IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2004 MTWCC 25

WCC No. 2003-0905

LINDA HAUPT

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: The claimant has three fused cervical vertebrae but her post-fusion neck condition was essentially non-symptomatic for a number of years, then she fell and hit the back of her head on concrete. Since that time she has suffered chronic head, neck, and shoulder aches. She seeks permanent total disability benefits based on her pain which she claims precludes her from undertaking regular employment.

Held: While an functional capacities evaluation (FCE) indicates she can work full-time in a sedentary position and a vocational consultant has identified four positions compatible with her education, age, and work history, the Court is persuaded that the claimant's chronic head, neck, and shoulder aches realistically preclude her from performing regular employment either on a full-time basis or a significant part-time basis.

Topics:

Benefits: Permanent Total Benefits: Pain As Disabling. Where the claimant has a long-time consistent work history, she returned to work and worked uneventfully after a two-level cervical fusion, then fell at work and hit the back of her head on concrete but returned to work for a time despite chronic headaches, neck and shoulder pain, the Court finds the chronicity and severity of her pain, along with the fact that use of her arms in ordinary activities exacerbates her pain, preclude her from performing regular employment.

Independent Medical Examination: FCE. While an FCE is evidence of the claimant's physical abilities, it is not conclusive evidence.

¶1 The trial in this matter was held on February 11, 2004, in Great Falls, Montana. Petitioner, Linda Haupt (claimant), was present and represented by Ms. J. Kim Schulke. Respondent, Montana State Fund (State Fund), was represented by Mr. Charles G. Adams.

¶2 Exhibits: Exhibits 1 through 25 were admitted without objection. Exhibit 26 was marked for identification and entered into the record as an offer of proof but is not considered by the Court.

¶3 Witnesses and Depositions: Linda Haupt, Dr. Patrick Galvas, and Mickie Marion Breedlove were sworn and testified. The parties also submitted the depositions of Linda Haupt and Dr. Dana Headapohl for the Court's consideration.

¶4 Issues Presented: The issues, as restated by the Court, are:

¶4a Whether the petitioner is permanently totally disabled.

¶4b Whether the petitioner is entitled to a penalty, attorney fees, and costs.

(Pretrial Order at 2.)

Counsel agreed that the petitioner's request for a lump-sum is premature and not ready for trial, therefore, the request is not included as an issue.

¶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 The claimant is fifty-two years of age. Since the time of the filing of her claim in this matter, she has married and taken her husband's surname, and is now Linda Fosterling. However, to preserve consistency between the name on her workers' compensation claim, the caption has not been changed.

¶7 The claimant is a high school graduate and took university level business and accounting courses for approximately two years.

¶8 The claimant has worked most of her adult life in the restaurant business. She has worked as a waitress, cook and baker, but her primary experience has been as a restaurant and kitchen manager, jobs that have entailed ordering food, hiring and firing employees, preparing menus, scheduling employees' shifts, and doing payroll and basic bookkeeping. (Trial Test. *and* Ex. 17 at 2.) Of significance to my decision in this case, the claimant has been consistently and steadily employed for most of her life. For approximately twelve years she was the manager of Village Dining and Lounge in Cut Bank, Montana.

¶9 On or about July 26, 1996, the claimant underwent cervical surgery. The surgery involved anterior C5-6 and C6-7 diskectomies and interbody fusion. The surgery was not attributable to any work-related injury or occupational disease.

¶10 The claimant made an excellent recovery from her 1996 surgery. Except for normal follow-up visits, the claimant did not receive any further treatment for her neck.

¶11 Following her recovery from neck surgery, the claimant worked for approximately two months as a receptionist at McCollum RV. She then went to work for Rocky Mountain Treatment Center in Great Falls as a cook and kitchen manager. She worked there from 1997 through June of 1999.

¶12 In July of 1999, the claimant went to work as a cook, baker, and waitress at Meadowlark Food and Fuel (Meadowlark Food), in Great Falls, Cascade County, Montana. Her salary varied depending on her particular assignment. Her highest wage was $7 an hour as a cook/baker.

¶13 On October 14, 1999, the claimant fell while at work at Meadowlark Food, hitting the back of her head on a concrete floor. She was taken to the Emergency Room of Benefis Healthcare in Great Falls, complaining of neck and head pain. (Ex. 5 at 10.) X-rays done at that time showed no evidence of fracture or disturbance of the integrity of her fusion. (*Id*.)

¶14 At the time of the claimant's 1999 industrial accident, the State Fund insured her employer. It accepted liability for the accident.

¶15 The claimant returned to work after one day off and continued working for Meadowlark Food until December 1999, when she was laid off.

¶16 The claimant then went back to work for Rocky Mountain Treatment Center as a kitchen manager, where she continued working until September 2000.

¶17 However, even though working, the claimant experienced headaches, and on April 15, 2000, she again sought medical care, this time from Dr. Dan Gordon. Her complaints at that time included "chronic daily headache in the area of the back of the head," approximately 15-20 episodes of vertigo following her October 14, 1999 fall, an episode of a "very sharp pain to the neck and shoulders when she was trying to pick up a heavier item of approximately 30 pounds." (Ex. 6 at 1.) Dr. Gordon restricted her to light duty and suggested she return to see Dr. Dale Schaefer, who had performed her 1996 neck surgery, to ascertain possible damage to her fusion. (*Id*. at 2.) However, x-rays taken shortly after her October 1999 accident showed her fusion was stable. (Ex. 5 at 13.)

¶18 The claimant continued to have headaches and neck pain and was referred to Dr. Ronald M. Peterson, who specializes in occupational and sports medicine. Dr. Peterson first saw her on July 14, 2000. (Ex. 9 at 23.) He recorded her complaints as "having pain in the back of her head" ever since the day she returned to work following her October 1999

fall and as thereafter developing "midline and left neck pain, as well as right shoulder pain." (*Id*.) Dr. Peterson described the claimant's current symptoms as follows:

> Currently Ms. Haupt has constant pain in the back of her head. If she turns her head to the right suddenly, she will get sudden shooting pain in the right suboccipital area without radiation. Associated with this sharp pain is dizziness "every time for several seconds, then suddenly it's gone". She denies any nausea. She also gets numbness in the entire right arm from the shoulder down with sudden turn of her head to the right. She denies any weakness of the right upper extremity or right hand grip.

(Ex. 9 at 23.)

¶19 Dr. Peterson had the claimant complete a pain diagram which he characterized as "[c]onsistent with history and physical, and **appropriate**." (*Id.,* emphasis added.)

¶20 Over the next three months, Dr. Peterson treated the claimant with medication, physical therapy, occipital blocks, and a home exercise program. Her condition did not materially improve and on September 25, 2000, he took her off work. (*Id*. at 3-5.)

¶21 Dr. Peterson opined that the claimant's October 14, 1999 fall permanently aggravated her underlying cervical condition (*id*. at 1) and the State Fund does not seriously dispute that determination.

¶22 Dr. Peterson referred the claimant to Dr. Patrick E. Galvas, a board certified physiatrist who has a Ph.D. in anatomy. Dr. Galvas saw the claimant for the first time on October 11, 2000 (Ex. 3 at 1) and has treated her since that time.

¶23 At present the claimant continues to have significant chronic headaches and neck pain. She testified that she has a chronic dull headache and occasional extreme headaches. Her pain is exacerbated by activity, including vacuuming at home. During the day she has to frequently change positions and lie down on account of her pain. She has trouble looking down. She is depressed and has difficulty concentrating. Dr. Galvas does not expect her condition to improve. (Galvas Trial Test.)

¶24 Dr. Galvas provided an excellent and educational anatomical explanation of the claimant's pain and why the October 14, 1999 fall triggered it. However, I need not go into that explanation since the dispute in this case simply concerns whether the claimant is permanently totally disabled since September 24, 2001, when she was found to be at maximum medical improvement (MMI). (Ex. 3 at 15.)

¶25 Cutting to the chase, Dr. Galvas disapproved all full-time jobs identified by the State Fund's vocational consultant as appropriate for the claimant. The jobs identified were (1) accounting technician, (2) telemarketer, (3) night auditor, and (4) receptionist, all of which are sedentary positions. Dr. Galvas approved only the part-time position of telemarketing but with reservations. In an office note of April 25, 2002, he pointed out her daily

headaches and the fact that "she cannot use her upper extremities to any certain degree because they flare her headaches." (*Id.* at 72.) After noting his approval of a job description for part-time telemarketer, he wrote, "She may be able to do that one, although I also have some reservations about that if she is forced to use her upper extremities with any degree of repetitions or resistance to forces." (*Id*.)

¶26 Mickey Marian Breedlove (Breedlove) is the State Fund's vocational consultant in this case. While I excluded any testimony concerning labor market research done just prior to trial because it had not been timely provided to the claimant's counsel, she testified that at the time she did her vocational analysis in 2002 the four jobs she had identified for the claimant were available in sufficient numbers in Montana such that the claimant would have regular access to the jobs. She testified that all of the jobs except that of night auditor were available on both a full and part-time basis. Finally, she indicated that her present opinions are unchanged.

¶27 While I did not allow the State Fund to provide last minute updated information on the availability of the four jobs, no evidence was offered by the claimant to dispute the continued availability of the jobs. Moreover, the nature of the jobs are such that common sense indicates they continue to be available.

¶28 With respect to the telemarketer position, Breedlove testified that headsets are available. This testimony was in response to the claimant's testimony that she tried using the telephone on a trial basis and found that a half hour of use aggravated her pain: her telephone trial did not involve a headset.

¶29 However, in response to my questions Breedlove also testified that telemarketers must regularly enter information concerning their calls. The entries are made either in handwriting or by computer. Depending on the job, the entry of information can be either occasional or frequent. In either event, entry of information would require the claimant to use her arms and hands on a regular basis to either make handwritten notes or enter data on a computer.

¶30 The entry wage for telemarketers is from $5.15 to $7.00 an hour. (Ex. 17 at 17.)

¶31 A medical panel requested by the State Fund examined the claimant and reached a different conclusion than did Dr. Galvas. The panel found her capable of employment based on a functional capacity evaluation (FCE) indicating that she was able to perform sedentary work. (Ex. 13 at 34.) The panel agreed that she "should avoid awkward neck positions, over-head work on a frequent or prolonged basis, activities involving extensive or prolonged upper extremity use." (*Id*.)

¶32 Dr. Headapohl, who is board certified in occupational and environmental medicine, authored the panel report and testified by deposition. She testified that the panel's examination suggested some "functional", i.e. psychological overlay to the claimant's pain

complaints. (Headapohl Dep. at 16.) She testified that the claimant is capable of full-time sedentary work consistent with her physical restrictions.

¶33 I do not doubt that physicians looking at the claimant and the facts in this case may reach different conclusions concerning the claimant's ability to work. But the bottom line in the case is a subjective one. Pain, as the physicians who testified in this case, is ultimately a subjective, personal experience. I must consider the claimant's pain and whether it prevents her from working either full or part time in a sedentary job.

¶34 Pain is of course something that can be feigned and exaggerated. While the IME panel report suggests psychological factors may be present, this case turns on my assessment of the degree of pain the claimant in fact experiences and the effect of activity on her pain. The claimant's testimony, as well as that of Dr. Galvas, is important to my determining whether her pain complaints are genuine to the extent she claims, for if they are, then I must conclude that she is unable to work on a regular basis, either full or part time.

¶35 Much ado has been made of the FCE the claimant underwent on November 26, 2001, and which concluded that the claimant was "able to work for a 8 hour day at the SEDENTARY physical demand level." (Ex. 11 at 1.) Dr. Galvas testified that the FCE must be considered in assessing the claimant's ability to work but should not be deemed conclusive since it involved only a two day trial. Even Dr. Headapohl indicated that she did not consider it conclusive. (Headapohl Dep. at 12.) I agree for the reasons set forth in Dr. Galvas' testimony. Moreover, I note that the FCE is more than two years old and does not consider the claimant's subsequent history.

¶36 In evaluating the claimant's testimony concerning her pain and the activities she is able to do, I have considered my impression of her demeanor and honesty. But, importantly, I have evaluated my impressions in light of her job history. Her job history is important to my evaluation because prior to her October 14, 1999 accident she had a long-term, uninterrupted history of employment. Especially significant is the fact that after her cervical fusion in 1996, she reported essentially full recovery and returned to full-time work. And, following her October 1999 accident she returned to work even though she plainly was suffering chronic headaches and neck pain. She is no slacker. Her work history indicates she is motivated to work and she testified that she would rather be working than on disability. Whether or not psychological factors are affecting her perception of pain and disability, I do not believe she is exaggerating her pain or disability.

¶37 I find that the claimant is presently unable to work either full or part time on account of her October 14, 1999 industrial accident.

¶38 However, I find that the State Fund's refusal to reclassify the claimant as permanently totally disabled was not unreasonable. Well qualified physicians disagree as to her ability to work, and even Dr. Galvas does not rule out her working as a telemarketer on a part-time

basis. Ultimately, the question involves a subjective judgment on my part as to the claimant's subjective pain. I also note that even though it disputes the claimant's assertion that she is permanently totally disabled, the State Fund has continued to pay her benefits at her total disability rate pending the Court's determination.

CONCLUSIONS OF LAW

¶30 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).

¶40 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).

¶41 Permanent total disability benefits are governed by section 39-71-702, MCA (1995-1999), which provides in relevant part:

> **39-71-702. Compensation for permanent total disability.** (1) If a worker is no longer temporarily totally disabled and is permanently totally disabled, as defined in 39-71-116, the worker is eligible for permanent total disability benefits. Permanent total disability benefits must be paid for the duration of the worker's permanent total disability, subject to 39-71-710.
>
> (2) The determination of permanent total disability must be supported by a preponderance of objective medical findings.
>
> Permanent total disability is defined in section 39-71-116(24), MCA (1999), as follows:
>
> (24) "Permanent total disability" means a physical condition resulting from injury as defined in this chapter, after a worker reaches maximum medical healing, in which **a worker does not have a reasonable prospect of physically performing regular employment. Regular employment means work on a recurring basis performed for remuneration in a trade, business, profession, or other occupation in this state.** Lack of immediate job openings is not a factor to be considered in determining if a worker is permanently totally disabled. [Emphasis added.]

¶42 The State Fund initially argues that the claimant's claim of permanent total disability is not supported by "a preponderance of objective medical findings." The claimant has objective medical findings in spades based on her original cervical fusion. The question is whether she must prove that she has additional objective findings based on the aggravation of her preexisting neck condition which she suffered in her October 14, 1999 industrial injury.

¶43 In analyzing the State Funds "objective medical findings" argument I note that it accepted liability for the October 14, 1999 accident. Further, it does not dispute that the claimant's October 1999 accident materially aggravated her preexisting neck condition. Its position on these issues is consistent with Montana law, which expressly provides that an insurer is liable for an injury which aggravates a preexisting condition. § 39-71-407(2)(a)(ii), MCA (1999).[(1)]

¶44 Aggravation" is a term of art which is well understood in the context of Montana workers' compensation law. "That an employee was suffering from or afflicted with a preexisting disease or disability does not preclude compensation if the disease or disability was lit up, aggravated or accelerated by an industrial injury." *Birnie v. U.S. Gypsum Co.,* 134 Mont. 39, 45, 328 P.2d 133, 136 (1958). A requirement that an aggravating injury or disability resulting therefrom must be independently proved by objective evidence would fly in the face of the entire definition of aggravation. It is sufficient that the underlying condition which is aggravated is supported by objective medical evidence. Objective evidence of the claimant's underlying condition exists simply by the fact of her cervical fusion. Moreover, Dr. Galvas testified that the claimant suffered muscle spasm and reduced range of motion as a result of her 1999 aggravation.

¶45 The State Fund also urges that the claimant can return to work in a sedentary position, therefore she has a reasonable prospect of performing regular employment. I have found as a matter of fact that it is unlikely that the claimant can work either part or full time on account of her pain. Pain is a factor that must be considered in determining whether a claimant is capable of regular employment; if so severe that the claimant is unable to work on a regular basis, then the claimant must be deemed permanently totally disabled. *Killoy v. Reliance Nat. Indemn.,* 278 Mont. 88, 923 P. 531 (1996); followed in *Stephenson v. Cigna Ins. Co.*, 2001 MTWCC 12. The claimant has satisfied me that her pain precludes her from regular employment, therefore I find and conclude that she is permanently totally disabled.

¶46 The claimant is also seeking attorney fees and a penalty. Both require proof that the insurer has acted unreasonably in denying her request for reclassification as permanently totally disabled. §§ 39-71-611, -612 and -2907, MCA (1987-1999), 39-71-2907, MCA (1991-1999). I have found as a matter of fact that the insurer reasonably disputed the claimant's disability status, therefore she is not entitled to either attorney fees or a penalty.

JUDGMENT

¶47 The claimant is permanently totally disabled. The State Fund shall reclassify her as such and continue to pay her total disability benefits until and unless her status changes.

¶48 The claimant is not entitled to attorney fees or a penalty.

¶49 The claimant is entitled to her costs and shall file her memorandum of costs in accordance with Court rules.

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

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

DATED in Helena, Montana, this 9th day of March, 2004.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Ms. J. Kim Schulke
Mr. Charles G. Adams
Submitted: February 11, 2004

1. Section 39-71-407(2)(a), MCA (1995-1999) provides in relevant part:

> (2)(a) An insurer is liable for an injury, as defined in 39-71-119, if the injury is established by objective medical findings and if the claimant establishes that it is more probable than not that:
>
> (i) a claimed injury has occurred; or
>
> (**ii) a claimed injury aggravated a preexisting condition.** [Emphasis added.]