.

JUDGMENT

¶34 The claimant is not entitled to temporary total disability benefits on account of her July 2, 2001 industrial accident. She is also not entitled to further medical benefits. Her petition is **dismissed with prejudice**.

¶35 Claimant is not entitled to costs.

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

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

DATED in Helena, Montana, this 19th day of December, 2002.

(SEAL)

/s/ MIKE McCARTER
JUDGE

c: Ms. Pamela Ann Hand
Mr. Robert E. Sheridan
Submitted: June 28, 2002