

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 46

WCC No. 9311-6951

MARGARET KOBER

Petitioner

vs.

BUTTREY FOODS

Respondent/Insurer/Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The trial in this matter was held on February 15, 1994, in Great Falls, Montana, the Honorable Mike McCarter, Judge of the Workers' Compensation Court, presiding. Petitioner, Margaret Kober (claimant), was present and represented by Mr. Norman H. Grosfield. Respondent, Buttrey Foods (Buttrey), was represented by Mr. Thomas A. Marra. Claimant was sworn and testified on her own behalf. Patrick Stephenson of Intermountain Claims was sworn and testified. The parties stipulated that the Court could consider the deposition testimony of John R. Dorr, M.D. and William Shaw, M.D. Exhibit Nos. 1 through 17 were admitted into evidence by stipulation.

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

FINDINGS OF FACT

1. At the time of trial claimant was 58 years old, married, and living in Townsend, Montana.
2. Claimant was employed by Buttrey for 26 years as a meat wrapper. Her job included wrapping meat, filling meat cases, putting up trays of meat, and scrubbing floors.
3. On April 1, 1986, claimant suffered an industrial injury while working for Buttrey. Claimant injured her back as she loaded a case of chickens into a cooler. The cases weigh up to 60 pounds.
4. At the time of claimant's injury Buttrey was self-insured under Compensation Plan No. 1 of the Montana Workers' Compensation Act. Intermountain Claims has acted as Buttrey's adjuster for this claim.

5. On September 26, 1988, the claimant and Buttrey entered into a full and final compromise settlement with respect to the 1986 injury. However, the settlement agreement reserved future medical benefits to the claimant. Thus, Buttrey continues to be responsible for medical bills incurred by claimant for treatment relating to the 1986 injury.

6. The present dispute concerns the extent of Buttrey's liability for medical expenses. Claimant went without seeing a physician from March 9, 1989 until November 30, 1992, when she went back to see her treating physician on account of worsening back pain. Buttrey, through Intermountain Claims, has refused to pay Dr. Dorr's recent bills. It asserts that her current back condition is unrelated to her 1986 injury and that it has no further responsibility for medical expenses incurred in connection with treatment of claimant's back condition.

7. Buttrey attributes claimant's current back condition to preexisting degenerative disc disease.

8. Claimant injured her back in an industrial accident in 1972. She was off work for approximately three months. Dr. William H. Walton, an orthopedic surgeon, treated claimant and took x-rays on December 28, 1972. Claimant suffered additional back symptoms in 1976, taking two weeks off for bed rest. Additional x-ray were taken at that time.

9. Between 1976 and 1986 the claimant worked without incident and without back pain or other back symptoms. She testified to this history and her testimony is not controverted by other evidence. The Court finds her testimony credible and adopts it.

10. After her industrial injury on April 1, 1986, claimant was treated by Dr. Walton and x-rays were taken on May 8, 1986. Dr. Walton felt claimant probably had disc herniation at L5-S1 and also identified degenerative disc changes at L4-5 and at L5-S1. Dr. Walton determined that claimant reached maximum medical healing on January 2, 1987. (Medical records attached to Shaw Dep.)

11. Claimant was examined by Dr. Robert K. Snider, who agreed with Dr. Walton's assignment of a 5% impairment rating for claimant in April of 1987. Dr. Snider's impression of claimant was chronic back sprain. (Medical records attached to Shaw Dep.)

12. Dr. John Dorr, an orthopedic surgeon and an associate of Dr. Walton, treated claimant from November 11, 1987 through March 9, 1989. Claimant did not seek further medical treatment until she resumed treating with Dr. Dorr on November 30, 1992. Although Dr. Dorr did not see claimant during this interval, he prescribed medication for pain in April 1989 and again in May 1991. Dr. Dorr is currently claimant's treating physician.

13. Since her 1986 injury claimant has had pain and a burning sensation in her lower back. The pain and burning have been continuous, although it has varied in intensity. Overall, the

pain and burning sensation has worsened with time. Her pain in November 1992, and currently, is in the same area of her back as in 1986.

14. When claimant returned to see Dr. Dorr on November 30, 1992, she advised Dr. Dorr that her condition was slowly getting worse.

15. Claimant has not returned to work or suffered any subsequent injury since 1986.

16. Mr. Patrick Stephenson (Stephenson) has adjusted claimant's case for Buttrey. On December 16, 1992, apparently in response to Dr. Dorr's medical bills, Stephenson wrote a letter to Dr. Dorr. The letter stated in part:

From the medical evidence in the file, it would appear that Margaret Kober's disc degeneration in the lumbar area had started substantially before her onset of symptoms, which occurred on or about 04/01/86. As the patient's x-rays revealed distinct narrowing at L4-5 and L5-S1 when she first saw Dr. Walton on 05/08/86, we would assume you would agree that the patient's disc degeneration the lumbar area had started substantially before the above-captioned claim occurred.

It is not our intention to indicate Ms. Kober did not have a compensable injury in April 1986, which was subsequently diagnosed as a chronic back sprain; however, if Ms. Kober's above-captioned back sprain aggravated the pre-existing degenerative disc disease, **the insurer is only responsible for the aggravation, not necessarily the pre-existing condition.**

Based on the patient's medical history, as outlined above, it would appear that any follow-up medical care for the patient's degenerative changes in the lumbar area would not be compensable under the above captioned claim. Although we do not expect you to make a legal interpretation of Ms. Kober's case, should you disagree that Ms. Kober had a pre-existing condition, involving the lumbar disc degeneration, please advise us accordingly, and we would also request you provide us with any medical records that would support any objection to our interpretation.

(Ex. No. 3, all emphasis added.)

17. Dr. Dorr responded to Stephenson on February 2, 1993, concurring that claimant did have some preexisting disc disease, but went on his letter to state:

I do feel that this injury certainly aggravated her pre-existing disease and, in fact, seemed to have triggered her significant symptoms. . . .

I believe it would be possible for her to make the case that she was able to tolerate her pre-existing condition until such time as she had her injury. **The aggravation of**

her pre-existing condition has markedly increased her symptoms and decreased her ability to function.

(February 2, 1993 letter from Dr. Dorr to Stephenson, attached to Dorr Dep.; all emphasis added.)

18. Stephenson wrote Dr. Dorr on February 23, 1993, reiterating Buttrey' position that it was responsible only for the aggravation and not any underlying condition:

With the understanding that Margaret Kober's claim of 04/01/86 involved a diagnosed chronic back sprain, which had aggravated the pre-existing degenerative disc disease, and as stated in our 12/16/92 [letter], **the Workers' Compensation insurer is responsible for the aggravation only, and is not responsible for the pre-existing condition.**

(Ex. No. 4; emphasis added.) Stephenson went on in his letter to request Dr. Dorr's further opinion as to whether claimant's condition was a result of "normal progression of degenerative disc disease," asking:

With the understanding that Ms. Kober is nearly 58 years old, and had evidence of degenerative disc disease as early as 1986, we would request your professional medical opinion as to whether it would be more probable that Ms. Kober's current degenerative findings represent a normal progression of degenerative disc disease, considering Ms. Kober's age and previous medical findings, as opposed to any other factors.

(*Id.*)

19. Dr. Dorr responded on March 15, 1993, reiterating and stressing his opinion that claimant's preexisting back condition was aggravated and worsened by the 1986 injury. In full, Dr. Dorr wrote:

As I stated in my letter of February 2, 1993, I felt that Margaret Kober was able to tolerate her pre-existing condition until such time as she had her injury. **The aggravation of her pre-existing condition has markedly increased her symptoms and decreased her ability to function. I believe that statement speaks for itself.**

(March 15, 1993 letter from Dr. Dorr to Stephenson, attached to Dorr Dep.; all emphasis added.)

20. On April 26, 1993, Stephenson requested an Independent Medical Examination by Dr. William S. Shaw, a specialist in occupational medicine. (Shaw Dep. Ex. No. 1: April 26, 1993 letter of Stephenson to William S. Shaw, M.D.) Both Dr. Shaw and Dr. Whitney Robinson, an orthopedic surgeon, examined claimant on July 13, 1993.

21. In a report received by Intermountain Claims on July 16, 1993, Dr. Robinson expressed the following conclusions:

It is my opinion after examining the patient and reviewing the studies that Ms. Kober does have a preexisting condition. This perhaps started in 1972, however, she did have a relatively pain free interval for 14 years until 1986. At that time she had a repeat injury at work. Since then she's had continuation of her symptoms. There is no doubt that part of her symptoms are the natural progression of degenerative disk disease and facet arthritis which she clearly does have. **However, I do think she has a documented exacerbation of her preexisting condition as noted by the injury at work in 1986 and she has not completely recovered from this to this date. It's my opinion that her current symptoms can be traced to that exacerbation in 1986 and perhaps even all of the way back to 1972. However, because of the 14 year relatively pain-free interval between 1972 and 1986 it seems more appropriate to put the starting date at 1986.**

(Shaw Dep. Ex. No. 1: July 13, 1993 Report of Dr. Robinson, date stamped as received by Intermountain on July 16, 1993; emphasis added.) Dr. Robinson's report also noted that claimant's pain had "never really disappeared since the episode in 1986." (*Id.*)

22. Dr. Shaw also forwarded a July 13, 1993 report to Intermountain. The history recorded by Dr. Shaw includes the following:

She has continued to have burning in her back ever since 1986. She just got used to it, but it never got any better. In the fall of 1992, her symptoms apparently gradually got worse with progressing severity such that she sought attention from Dr. Dorr.

(Shaw Dep. Ex. No. 1: July 13, 1993 Report of Dr. Shaw, date stamped as received by Intermountain on July 16, 1993.) He provided the following impression:

IMPRESSION: Ms. Kober presents with symptoms and x-rays consistent with a gradually progressive disk degeneration of the lumbar spine primarily involving L4-5 and L5-S1. The progression can be documented over 20 years' time.

Symptomatically, the patient dates her subjective complaints to an incident of April 1986. She notes a subjective increase in symptoms as of approximately the fall of 1992 without precipitating events. No evidence of neurologic deficit is detected. **There is no indication that the objective progression of her disease changed subsequent to the 1986 episode though clearly her subjective symptoms are alleged to have changed significantly following that episode.**

(*Id.*; all emphasis added.)

23. Stephenson then sent letters to Dr. Shaw and Dr. Robinson requesting further clarification. (Ex. Nos. 7 and 8). The letters requested that the doctors consult with one

another and provide their consensus opinion "on a more probable than not basis, as to whether Ms. Kober's diagnosed degenerative disc disease has, with a degree of medical certainty, resulted from the patient's normal aging process, or other factors, as opposed to any effects of Ms. Kober's 04/01/86 injury."

24. On August 20, 1993, Dr. Shaw sent Stephenson a letter in which he stated that the letter represented a consensus of himself and Dr. Robinson. (Shaw Dep. Ex. No. 1; August 20, 1993 letter of Dr. Shaw to Patrick Stephenson.) In the letter Dr. Shaw stated that x-ray evidence over the previous 20 years showed a "continued progression" of degenerative disc disease on "a rather straight line and continuous process over a 20 year period."

Commenting on the role of the 1986 injury, Dr. Shaw said:

Historically, Ms. Kober convincingly recounts that she did not have symptoms between approximately 1972 and 1986. Following her incident at work, she then developed symptoms. These symptoms persisted essentially unchanged until, without obvious precipitating event, in the fall of 1992 her symptoms apparently gradually began to worsen. The etiology of that worsening is unclear. **I feel quite comfortable acknowledging that her symptoms between 1986 and 1992 are attributable to the incident of April 1986. However, I do not believe that any specific incident or injury can be identified to explain the worsening which has occurred over the past year or so. I cannot say to a reasonable degree of medical certainty that recent exacerbation of her symptoms can be directly attributed to her incident of April 1986.**

(*Id.*; emphasis added.)

25. Dr. Shaw also testified that he had discussed the case with Dr. Robinson, and that the letter was a fair and accurate representation of what he and Dr. Robinson believed. The Court does not find Dr. Shaw's August 20, 1993 letter to credibly speak on behalf of Dr. Robinson. It is hearsay evidence, and is not part of the medical records maintained in the ordinary course of medical practice. No explanation was given as to why Dr. Robinson was not deposed or called as a witness in this case. Moreover, in light of Dr. Shaw's own acknowledgement that the 1986 injury triggered the symptoms that persisted between 1986 and 1992, it is not at all clear that Dr. Robinson's agreement, even if given, amounted to a repudiation of his opinion that claimant's symptom's were triggered by and can be traced to the 1986 injury. The Court gives no weight whatsoever to Dr. Shaw's claim that Dr. Robinson concurs in his opinions.

26. Thereafter, on September 27, 1993, Stephenson wrote again to Dr. Dorr, denying payment for Dr. Dorr's care of claimant. In that letter he wrote:

Both Dr. Shaw and Dr. Robinson completed medical evaluations of your patient, and both doctors are in agreement that Ms. Kober's worsening of symptoms which

occurred in late 1992 cannot be attributed directly to any effect of her incident of 04/01/86.

(Ex. No. 9.)

27. Buttrey has persisted in its position that it is no longer responsible for medical care related to claimant's back condition, forcing claimant to trial.

28. The only medical testimony presented in this matter was that of Dr. Shaw and Dr. Dorr. Both testified by deposition.⁽¹⁾ As previously noted, Dr. Robinson did not testify.

29. Dr. Dorr adhered to his original opinion that claimant's current condition is more likely than not related to her injury of April 1, 1986, which aggravated a preexisting condition:

THE DEPONENT: Okay. The whole thing of determining causation is always difficult. We have a patient who did have some early X-ray changes when seen in '72. She was doing well until she had her symptoms and then - - or until she had her injury, and then developed marked symptoms that have been progressive since that time.

Whether or not she would have had trouble without that injury in '86, I don't know. Certainly the fact that she had the injury triggered the symptoms.

So I think at least we have exacerbation of a preexisting condition, and it has been steadily progressive since that time.

(Dorr Dep. at 10.)

30. Dr. Shaw testified that after reviewing the records, films and history of the claimant, his impression was that claimant's symptoms and x-ray findings were consistent with a gradually progressive disc degeneration of the lumbar spine which could be documented over 20 years. Dr. Shaw also testified that the findings in 1992 were essentially what would have been predicted from viewing claimant's x-rays taken in 1972, 1976 and 1986. (Shaw Dep. at 24-25, 30.) In direct examination he further testified that claimant's 1986 accident neither accelerated nor changed the progression of the disease, nor did it cause a permanent and objective aggravation of the progressive disc disease. (Shaw Dep. at 33-34). In conclusion he testified:

I don't believe to a reasonable degree of medical certainty that this lady's status when I saw her in July of 1993, I don't believe that it was significantly related to a specific incident such as that which occurred in 1986.

(*Id.* at 34.)

31. However, upon cross-examination Dr. Shaw conceded that claimant's symptoms were triggered by the 1986 industrial accident and that claimant's symptoms between 1986 and 1992 were attributable to the 1986 accident:

Q Well, doctor, in your report of August 20, 1993, you say, "I feel quite comfortable acknowledging that her symptoms between 1986 and 1992 are attributable to the incident of April 1986."

A Yes, sir. That is what I said.

Q Okay. And you still agree with that.

A Yes, sir.

(Shaw Dep. at 44.) He further agreed that she continued to have problems up to the time of his examination:

Q She continued to have pain in the same area in 1993 when you saw her. Right?

A Oh, yes, sir, she was continuing to have pain in 1993.

(*Id.* at 45.) Dr. Shaw gave the following opinion concerning the relationship of the 1986 injury to claimant's current condition:

Q So wouldn't it be fair to say that the symptoms she was suffering from from [sic] 1986 through the time you saw her in 1993 are attributable to her incident in April of 1986?

A I think I may have gotten confused in your question. Did you say the symptoms from 1986 to 1993 or 1992?

Q 1993.

A Well, I guess what I would say is that the incremental change between 1992 and 1993 I do not -- I cannot explain based on any incident from 1986. If we could measure pain and in 1986 to 1992 she had a pain of X and in 1992 she increased her pain to X plus Y, then I could say that as of 1993 X was attributable to the incident of 1986, but Y was not. I have a great deal of difficulty separating out pain like this, Mr. Grosfield, but I think that's what you're asking me.

(*Id.* at 45; emphasis added.) He repeated his position in answer to later questions:

Q Doctor, certainly at least some of the pain that she was suffering at the time you saw her would have been a part and parcel of the type of pain that you reference in your letter of July 13, 1993. Wouldn't it?

A I think what you're asking me is of the pain that she has now, X plus Y, is some of it X?

Q Yes. You stated it better than I did.

A And I thought I answered that affirmatively before.

Q And some of it would be X.

A Yes, sir. It's now X plus Y.

(*Id.* at 46-47.)

32. The medical testimony of both Dr. Dorr **and** Dr. Shaw, as well as claimant's own historical testimony concerning her pain, clearly and unequivocally establish that, although claimant had preexisting degenerative disc disease, the 1986 industrial accident triggered back pain which has persisted to this day. The opinions and evidence further establish that the nature of claimant's pain has not changed since 1986. Rather, it has merely worsened over the last couple of years. Notwithstanding Dr. Shaw's attempt to separate the worsening of the pain from the pain claimant has suffered since 1986, this evidence establishes that claimant's current condition is attributable to her 1986 industrial accident.

33. Dr. Dorr testified that elective surgery on claimant's back is an option under consideration.

34. The insurer's denial of further medical benefits was unreasonable. It is clear from Mr. Stephenson's opening letter of December 16, 1992 to Dr. Dorr that Buttrey was going to deny further medical treatment on the theories that claimant's condition was no longer the result of her 1986 injury and that Buttrey was responsible only for the specific effects of the injury. When Dr. Robinson, one of the IME doctors, also expressed the opinion that claimant's condition was attributable to the 1986 injury, Stephenson wrote to Robinson asking for "clarification" and enlisted Dr. Shaw to get a "consensus" on the matter. When Dr. Shaw conceded that a part of claimant's current pain is a continuation of pain triggered by the 1986 incident, and that such pain has merely worsened without any further injury or aggravation, Buttrey's continued to deny its responsibility for medical expenses and forced claimant to trial.

35. Claimant's description of her continuous pain since 1986 and its worsening in 1992 was credible and even Dr. Shaw found no reason to doubt her.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this proceeding pursuant to section 39-71-2905, MCA.
2. The claimant has the burden of proving her entitlement to benefits by a preponderance of the credible, probative evidence. ***Ricks v. Teslow Consolidated***, 162 Mont. 469, 512 P.2d 1304 (1973); ***Dumont v. Wickens Bros. Const. Co.***, 183 Mont. 190, 598 P.2d 1099 (1979). Thus, the claimant must prove that her current medical condition is attributable to her April 1, 1986 industrial injury. She has carried her burden.

There is no factual controversy concerning claimant's 1986 industrial injury or its impact upon claimant. The fact of injury is undisputed. It is also undisputed that the injury triggered pain and burning in claimant's lower back, and that the burning and pain has persisted since 1986, worsening in 1992. It was the worsening of these symptoms which prompted claimant to return to Dr. Dorr, her treating physician.

Buttrey's case against benefits is premised on Dr. Shaw's testimony that claimant's preexisting condition, rather than the 1986 injury, is causing the worsening of claimant's symptoms. Based on that opinion, it has refused medical benefits entirely, refusing even to admit responsibility for that part of the pain which Dr. Shaw concedes is attributable to the 1986 injury.

The basic dispute in this case is not a factual one, for it is abundantly clear that claimant has preexisting disc disease, and equally clear that her 1986 industrial accident triggered her persistent symptoms of pain and burning. Rather, the dispute involves an application of law. Buttrey's has interpreted the law as allowing it to cut off benefits for a compensable condition where the condition worsens as the natural result of the preexisting condition. Its position is plainly contrary to established legal precedents.

It is a well established Montana rule of law that the employer takes the employee subject to the employee's physical condition at the time of employment. ***Robins v. Anaconda Aluminum Co.***, 175 Mont. 514, 575 P.2d 67 (1978); ***Shepard v. Midland Foods, Inc.***, 205 Mont. 146, 666 P.2d 758 (1983). An employee who suffers from a preexisting condition is entitled to compensation if the condition was aggravated or accelerated by the industrial injury. ***Hash v. Montana Silversmith***, 248 Mont. 155, 158, 810 P.2d 1174 (1991) (citing ***Shepard v. Midland Foods***.).

The Montana Occupational Disease Act allows apportionment between the effects of an occupational disease and a preexisting condition⁽²⁾ Section 39-72-706, MCA. So do the workers' compensation acts of seven other states. Larson's Workmen's Compensation Law, § 12.26 at 3-480. However, in all other states, including Montana,

the relative contribution of the accident and the prior disease is not weighed, nor is the shortened life expectancy of the employee because of the disease considered. The general idea is that even if the decedent would probably have died of cancer in any case, the employment is deemed for compensation purposes the cause of death if, due to a blow hastening the cancer, the employee dies today instead of six months from now. "To hasten death is to cause it."

Id. at 3-480-482.

The Montana Supreme Court has previously considered and dismissed arguments that the direct effects of an aggravation should be separated from the effects of the preexisting condition itself and that the insurer's liability in aggravation cases should be limited to the

direct effects of the aggravation. In **Robins** the Supreme Court rejected a contention that the effects of a prior work related injury must be factored out of the disability determination in a subsequent injury case. The insurer in that case argued that "only the effects of the 1973 injury can be considered" and "that any disability claimant has from the 1964 injury cannot be a factor in determining claimant's current disability." 175 Mont. at 519. The Supreme Court rejected the arguments and held that claimant was entitled to permanent total disability benefits based on his overall condition:

The 1964 injury caused claimant to have some disability. However, he was able to return and did return to work. The 1973 injury caused additional disability. After this injury, claimant tried but could not return to work. Thus, this last injury combined with the prior injury **entitles claimant to compensation to the extent he is now disabled. In determining the degree of disability, we conclude that both injuries must be considered.** [Emphasis added.]

Id. at 519-520. In **Shepard**, the claimant suffered from a degenerative knee condition that was aggravated by a fall at work. The insurer argued that claimant was not entitled to disability benefits because his preexisting condition would have forced him into early retirement within a short time irrespective of the injury at work. The Supreme Court rejected the argument. *Id.* at 153, 156. A further discussion of these cases and their holdings is found in this Court's recent decision in **Carmody v. Employers Insurance of Wausau**, WCC No. 9302-6686 (decided May 6, 1994).

In this case the 1986 injury lit up or triggered the claimant's symptoms. The basic symptoms have persisted since the injury. Montana law does not provide any legal basis for denying benefits because the pain triggered by the 1986 industrial accident has now increased. Even Dr. Shaw, when discussing the roles of the injury and the preexisting condition in terms of X and Y, admitted to "hav[ing] great difficulty separating out pain like this." Buttrey is responsible for claimant's medical expenses related to her back condition.

3. Claimant is entitled to a penalty for Buttrey's unreasonable refusal to pay the medical expenses incurred by claimant for treatment of her back condition. Section 39-71-2907, MCA (1985), provides for an increase in an award where "payment of compensation has been unreasonably delayed or refused by an insurer, either prior or subsequent to an order by the workers' compensation judge granting a claimant compensation. . . ."

As found in this decision, Stephenson's correspondence evidences Buttrey's intent from the very beginning to deny claimant's request for further medical benefits. Stephenson has taken the unwavering position that Buttrey "is responsible for the aggravation, not necessarily the preexisting condition." (Ex. No. 3; December 16, 1992 letter to Dr. Dorr.) It is also noteworthy that when Stephenson first wrote to Dr. Dorr, the only response he solicited was whether Dr. Dorr disagreed that claimant had a preexisting condition. When Dr. Dorr responded to Stephenson's initial letter, telling him that claimant's 1986 "injury

certainly aggravated her preexisting disease and, in fact, seemed to have triggered her significant symptoms" (February 2, 1993 letter from Dr. Dorr to Patrick Stephenson, attached to Dorr Dep.), Stephenson rejected the answer, writing back to reiterate that Buttrey "is responsible for the aggravation only, and is not responsible for the pre-existing condition." (Ex. No. 4.) When he received Dr. Robinson's report stating that claimant's "current symptoms can be traced to that exacerbation in 1986" (Shaw Dep. Ex. No. 1; July 13, 1993 Report of Dr. Robinson), and Dr. Shaw's report stating that claimant had continual burning in her back ever since the 1986 accident (Shaw Dep. Ex. No. 1; July 13, 1993 Report of Dr. Shaw), Stephenson requested "clarification" and a "consensus" opinion from both doctors. After Dr. Shaw acknowledged, both in his clarification letter of August 20, 1992 (Shaw Dep. Ex. No. 1) and in his deposition, that claimant's symptoms between 1986 and 1992 were attributable to the 1986 injury and that those same symptoms had worsened in the fall of 1992, Stephenson still persisted in denying further medical benefits, forcing this matter to trial. As already noted, the dispute in this matter is not a factual or medical one, rather it is a legal one. In persisting in the denial of medical benefits, Stephenson hung his hat on a legal theory that is unsupported by, and contradictory, to Montana Supreme Court decisions concerning aggravation of preexisting injuries.

4. The claimant is entitled to an award of attorney fees and costs pursuant to section 39-71-611, MCA, in an amount to be determined by the Court..

5. Claimant is entitled to costs in an amount to be determined by the Court.

JUDGMENT

1. This Court has jurisdiction over this matter pursuant to section 39-71-2905, MCA.

2. Buttrey shall pay all medical benefits claimant has incurred for the treatment of her back condition and which it has refused to pay to date. Buttrey is also liable for future reasonable medical and hospital bills for the treatment of claimant's back condition.

3. Claimant is entitled to a penalty pursuant to section 39-71-2907, MCA. The 20% penalty shall apply to medical benefits due at this time, as well as to all future medical benefits.

4. Claimant is entitled to an award of reasonable costs and attorney fees pursuant to section 39-71-611, MCA, in an amount to be determined by the Court.

5. The JUDGMENT herein is certified as final for purposes of appeal pursuant to ARM 24.5.348.

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

DATED in Helena, Montana, this 9th day of May, 1994.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Norman H. Grosfield

Mr. Thomas A. Marra

1. Dr. Shaw's deposition was video taped.
2. In this case Buttrey does not accept responsibility for even a portion of claimant's back condition. Rather, it denies liability entirely.