

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1996 MTWCC 47

WCC No. 9603-7514

MICHAEL KAISER

Petitioner

vs.

SEARS ROEBUCK AND COMPANY

Respondent/Insurer/Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: In 1981, claimant was working as an appliance repairman for Sears, a self-insured employer. While working on a furnace at a customer's home, he received an electrical shock that knocked him unconscious. Within 24 hours, he experienced swelling and pain in his arm and ankle and began having headaches and some difficulties with movement. In 1991, claimant and Sears entered into a full and final compromise settlement reserving medical benefits to claimant. In 1995, claimant began treating with Dr. James Burkholder, a family practitioner, for increased pain in his hips and low back, including difficulty walking. Dr. Burkholder prescribed physical therapy for claimant with Gordon Jones, who had treated claimant previously with good results. Sears contended this treatment and physical therapy was not related to the original injury and was not reasonable.

Held: Where an IME panel found claimant's ongoing complaints related to the injury, even if exacerbated by deconditioning, and recommended three physical therapy sessions, the Court finds treatment by Dr. Burkholder and one month's physical therapy related to the original injury and reasonable. Additional physical therapy was found not reasonable medical treatment where prescribed without examination of claimant or discussion with the physical therapist.

Topics:

Benefits: Medical Benefits: Liability. Where an IME panel found claimant's 1995 complaints of pain related to his 1981 electrocution injury, even though likely exacerbated by deconditioning, and recommended three physical therapy sessions, the Court finds treatment by claimant's family practitioner and one month's physical

therapy related to the original injury and reasonable medical treatment. Additional physical therapy was found not reasonable where prescribed without examination of claimant or discussion with the physical therapist.

Benefits: Medical Benefits: Reasonableness of Services. Where an IME panel found claimant's 1995 complaints of pain related to his 1981 electrocution injury, even though likely exacerbated by deconditioning, and recommended three physical therapy sessions, the Court finds treatment by claimant's family practitioner and one month's physical therapy related to the original injury and reasonable medical treatment. Additional physical therapy was found not reasonable where prescribed without examination of claimant or discussion with the physical therapist.

Causation: Medical Condition. Where an IME panel found claimant's 1995 complaints of pain related to his 1981 electrocution injury, even though likely exacerbated by deconditioning, and recommended three physical therapy sessions, the Court finds treatment by claimant's family practitioner and one month's physical therapy related to the original injury and reasonable medical treatment. Additional physical therapy was found not reasonable where prescribed without examination of claimant or discussion with the physical therapist.

This case came on for trial on May 20, 1996, in Helena, Montana. The claimant, Michael Kaiser (claimant), is the petitioner and was represented by Mr. Norman H. Grosfield. The respondent, Sears Roebuck and Company (Sears), which is self-insured, was represented by Ms. Sara R. Sexe.

Claimant and Gordon B. Jones testified. In addition the deposition of Dr. Dana Headapohl and Exhibits 1 through 11 were submitted to the Court for its consideration. The matter was deemed submitted at the close of trial. Depositions were also taken of both claimant and Gordon Jones but were not submitted to the Court for its consideration.

Issue: At issue is the liability of Sears for the medical bills of Dr. James Burkholder and physical therapist Gordon Jones. Sears has refused to pay the bills and argues that they are for medical treatments unrelated to claimant's industrial injury. It also argues that the medical treatment was not reasonable. In the event claimant prevails, he also seeks attorney fees and costs.

* * * * *

Having considered the Final Pretrial Order, the testimony and demeanor of the witnesses, the 11 exhibits, the deposition of Dr. Headapohl, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

1. The claimant suffered an industrial injury on July 30, 1981, while working for Sears. He was working on a furnace at a customer's residence when he received an electrical shock and was knocked unconscious. Within 24 hours he experienced swelling and pain under his left arm and in his left ankle, and began having headaches and difficulty in walking and in lifting his left arm.

2. Sears, which is self-insured, accepted liability for the injury and over the years has paid various medical and compensation benefits.

3. Claimant and Sears executed a full and final compromise settlement in June of 1991. Under the terms of the settlement, medical benefits remained open.

4. Claimant is currently receiving social security disability but does appliance repairs on a part-time basis, making between five and twenty service calls a month.

5. Since his injury the claimant has been treated by a number of physicians. At one time he was examined at the Virginia Mason Clinic in Seattle because of complaints of vertigo. (Ex. 6 at 1.) In 1991 he underwent a medical panel examination by Dr. Randall Sechrest and others. (Exs. 6 at 1 and 7.) Claimant also received physical therapy at various times but has stated that he discontinued physical therapy in 1993 on account of a controversy with the insurance company over the therapy. (*Id.*)

6. Claimant testified that over the years since his injury he has experienced basically the same symptoms as immediately following the injury, although his symptoms have waxed and waned.

7. The Court is unable to follow claimant's medical care over the years or verify his claim that his symptoms have been the same over the years because, with the exception of five physical therapy notes from 1989 to 1992, the parties have not provided the Court with medical records for claimant's treatment prior to 1995. They have not furnished the 1991 medical panel report or the records of any physicians who examined or treated claimant prior to 1995, although those records were made available to and were reviewed by a medical panel examining claimant in November 1995. (See Exs. 6-8.)

8. The physical therapy notes were for treatments by Gordon Jones, physical therapist. The notes consist of five typewritten progress notes dated November 1989, December 1989, April 1990, April 7, 1992, and April 9, 1992, and provide minimal information. (Ex. 10.)

a. The November 1989 note indicates that claimant was in a work hardening program and was receiving "physical therapy with myofascial release techniques to help relieve headaches, dizziness and flexibility" but provides no other information concerning claimant's specific complaints. (*Id.* at 1.)

b. The note of December 1989 provides some additional insight, stating:

Mike is being treated in physical therapy for multiple trigger point involvement, severe muscle tightness, and restricted ROM.

Cervical ROM is missing. Low back ROM increased, but his upper extremity is still tight and restricted. Occasional sharp pain occurs in the occiput area.

(*Id.* at 2.) The treatment mentioned was an "OA release, manual traction" and "myofascial release techniques." (*Id.*)

c. Mr. Jones' note for April 1990 (no precise date is provided) states that physical therapy was being discontinued by Dr. Etter. It went on to note that claimant "still cannot put his head back in extension without causing pain and dizziness." (*Id.* at 4.)

d. The April 7, 1992 note is briefer than the preceding ones, stating only that claimant was in that day and that:

OBJECTIVE: Mike is doing better; range of motion is increasing. Continue treating with rehab program exercises and icing. Continue stretching & strengthening exercises with his home program.

Continue icing before and after exercises.

PLAN: Continue home exercise program.

(*Id.* at 5.)

e. The note of April 9, 1992, states:

OBJECTIVE: Mike is doing very well; he continues with his stretching & stretching [sic] exercises with his home program.

This is Mike's last treatment today. He will be able to maintain with a home program. He states he is pain free at this time. Strength has improved greatly and range of motion has increased.

Mike will be discontinued from therapy at this time.

Continue icing before and after exercises.

PLAN: Continue home exercise program.

(*Id.* at 3.)

9. Prior to September 1995, claimant's last treating physician was Dr. Harry Etter. Dr. Etter left private medical practice and claimant has reported that he last saw Dr. Etter in 1991. (Ex. 1 at 3.) There was therefore approximately a four-year interval between providing his medical care.

10. On September 12, 1995, claimant began treating with Dr. James Burkholder, a family practitioner. (Dr. Burkholder's note for that visit is Exhibit 1 at 3.) At that time claimant was suffering increased pain in his hips and low back. His left hip was more symptomatic than his right. He experienced leg weakness and found it difficult to walk. He also testified that he was experiencing increased headaches, but that fact is not reflected in Dr. Burkholder's notes of September 12.

11. In his visit with Dr. Burkholder, claimant reported that at the time he last saw Dr. Etter in 1991 "he was managing his pain with Gordon Jones, physical therapist, and with acupuncture by Bridget Mazurek." (*Id.* at 3.) Dr. Burkholder concluded the visit by referring claimant "back to Gordon Jones." (*Id.* and see Ex. 1 at 2.)

12. Jones thereafter treated claimant for myofascial pain and spasm by manipulation and heat, stimulation, ultrasound, and a technique termed a "myofascial release." Jones testified that he is one of only a few Montana physical therapists who use myofascial releases.

13. According to Jones, claimant's pattern of muscle spasm was the same as when he had earlier treated claimant.

14. Jones testified that his treatments afforded claimant relief from pain and increased his mobility and range of motion.

15. Apparently, relief was not immediate because physical therapy continued over the next five months.

16. Claimant returned to Dr. Burkholder on October 3, 1995. The doctor's note for that date (Ex. 1 at 4) indicates that claimant was "doing better with his back after physical therapy." Claimant reported that he was "still having problems with pain in the neck and left arm." (*Id.*) Claimant also reported that his "marriage is on the rocks" and that he was depressed. On examination Dr. Burkholder reported, "Pain is limited to the low back." His final assessment was "[m]ild depression with chronic pain" and he referred claimant "to his usual counselor, Keith Trafton" (*Id.*)

17. In his office note of October 3, Dr. Burkholder commented that he had reviewed medical records of Dr. Etter. Based on Dr. Burkholder's note, Dr. Etter's records contained records of the medical panel that examined claimant in 1991 and of Seattle doctors who had earlier examined claimant. He noted that neither the panel nor the Seattle panel provided an explanation for claimant's pain:

Old records from Dr. Etter were reviewed. Pain evaluation by a Libby panel of physicians could not explain his pain. Evaluation from Seattle likewise was difficult to interpret as explaining his pain.

(*Id.*)

18. In his October 3 office note, Dr. Burkholder offered no further comment on the etiology of claimant's pain. However, on October 23, 1995, Dr. Burkholder responded to an inquiry from Sears' claims adjuster and wrote:

You have requested further information regarding Mr. Kaiser. Although I do not have direct evidence of why his legs have deteriorated, by history there is no doubt that this is connected to his previous problems. This conclusion is based on his history that he has never recovered and that he has [sic] similar problems previously. This is documented in his old record which I did get to peruse, but no longer have in my possession. It is entirely possible that psychologic stress has exacerbated his condition, but this is speculative.

(Ex. 1 at 5.) Dr. Burkholder then went on to agree that another medical panel examination was appropriate: "It is perfectly reasonable to have another medical evaluation panel."

19. Dr. Burkholder's October 23 office note does not mention any continuing prescription for physical therapy. However, he renewed his original prescription on October 19, 1995, and again on November 20, 1995, December 21, 1995, and January 22, 1996. Each of the renewals was for an additional month of therapy.

20. Dr. Burkholder's last medical note is for October 23, 1995. There is no record of Dr. Burkholder's reasons for renewing physical therapy.

21. At Sears' request, a medical panel examined claimant on November 21, 1995, in Missoula, Montana. The panel members were Dr. Dana Headapohl, who specializes in occupational and environmental medicine; Dr. Timothy Browne, an orthopedic surgeon; and Martin Cheadle, Ph.D., a psychologist specializing in pain treatment.

22. The examination by each of the panel members was comprehensive. Each member took an exhaustive medical history. Drs. Headapohl and Browne also conducted detailed physical examinations. Pelvic and spinal x-rays were also taken. The records of the examinations are set forth in Exhibits 6, 7 and 8. They indicate that each of the three panel members took a more comprehensive history and performed a more detailed physical examination of claimant than did Dr. Burkholder.

23. The panel members also reviewed claimant's medical records. Whereas Dr. Burkholder's office note indicates that his review was confined to the records of Dr. Etter, the 1991 panel, and the Seattle doctors, the reports of the panel members indicate that they had other medical records which were not available to Dr. Burkholder or at least are not reflected in his note of October 3, 1995. The individual reports of Drs. Browne, Headapohl and Cheadle mention records of Dr. Shafer, an osteopathic physician, who treated claimant from 1981 to 1985. They also mention records of Dr. Jacobson and Dr. Carpenter. Finally, their reports confirm they reviewed the records of Dr. Etter, the Virginia Mason Clinic in Seattle, and the 1991 medical panel.

24. In her report, Dr. Headapohl concluded that claimant's "symptoms are all essentially the same as before" except for his depression, which was related to his divorce, and opined that his "musculoskeletal symptoms are related to the 07-30-81 injury." (Ex. 6 at 6.) In his report, Dr. Browne did not comment on the etiology of claimant's symptoms but noted that claimant had become deconditioned over the previous two years. He commented that claimant was helped with physical therapy but that it was important for him to maintain a program of stretching and strengthening. (Ex. 7 at 2.) Dr. Cheatle felt that claimant's myofascial pain was related to his 1981 injury and recommended an independent exercise program as superior to the passive physical therapy he had been getting. (Ex. 8 at 6-7.)

25. The three panel members jointly answered specific questions put to them by Sears' adjuster. The specific questions and answers were as follows:

(1) What additional "increased symptomatology" symptoms were reported by the patient?

(1) Deconditioning

(2) Depression increased symptoms related to divorce, not the work related injury.

(3) L5-S1 narrowing degenerative changes not directly related to the accident.

(2) If the panel feels any of the patient's current symptomatology is, in fact, a direct result of his 07/30/81 injury, please specifically identify symptoms and recommend future treatment for any symptoms which have, to a reasonable degree of the [sic] medical certainty, resulted from his 07/30/81 accident.

Mr. Kaiser has become deconditioned. We would recommend 3 visits with physical therapist for the development of an independent home therapy program for general conditioning.

(3) Does Mr. Kaiser in fact, continue to suffer from any symptomatology which is, to a reasonable degree of medical certainty, a result of his 07/30/81 claim, and if so, what is the recommended treatment for the related condition?

Myofascial release therapy is maintenance in nature, not curative. We do not recommend continuation of passive treatment. Mr. Kaiser might benefit from a trial of an antidepressant for his sleep disturbance.

(Ex. 9 at 1.) The foregoing answers indicate that the panel considered claimant's myofascial pain to be related to his 1981 injury but that his condition has been affected by his deconditioning. The panel agreed that three sessions of physical therapy were warranted to get him back on track with a home exercise program. Dr. Headapohl's deposition made it

clear that the three physical therapy treatment recommendation was for a total of three treatments, not for three treatments in addition to those already provided by Gordon Jones.

26. The only medical testimony in this case was provided by Dr. Headapohl through deposition. Her testimony concerning the relatedness of claimant's current condition to his 1981 injury muddies the waters somewhat. In her testimony she pointed out that claimant suffers from degenerative disk disease, which is likely a major contributing factor to his low-back pain. (Headapohl Dep. at 20.) He also suffers from bursitis of his hip, which is unrelated to his injury and is contributing to his lower body complaints. (*Id.*) On the other hand, Dr. Headapohl attributed his myofascial pain complaints in his left posterior shoulder area and neck to his 1981 injury, noting that his symptoms in those areas had been "fairly consistently present" since his 1981 injury. (*Id.* at 19.) She also testified that claimant's depression and his deconditioning were factors in his pain. (*Id.* at 18, 20, 22.)

27. Although there may be several contributors to claimant's myofascial pain, the 1981 injury among them, Dr. Headapohl's testimony shows that it is impossible to unbundle or separate the factors when providing medical care. She noted that myofascial pain in one area may cause consequential pain in others:

Q: And of all of those, were any of those complaints that you just went through, other than the left shoulder problems, did you consider any of those to be related to the 1981 injury?

A: Not the bursitis, not the low back pain, not the impingement syndrome, but the **some of the - part of the myofacial [sic] pain experience in the left posterior shoulder area was related, I believe, to the 1981 injury, as it was consistent with his symptoms since the time of the accident.**

Q: What about the other myofacial [sic] complaints, then?

A: I think the - it gets somewhat complicated, because **one can have a myofacial [sic] pain syndrome in one area and because of stress there are multiple areas that are involved. I think stress is a major factor for him for other muscle tightness and spasms**, that the bursitis throws his body balance off. The leg length discrepancy, which he states he had, or has, also throws his body alignment off. All of those things together would contribute to overall muscle stress and pain and spasm and this kind of cycle.

(Headapohl Dep. at 20-21, emphasis added.)

28. The treatment recommendations made by the panel was for overall treatment of his myofascial pain. The treatment plan -- limited physical therapy followed by a home exercise program, accompanied by treatment of claimant's depression -- was not directed at pain in only one part of his body but towards remitting pain throughout his body.

29. Dr. Headapohl's testimony confirmed the panel recommendation of short-term physical therapy followed by a long-term home exercise program as appropriate treatment. She indicated that long-term physical therapy was not reasonable treatment for claimant's condition:

Q: In the panel summary that you identified as being this 1078 or 1079, there's a recommendation for three visits of physical therapy. Can you explain why only three visits were recommended?

A: We felt it important that he become trained in self-care and conditioning. He had had extensive passive treatment, and that does not work well on people who have myofacial [sic] pain. It works for a while, and a short course of passive physical therapy is very reasonable.

(*Id.* at 21-22, emphasis added.)

30. While Jones believed longer term physical therapy was reasonable, I give greater weight to the testimony and opinions of Drs. Headapohl and Browne. Drs. Headapohl and Browne have greater education and expertise in diagnosing and treating pain. While Jones may treat pain through physical therapy, their expertise encompasses treatment utilizing a far greater range of treatment options. Finally, Dr. Headapohl based her opinions not only on her own training and experience but upon her familiarity with current medical literature.

31. In light of the foregoing findings, I make the following ultimate findings:

a. Claimant's treatment by Dr. Burkholder and Gordon Jones was related to his 1981 industrial accident.

b. The first month of physical therapy, encompassing physical therapy sessions between and including September 18, 1995 and October 17, 1995, was reasonable medical treatment. While the number of treatment sessions during that month exceed the three sessions recommended by the panel, Dr. Burkholder's initial prescription was for a full month and the Court declines to draw a rigid line based on the panels three session recommendation.

c. On the other hand, physical therapy after October 17, 1995, was not reasonable. While Dr. Burkholder prescribed the additional therapy, he did not justify the additional prescriptions. The additional prescriptions were written without seeing claimant and there is no indication of what discussion Dr. Burkholder may have had with either claimant or Gordon Jones, or his rationale for extending the treatment. The panel opinion and testimony of Dr. Headapohl provided persuasive evidence that the additional treatment was not medically reasonable.

CONCLUSIONS OF LAW

1. Claimant was injured in July of 1981. Therefore, the 1981 version of the Workers' Compensation Act applies. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

2. Under the 1981 law claimant is entitled to payment for reasonable medical services. Section 39-71-704(1), MCA (1981), provides in relevant part:

Payment of medical, hospital, and related services. (1) In addition to the compensation provided by this chapter and as an additional benefit separate and apart from compensation, the following shall be furnished:

(a) After the happening of the injury, the employer or insurer shall furnish, without limitation as to length of time or dollar amount, reasonable services by a physician or surgeon, reasonable hospital services and medicines when needed, and such other treatment as may be approved by the division for the injuries sustained.

[Emphasis added.]

3. Claimant's visits to Dr. Burkholder were related to his 1981 industrial injury and were reasonable. His visits were prompted by a deterioration of his condition. While other factors independent of his injury contributed to claimant's overall condition, those factors cannot be unbundled or segregated for treatment purposes, and the statute does not provide for any apportionment. Therefore, Sears is liable for Dr. Burkholder's bills.

4. The physical therapy was related to claimant's 1981 injury and is compensable insofar as it is reasonable. Again, while other factors unrelated to claimant's 1981 condition may have played roles in his myofascial pain, those factors cannot be unbundled or segregated for treatment purposes, and there is no apportionment under the law.

5. The physical therapy provided between and including September 18, 1995 and October 17, 1995, was reasonable and Sears is liable for payment of Mr. Jones' bills for those treatments. Physical therapy after October 17, 1995, was not reasonable medical treatment and Sears is not liable for those treatments.

6. Sears denied liability for all medical expenses at issue in this case. Claimant has therefore prevailed in this action and is entitled to attorney fees. §39-71-611, MCA (1981). The amount of attorney fees shall be determined at a later date.

7. Claimant is entitled to his costs.

JUDGMENT

1. Sears Roebuck and Company shall pay Dr. Burkholder's bills for his treatment of claimant on September 12 and October 3, 1995, and for his October 23, 1995 response to the inquiry by Sears' adjuster.

2. Sears shall also pay Gordon Jones' bills for all physical therapy sessions between and including September 18 and October 17, 1995.

3. Sears shall pay claimant's costs and attorney fees in an amount to be determined by the Court at a later time and in accordance with ARM 24.5.343.

4. 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.

5. This decision is certified as final.

Dated in Helena, Montana, this 28th day of June, 1996.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Norman H. Grosfield

Ms. Sara R. Sex

Submitted: May 20, 1996