IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2002 MTWCC 3

WCC No. 2001-0410

LINDA LINDEMAN

Petitioner

vs.

CONNECTICUT INDEMNITY COMPANY

Respondent/Insurer for

PEAK MEDICAL

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: In 1985 claimant suffered a compression fracture at the T12 vertebral level. Over the next 15 years she suffered back pain but continued to work on a regular basis without loss of time and required medical treatment only sporadically, indeed on only four occasions prior to 2000. On March 22, 2000, she fell on her buttocks and thereafter experienced more constant, and more severe back pain in her entire back but particularly in her low back. An IME physician opined that the March 22nd incident had only temporarily aggravated her preexisting condition and that the aggravation had resolved a month after the accident. On that basis, the insurer terminated temporary total disability benefits and refused to authorize further medical treatment. Other physicians, who continued to treat claimant long after that month had gone by, opined that the aggravation she suffered is continuing and that she needs further treatment to improve her condition. Meanwhile, she remains unable to work.

Held: Concessions by the IME physician in response to cross-examination and the opinions of the other physicians who have seen claimant persuade me that claimant has not reached MMI and needs further evaluation and treatment by a physiatrist. Hence, she is entitled to reinstatement of TTD and medical benefits.

Topics:

Maximum Medical Improvement. Where a preponderance of the evidence demonstrates that claimant's condition may be materially improved with further medical evaluation and treatment, she has not reached MMI.

Proof: Conflicting Evidence: Medical. In an aggravation case, a comparison of claimant's pre-aggravation history of medical treatment and disability to her post-aggravation treatment and disability may be considered in assessing conflicting medical testimony as to causation and MMI.**Proof: Conflicting Evidence: Medical.** In assessing a physician's opinions, the Court may consider testimony given by the physician which undermines his opinions.

¶1 The trial in this matter was held on November 7, 2001, in Great Falls, Montana. Petitioner, Linda Lindeman (claimant), was represented by Mr. Richard J. Martin. Respondent, Connecticut Indemnity Company, was represented by Mr. Robert E. Sheridan.

¶2 Exhibits: Exhibits 1 through 15 were admitted without objection. Exhibit 16 was withdrawn.

¶3 Witness and Depositions: Claimant was the only witness at trial. The parties submitted the depositions of Dr. Steven Chrzanowski and Dr. Ronald M. Peterson.

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

1. Whether Petitioner/Claimant['s] current medical condition and disability are a result of the March 22, 2000 work related injury.

2. Whether Petitioner/Claimant is entitled to reinstatement of medical and compensation benefits.

3. Whether Respondent/Insurer is liable for payment of attorney fees, costs and penalties pursuant to §§ 39-71-611 and 39-71-2907, MCA.

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

FINDINGS OF FACT

¶6 Claimant is forty-seven years old. She is a registered nurse. (Ex. 1.) She has worked in a wide variety of nursing jobs, sometimes part time only.

Preinjury Back Problems

¶7 Claimant has a long history of back problems. The first evidence of back treatment in the record is dated April 29, 1981. Claimant visited Great Falls Orthopaedics "for evaluation of her low back." (Ex. 11 at 1.) The brief note states:

> When she was 13 she injured her back while tubing. Ever since she has had some occasional back pain. Now intermittent in nature. Hospitalized a couple of times for traction.
>
> EXAM: Is really unremarkable. X-rays reveal some minimal scoliosis. Treatment is conservative. We have started her on some back exercises and we will see her again in approximately 1 month.

(*Id*.)

¶8 The record contains no further reference to back pain until September 1985, when claimant suffered a serious back injury. She was standing on scaffolding when the scaffolding collapsed. She fell four to six feet, landing on a hard surface. X-rays revealed compression fractures at the L1-T12 level. She was hospitalized for approximately two weeks, then wore a back brace for three months.

¶9 Several months after her injury, claimant began working as a nurse. On account of her back injury she limited her lifting to twenty pounds and avoided bending.

¶10 Claimant worked continuously through March 22, 2000, sometimes full time and sometimes part time, never missing work because of her back. However, as claimant testified, "when you break your back, sometimes you have problems." (Trial Test.) Over the years, she suffered periodic flareups of back pain sufficiently significant to require intermittent medical treatment.

¶11 On January 17, 1997, claimant sought treatment with Great Falls Orthopaedics for "low back and bilateral lower extremity pain." (Ex. 11 at 7.) The medical note for that date surveys her history of back pain, including her post-1985 history, noting that she had done "fairly well for the most part." The note also described her then current symptoms.

> She has a long history of problems with her low back. Most of her difficulties began in 1985 when she fell through a scaffolding and sustained a compression fracture at her thoracolumbar junction. She was admitted to the hospital at that time by Dr. Popnoe and treated conservatively in a back brace with progressive mobilization. She has done fairly well for the most part. It doesn't appear to interfere with her job. She had some difficulties in 1991 at which time she saw Dr. Weill who ordered an MRI of her back. This showed changes consistent with her old trauma as well as some mild disc herniation at the L5-S1 level, but no evidence of nerve root impingement. For about the last 3-4 months, she has been having some increasing pain in her back and down into her right buttock and down into the posterior aspect of her right thigh. She also describes the feeling of some tingling down into her legs. She describes it as a catching pain that is just constantly aggravating to her. With coughing and sneezing, she feels pressure in her back, but not frank pain. She does describe problems with urgency upon urination and defecation. She feels that this

> may have been increasing in the last few months. She rates her pain as an 8 on a scale of 1 to 10 when it goes down her legs and about a 5 when she is not real irritable. She has been utilizing a heating pad, some occasional Motrin and once in awhile Darvocet.

(*Id*.)

¶12 Examination on January 17, 1997, indicated some diminished reflex and much sensitivity to palpation. Lumbar spine x-rays were consistent with her 1985 trauma and showed some mild degenerative changes at the lumbosacral junction. (*Id*.) The doctor's assessment was "low back pain which is probably a combination of post-traumatic changes and degenerative changes." (*Id*.) However, due to concern about the radicular nature of her pain, the doctor requested an MRI of the lumbar spine, which was done January 21, 1997. (*Id.* at 5.) Slight disc protrusion was noted, involving "slight extrinsic pressure against the S1 nerve root sleeves." (*Id.* at 6.) The 1985 compression and associated vertebral changes were also noted, but not thought to be causing significant pressure on the spinal cord. (*Id*.)

¶13 The next recorded examination and treatment was on October 7, 1998, by Dr. Steven Chrzanowski, a board certified internist who thereafter became claimant's primary treating physician. (Chrzanowski Dep. at 6, 8.) Claimant described her 1985 injury and stated "her discomfort had worsened or exacerbated over the two months prior to that visit." (*Id*. at 7.) She "indicated at that time that she had pain periodically of the lower back. That normally she took over the counter analgesic medications but occasionally it did worsen." (*Id*. at 8.) Dr. Chrzanowski testified claimant's pain was at that time "localized to the lower back or the lumbar area." (*Id*. at 7.) He thought her pain at that point was muscular in origin. (*Id*.)

¶14 The next recorded medical treatment was on January 9, 1999, over a year later, when claimant sought treatment at the Great Falls Immediate Care Facility for "low back pain" and was seen by Dr. Terrance J. Sweeney. (Ex. 9 at 2.) Dr. Sweeney found some tenderness in the lumbar spine, but his exam was otherwise unremarkable. He diagnosed "low back pain, mechanical likely" and prescribed medication, fluids, and stretching exercises. (*Id*.) X-rays were taken that same day, with the radiologist noting: "There is marked compression of the T12 vertebra with increased sclerosis at the site of the old fracture. The amount of compression has progressed when compared to the baseline examination from 1985." (*Id*. at 3.)

¶15 On October 28, 1999, claimant visited Dr. Chrzanowski for several problems, including low-back pain. (Chrzanowski Dep. at 15.) The doctor ordered both x-rays and an MRI. (Chrzanowski Dep. at 16-17; Ex. 7 at 1.) Both studies were done November 11, 1999. (*Id*.) The radiologist read the x-rays as showing an "old anterior wedge compression of L1 with associated mild degenerative changes around T12-L1 and L1-2," as well as "minimal loss of disc height at L5-6." (Ex. 7 at 1.) His impression of the MRI study was:

1. Stable appearance of the lumbar spine with old L1 compression deformity and small posterior spur protruding into the spinal canal but not causing a significant degree of spinal stenosis or cord compression.

2. Minimal disc desiccation and broad-based bulge at L5-6 without compromise of the spinal canal.

3. Normal morphology to the conus, which terminates at the L1 level.

(*Id.* at 2-3.) Dr. Chrzanowski recommended and prescribed an epidural steroid injection, which was administered on November 30, 1999. (Chrzanowski Dep. at 17; Ex. 7 at 4.) Claimant testified the epidural helped for a short while only.

¶16 In late November and December 1999, claimant called Dr. Chrzanowski complaining about lower back discomfort relating to the epidural injection. (Chrzanowski Dep. at 18.)

March 22, 2000, Injury

¶17 Claimant began working for Missouri River Manor in January 2000. On March 22, 2000, when she tried to sit on a rolling chair, the chair slid away. She fell on her buttocks and left wrist. (Uncontested Fact 1; Ex. 2.)

¶18 Claimant experienced immediate severe pain and went to the emergency room at Benefis Healthcare, where she complained "of pain from her coccyx to the base of her neck." (Ex. 7 at 6.) X-rays taken at that time showed "no acute findings and old L1-T12 fractures, which appear to be quite substantial." (Ex. 7 at 6,10.) The emergency room assessment was acute back spasm and sacral contusion. (*Id.* at 7.) Claimant was treated with medication, instructed not to lift or carry more than five pounds for the next week, and told to consult her regular physician. (*Id.* at 6.)

¶19 At the time of her March 22, 2000 injury, Missouri River Manor was insured by Connecticut Indemnity Company (Connecticut Indemnity). Claimant completed a First Report of Injury on March 24, 2000, indicating that she suffered strain involving her left wrist, neck, buttocks, and back. (Ex. 2 at 1). Connecticut Indemnity accepted liability for her injury. (Pretrial Order, Uncontested Fact 2.) It began paying medical benefits, but not temporary total disability benefits even though claimant was restricted and off work.

Post-March 22nd Medical

¶20 On March 27, 2000, claimant saw Dr. David R. Engbrecht on account of continuing pain, which was most severe in the upper back. (Ex. 4 at 7.) Dr. Engbrecht assessed "contusion low back with possible mild thoracic strain" and he prescribed physical therapy, medication, local heat, and "light duty for two weeks." (*Id.*)

¶21 The following day, March 28th, claimant saw her regular doctor, Dr. Chrzanowski. Her primary complaints at that time were upper back and wrist pain. The doctor encouraged

claimant to keep her physical therapy appointment and to use prescribed medications. (*Id*. at 8.) He also ordered x-rays to check the left wrist, right ribs, and thoracic spine but those x-rays were negative for fracture (*Id*.) Dr. Chrzanowski associated claimant's upper back and wrist pain with her March 22nd accident because she "did not have these pains prior to that fall." (Chrzanowski Dep. at 21.)

¶22 Claimant underwent physical therapy from March 29 to April 14, 2000. On March 29th she reported "entire back pain," ranging from a 3 up to 9½ on a ten point scale. (Ex. 8 at 1.) Treatment involved "the neck through low back" (ex. 7 at 3-4), and included hot packs, electrical stimulation, and exercise. (*Id*. at 2-4.)

¶23 On April 18, 2000, claimant returned to Dr. Chrzanowski, for unrelated conditions, but he recorded: "Back pain is manageable, going to physical therapy. Does need a refill of the Valium for anxiety. She is starting to work at Spectrum and still working p.r.n. at Missouri River Manor." (Ex. 4 at 9.) On April 25, 2000, at claimant's request, Dr. Chrzanowski wrote a note that "Linda may return to regular work duties." (*Id*. at 10; Chrzanowski Dep. at 23.)

¶24 Claimant was off work for approximately one month. She testified that she requested the release and returned to work because she needed the money. When she returned to work, claimant's initial duties involved conducting interviews and other light-duty work. She testified she was still sore but was able to perform her work.

¶25 On May 17, 2000, claimant saw Dr. Chrzanowski for multiple medical problems, some unrelated to her injury. She told him at that time that she was "still having lower back pain, taking occasional Darvocet. Ultram has not helped. Hydrocodone makes her itchy. She would like a few Tylenol #3." (Ex. 4 at 13.) He prescribed further pain medication and an antacid. (Chrzanowski Dep. at 24.)

¶26 On June 1, 2000, claimant was involved in a minor car accident. Her car was hit by another from behind. She suffered whiplash type symptoms thereafter. An emergency room report noted that she had "some neck and right-sided shoulder pain. (Ex. 7 at 12.) On examination, Dr. Timothy J. Kosmatka noted "marked tenderness to palpation in the paraspinal regions." X-rays of the cervical spine disclosed minimal degenerative disk disease with no acute findings. (*Id*. at 18.)

¶27 Following the accident claimant had acute upper back pain and sought trigger point injections from Dr. Chrzanowski. On June 13, 2000, the doctor provided "three injections, two on the right upper back and one on the left upper back." (Chrzanowski Dep. at 26.)

¶28 The injections helped "tremendously" and on June 20, 2000, claimant returned to Dr. Chrzanowski to request trigger point injections of her lower back. (*Id*.) Dr. Chrzanowski related her continuing lower back pain to her March 22nd industrial injury, writing:

> Basically, this is related to the March 23rd [sic] workman's comp incident and her continued lower back pain. Physical therapy didn't seem to help extensively. We did injections at the upper back last week in regard to the motor vehicle accident. These helped tremendously and she would like to proceed to injection of the lower back, again related to the March 23rd [sic] injury. In general, she is continuing on the same medication program.

(Ex. 4 at 15.)

¶29 On June 23, 2000, claimant's employment with Missouri River Manor was terminated. (Uncontested Fact 4.)

¶30 During the remaining months of 2000, claimant continued to receive medical care for back pain, especially in her low back.

¶31 She continued physical therapy for her lower back, upper back, and neck. (*Id*.)

¶32 On July 5, 2000, Dr. Chrzanowski administered two additional trigger point injections, one in the upper back, one in the lower back, and also ordered an MRI (Ex. 4 at 15), which disclosed "no significant change in the appearance of the lumbar spine" when compared with the preinjury MRI, taken November 11, 1999. (Chrzanowski Dep. at 29-30; Ex. 4 at 17). Claimant also reported she was depressed but the doctor did not relate claimant's depression to either the nursing home or automobile accident. (Chrzanowski Dep. at 29.)

¶33 On July 24, 2000, claimant returned to Dr. Chrzanowski on account of her depression but also mentioned continuing back pain. (Ex. 4 at 17; Chrzanowski Dep. at 31-32.)

¶34 Dr. Chrzanowski administered trigger point injections in the low back on September 22, October 9, and November 22, 2000. (Ex. 4 at 19.) Dr. Chrzanowski related these treatments to the March injury. (*Id*.)

¶35 An epidural steroid injection was given to claimant at Benefis Healthcare on December 19, 2000, for "recurrent symptoms mainly limited to the low back at this time." (Ex. 7 at 21.)

¶36 In January 2001, claimant was involved in another auto accident and thereafter complained of abdominal and rib pain, apparently related to seat belt trauma. (Ex. 4 at 20-21; Chrzanowski Dep. at 36-37.)

¶37 On account of her continuing back pain, and upon the referral of Dr. Chrzanowski, Dr. Michael A. Dube, an orthopedic surgeon, examined claimant on February 27, 2001. He noted claimant "has had back pain for 15 years dating back when she had a fracture at L1," which has "gotten worse after some lifting at work." (Ex. 4 at 25.) Following examination, Dr. Dube's impression was "mechanical low back pain." (*Id*.) He explained:

> Her disc and MRI appear to be somewhat normal for her age. **Her pain from her L1 fracture does not appear to be the predominant problem. Her pain is mostly**

> **down at the low lumbar region and she really would require significant physical therapy program for stretching, strengthening and conditioning**. I do not feel that she is a surgical candidate.

(*Id.,* emphasis added.)

¶38 Claimant thereafter began physical therapy anew commencing February 28, 2001, and continuing to April 26, 2001. At the time of her initial PT evaluation "she [was] complaining of severe pain from the mid to lower thoracic region down into the lumbar spine and into the left hip and posterior left thigh" and "decreased mobility because of the chronic myofascial and low back pain." (Ex. 8 at 7.)

¶39 Despite physical therapy, though at times showing some improvement (e.g., on April 3, 2001, ex. 8 at 13), claimant continued to experience back pain and associated problems. (Ex. 4 at 27-29; Ex. 8 at 8-15.) She tried a TENS unit in March 2001. (Ex. 8 at 8-10.) On March 15, 2001, Dr. Chrzanowski administered four trigger point injections to her lower back. (Ex. 4 at 28.) She also suffered from other medical conditions (Chrzanowski Dep. at 42; Ex. 4 at 30-33), complicating treatment for her back problem.

¶40 On May 1, 2001, the insurer began paying claimant TTD benefits, including some retroactive benefits. Claimant testified that the adjuster, Sandy Scholl, told her she should have received TTD benefits "from the beginning."

¶41 On that same day - May 1, 2001 - claimant was examined by Dr. Dale M. Schaefer, a neurosurgeon, on referral from Dr. Chrzanowski. (Ex. 6.) He noted claimant's symptoms as including "low back pain, pain that occasionally radiates to the left buttock and posterior thigh, and pain that radiates up the back and into the neck." (Ex. 6 at 1). Claimant told Dr. Schaefer that after her 1985 injury she had experienced back discomfort "that tends to fluctuate a little bit, but she has been able to control this by limiting her activities." (*Id.*) However, she described her back pain after the March 22, 2000 accident as persistent. She noted that physical therapy helped her somewhat, but she did "not feel as though she has been given the opportunity to completely heal." (*Id*.)

¶42 Other than adducing tenderness across the back, Dr. Schaefer's examination of claimant was essentially unremarkable. (*Id*.) His review of the recent lumbar spine MRI showed "no change in her mild compression fracture and mild kyphotic deformity at L1" but disclosed that claimant "does have some degenerative changes in her discs at L4-5 and L5-S1." (*Id.* at 2.) He recommended further "evaluation by a physiatrist in an effort to manage" what he characterized as "this **chronic pain syndrome**." (*Id.,* emphasis added.)

¶43 Dr. Chrzanowski wrote the insurer on May 3, 2001, referencing the neurologic consultation with Dr. Schaefer. (Ex. 4 at 32.) Dr. Chrzanowski recommended "intensive physical therapy for three to four weeks without breaking for work, therefore, she has been requested to be off work for one month starting last week." (*Id*.)

¶44 The insurer's response to Dr. Chrzanowski's request was to schedule claimant for an independent medical examination (IME) with Dr. Ronald Peterson. Dr. Peterson specializes in occupational/sports medicine but is not board certified in that specialty. He is certified as a fellow in the American Academy of Disability Evaluating Physicians. (Peterson Dep. at 3.)

IME and Testimony of Dr. Ronald Peterson

¶45 Dr. Peterson saw claimant on June 18, 2001. In conjunction with that visit, the insurer provided him with a list of ten questions, the most important of which were whether claimant had reached MMI with respect to her March 22, 2000 injury and whether further medical care with respect to that injury was warranted. (Ex. 5 at 2-3.)

¶46 During the history taken by Dr. Peterson, claimant said she was in constant lower back pain, which becomes worse with prolonged sitting, walking, or standing. (*Id.* at 5.) She described the pain as sometimes radiating into her left thigh and left groin. (*Id.* at 6.) She also noted pain in her mid back and neck since the March 22nd incident. (*Id.* at 5.) Claimant acknowledged the June 1, 2000 car accident, noting increased neck and mid/lower back stiffness for approximately one week following the accident. (*Id.*) She stated that at the time of that accident, she had stopped physical therapy because she was having difficulty scheduling it and "was having 'fewer symptoms and I thought I could control most everything on my own.'" (*Id.*)

¶47 Upon physical examination of claimant, Dr. Peterson noted tenderness to palpation and percussion in bilateral lumbar paravertebral muscles, more on the left, and minimal tenderness at the back of the left side of the head. (*Id.* at 7; Peterson Dep. at 8-9.) He found no evidence of muscle spasm. (Peterson Dep. at 9.) Dr. Peterson found some decreased range of motion in claimant's left hip. He believed the most probable cause "was increased muscle tension of her lower back and the muscles around her left hip." (*Id.* at 11.) His examination was otherwise basically within normal. (*Id.* at 11.)

¶48 Based on claimant's history, review of available medical records, and his examination, Dr. Peterson diagnosed: myofascial lower back pain, left more than right; left lumbar radiculitis, activity-related; secondary mid back and shoulder pain due to increased muscle tension; muscle contraction headaches, activity-related; and sleep disturbance, activity-related. (Ex. 5 at 9.) He concluded claimant "had increased lower back pain with activities, and decreased lower back endurance." (*Id.*)

¶49 Dr. Peterson opined that the March 22, 2000 injury "caused temporary aggravation of her pre-existing myofascial lower back pain, secondary to the [pre-existing] compression fractures." (*Id.*) At deposition, he explained myofascial pain as follows:

> With myofascial pain . . . there has been an injury to the muscle or where the muscle attaches to the tendon or where the tendon attaches to the bone. And because of

> that injury, either the muscle has healed with less endurance or less strength or both. And when they try to again use that muscle or that muscle group, they may have recurrent pain. They may have deceased endurance. They may have decreased range of motion. But in our practice, the time interval for myofascial pain is much longer than a sprain-strain injury.

(Peterson Dep. at 13). He believed that claimant's mid-back, neck, and shoulder pain following her March 22, 2000 injury was secondary to her low back condition. (*Id*. at 50.)

¶50 Dr. Peterson believed claimant suffered from a myofascial pain condition prior to the March 22, 2000 injury and Dr. Chrzanowski appears to agree that claimant suffered some myofascial pain prior to the March 22, 2000 accident. (Ex. 4 at 43.)

¶51 At deposition, Dr. Peterson was asked to explain his conclusion that claimant suffered a temporary aggravation of a myofascial condition. Initially, he referenced the fact that claimant had self-imposed a twenty-pound lifting restriction prior to the March 22nd incident and avoided repetitive bending. (Peterson Dep. at 14.) He believed that after the March 22nd incident, claimant was trying to work beyond her self-imposed limitations, which led to additional difficulties with back pain. (*Id*. at 14-16.) However, his belief is not corroborated by his written history, by claimant's testimony, or by any other evidence in the record.

¶52 Dr. Peterson further opined that claimant reached MMI on April 25, 2000, when Dr. Chrzanowski released her to return to regular work duties. His own testimony, however, undermines that opinion. Dr. Peterson acknowledged that he found no actual MMI date in the records. (Peterson Dep. at 49.) He conceded after April 25, 2000, the aggravation "still had contributing factors in terms of her decreased endurance and decreased strength." (*Id*. at 17.) He conceded that the "aggravation" was still affecting claimant after April 25, as evidenced by the continued trigger point injections and physical therapy. (*Id*. at 49-50.) He also agreed that after her 1985 injury and prior to her March 22, 2000 injury the claimant had one significant flareup of her back, whereas after the 2000 injury, she had suffered "repeated or almost constant flares of that low back condition." (*Id*. at 51.)

¶53 While disagreeing that further physical therapy is necessary, Dr. Peterson believed claimant could benefit from a home exercise program, which he recommended to her. (*Id*. at 18.) However, he noted that claimant has been instructed in a home program. (Ex. 5 at 9.)

Termination of Benefits

¶54 Based on Dr. Peterson's examination, on June 12, 2001, the insurer gave two weeks notice that claimant's TTD benefits, as well as medical benefits, were being terminated. (Ex. 12 at 1.) TTD benefits terminated on July 25, 2001. (*Id*.) Her petition to this Court followed shortly thereafter (September 14, 2001).

Dr. Chrzanowski's Response and Testimony

¶55 Dr. Chrzanowski reviewed Dr. Peterson's report and disagreed with Dr. Peterson's conclusions. In an August 20, 2001 letter to claimant's counsel, he wrote:

> Mrs. Lindeman has been my patient now for several years. She sustained an injury to her back on March 22, 2000. Since that time, she has suffered considerably with back pain. I believe although she might have had pre-existing back discomfort, that her back pain worsened considerably since the injury of March 22, 2000. I certainly agree that she has a diagnosis of myofascial back pain and that multiple modalities have been recommended and suggested for alleviation and treatment of her symptoms. I personally sent her to a neurosurgeon, Dr. Schaefer, who recommended a physiatrist to evaluate and treat her in a comprehensive physical therapy program. This would also be a comprehensive rehab program. She had an appointment with Dr. Galvas scheduled, but as I understand Workmen's Comp will not cover this. I agree that she has a diagnosis of myofascial back pain, and this was significantly worsened since the injury in 2000, and she has not healed from this. This is significantly limiting her work capacity. Now, I stand with my recommendations that she see a physical medicine specialist, and she have a comprehensive rehab and physical therapy program in efforts to hopefully be able to return her back to work.

(Ex. 4 at 43.)

¶56 At deposition, Dr. Chrzanowski repeated that he disagreed with Dr. Peterson's conclusion that claimant suffered a temporary aggravation that has resolved, again noting that claimant has suffered recurrent lower back pain since March 2000. (Chrzanowski Dep. at 50.) However, his own opinions and explanations are confusing and at times uncertain or difficult to understand. He testified that when he released claimant to full duties on April 25, 2000, he believed she was at maximum medical healing. (*Id*. at 52.) When asked what he believed caused her subsequent, recurrent back symptoms, he testified: "I don't think I could say for sure what exactly caused the flare." (*Id*.) When asked if he still felt claimant was at MMI, he testified: "It's difficult to say. You know, a person can certainly be at maximum healing but still have, you know, symptoms from the injury and the discomfort too." (*Id*. at 57-58.)

¶57 But when asked if he thought it was appropriate for claimant to still be off work, he testified: "Well, due to her current back pain as of the last time I saw her in July, I think that she does need the comprehensive physical therapy strengthening program that Dr. Schaefer recommended." (*Id*. at 58.) He recommended evaluation by a physiatrist (a physician specializing in physical medicine) such as Dr. Patrick Galvas. (*Id*. at 51, 53.) Finally, when pressed as to whether he stood by his August 20, 2001 letter concerning causation and the need for treatment, he gave the following testimony:

> Q (By Mr. Martin) Given the fact that you've had now a chance to spend an hour and a half with us lawyers and her file, do you still concur with your opinion in your letter of August 20th to me? Is there anything that changes in that letter?
>
> A I don't think there is anything that changes. I still think she needs to be in a comprehensive program with a physiatrist such as Dr. Galvas.
>
> Q And with respect - specifically with respect to the issue of what is the cause of her current condition, the two options being the 1985 incident or the March 22, 2000 incident, do you still concur or still stay by your opinion in your August 20th letter that it's the March 22, 2000 incident that is causing her to be disabled at this time? A Well, I would say that she - you know, she certainly has had more complaints of the back pain since that injury of March 22nd than she did prior to it.
>
> Q So based on that fact, is that what leads you to feel that the March 22nd incident is the more culpable, if that's the right word, for her present problems?
>
> A I think based on the amount of discomfort she's had since then, it would certainly be more possible.

(*Id*. at 59-60.)

Opinion by Dr. Michael Luckett

¶58 Claimant continued to experience back pain following Dr. Peterson's IME and Dr. Chrzanowski referred her to Dr. Michael Luckett, an orthopedic surgeon. Dr. Luckett examined claimant on August 30, 2001. He noted her chief complaint as "back and lower extremity pain intermittent since a 1985 fracture, constant since a work related fall 3/22/00." (Ex. 11 at 8.) After reviewing claimant's history and conducting his own examination, Dr. Luckett recorded his recommendations:

> I have had an extensive discussion regarding the potential for surgical treatment including a low likelihood of complete pain relief. I have told her that she would have a 10-20% chance of complete pain relief and only about an 85% chance of partial pain relief if she has appropriate work-up with discograms. I think, if she chooses to consider surgery, ultimately she will require discography from T9 to the sacrum. I have told her my goals would not be to get her back to unrestricted nursing but medium duty with occasional bend, lift, twist up to 50 pounds. I think similar goals would be reasonable with conservative management. She would like to continue with a trial of physical therapy 3 times a week for 6 weeks with a trial of McKenzie exercises, trunk strengthening, aerobic conditioning, and home exercise program. **I feel her current condition is a work related exacerbation of pre-existing condition. This is directly related to her injury 3/22.**

(*Id.* at 9, emphasis added.) In relating claimant's current complaints to the March 22, 2001 injury, Dr. Luckett pointed out "that previously [to the March 22nd injury] her symptoms had always been intermittent, and they have been constant since the injury." (*Id*.) Dr. Luckett also suggested that claimant discuss her depression with Dr. Chrzanowski because he was "not certain that her depression is being adequately addressed." (*Id*.)

¶59 Claimant testified she did not understand Dr. Luckett to have actually recommended surgery, but simply to have discussed with her the chances she would have of improving with surgery. She also expressed hesitancy to undergo surgery.

Examination by Dr. Patrick E. Galvas

¶60 That same day, and pursuant to Dr. Chrzanowski's prior recommendation, claimant was examined by Dr. Patrick E. Galvas, who is board certified in Physical Medicine and Rehabilitation. (Ex. 10 at 1.) After taking a history and examining claimant, Dr. Galvas diagnosed "bilateral sacroiliitis," "possible cervicothoracic strain," and "depression." (*Id*. at 2.) He gave claimant medication samples, recommended further testing, and asked claimant to return in two weeks. (*Id.* at 3.)

¶61 Claimant returned to Dr. Galvas on September 13, 2001. She thought new medications were helping her and was given refills. (*Id.* at 4.) At the time of this appointment, Dr. Galvas was still waiting for copies of claimant's records of other treatment and recommendations to "help [him] evaluate her current condition." (*Id*.) He asked claimant to return in four weeks. (*Id*.) He told her not to worry if his bills were not paid by workers' compensation. (*Id*.) At the time of trial, claimant had not yet returned to see him.

Resolution

¶62 I am persuaded claimant has not yet reached maximum medical healing from her March 22, 2000 accident at work, and that further medical evaluation and treatment is warranted.

¶63 In reaching my determination, I find it significant that the claimant's condition materially changed following the March 22, 2000 accident, that she continues to suffer significant and debilitating back pain, and that all treatment options for that pain have not been exhausted. Prior to her March 22nd accident, claimant had been doing well for over 15 years, requiring only very sporadic treatment for back pain. Her pre-March 22nd history is summarized in the following chart:

1985	Back injury resulting from fall from scaffolding.
1991	Claimant seen by Dr. Weill regarding back pain. MRI taken.

January 17, 1997	Claimant seen at Great Falls Orthopaedics for "low back and bilateral lower extremity pain."
October 7, 1998	Claimant seen by Dr. Chrzanowski for low back pain.
January 9, 1999	Claimant seen at Great Falls Immediate Care Facility for low back pain.

After March 22nd, her pain was constant and she was almost continually under a physician's care and treatment for her back pain.

¶64 While the medical opinions supporting a conclusion that claimant has not reached MMI are not as clean and clear as they might be, nonetheless they are more persuasive than Dr. Peterson's opinions. In February 2001, Dr. Dube found "mechanical low back pain" and opined that "she [claimant] really would require significant physical therapy program for stretching, strengthening and conditioning." (Ex. 4 at 25.) During May 2001, Dr. Schaefer noted little remarkable in his examination of claimant and recommended treatment "by a physiatrist in an effort to help her manage this chronic pain syndrome." (Ex. 6 at 2.) Dr. Chrzanowski, claimant's treating physician for several years, agrees that further treatment is necessary and remains firm in his conviction that claimant's pain following the March 22nd injury is different. In an August 20, 2001 letter, he agreed with Dr. Peterson's diagnosis of ""myofascial back pain" and further opined that the condition had "significantly worsened since the injury in 2000, and she has not healed from this," an opinion that he stood by in his deposition, although his affirmance of the opinion was not as unequivocal as it might have been. He also recommended further evaluation and treatment by a physiatrist. Dr. Luckett, an orthopedic surgeon, opined that claimant's current condition is a work-related exacerbation of a preexisting condition. Finally, while Dr. Galvas has not yet undertaken a comprehensive analysis of claimant's situation, his records indicate his preliminary opinion that a work-up of claimant is appropriate and that she may benefit from further treatment.

¶65 While testifying that claimant has reached MMI, Dr. Peterson's responses to questions put to him on cross examination undermine his opinion that claimant's March 22nd injury was a temporary aggravation which resolved a month later. As noted in paragraph 52:

> He [Dr. Peterson] conceded after April 25, 2000, the aggravation "still had contributing factors in terms of her decreased endurance and decreased strength." (Peterson Dep. at 17.) He conceded that the "aggravation" was still affecting claimant after April 25, as evidenced by the continued trigger point injections and physical therapy. (*Id*. at 49-50.) He also agreed that after her 1985 injury and prior to her March 22, 2000 injury the claimant had one significant flareup of her back,

whereas after the 2000 injury she had suffered "repeated or almost constant flares of that low back condition." (*Id*. at 51.)

¶66 Treatment by a physiatrist, Dr. Galvas in particular, is a reasonable recommendation to sort out claimant's situation and treat her. When that assessment is complete and any recommended treatment carried out, claimant may at that point have reached MMI. I find reasonable primary medical services to which claimant is presently entitled include reasonable treatment by Dr. Galvas and a comprehensive rehabilitation program, with time off from work to undertake such program, as recommended by the physicians noted above. This is not a finding that open-ended treatment will be reasonable, but only a finding that based on the present record claimant is entitled to the recommended specific course of treatment. Future considerations of disability, permanent impairment, and causation of such, are not to be implied from this decision, but will turn upon any record later presented, including the record of claimant's new course of treatment and medical opinions emerging after that course of treatment.

¶67 Finally, I find the insurer's July 12, 2001 termination of benefits was reasonable. While I have not adopted Dr. Peterson's ultimate opinion regarding MMI, the insurer was entitled to credit it. His examination of claimant, his review of her history and medical records, and his analysis were extensive and well prepared. Moreover, other aspects of the medical record support the insurer's questioning whether claimant's present condition was related to the March 22nd accident. Her symptoms changed in location and seemed to wax and wane.

CONCLUSIONS OF LAW

¶68 The 1999 version of the Workers' Compensation Act applies because claimant's accident occurred during March 2000. *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶69 Under section 39-71-116(18), MCA (1999), "'Medical stability,' 'maximum healing,' or 'maximum medical healing' means a point in the healing process when further material improvement would not be reasonably expected from primary medical treatment." For the reasons explained above, I agree that further material improvement can reasonably be expected in claimant's treatment. Thus, she has not yet reached MMI and is entitled to compensation for reasonable medical services received since termination of medical benefits and to additional reasonable medical services consistent with this opinion.

¶70 Under section 39-71-701(1)(a), MCA (1999), claimant is entitled to TTD benefits as follows:

> (a) when the worker suffers a total loss of wages as a result of an injury and until the worker reaches maximum healing; or

(b) until the worker has been released to return to the employment in which the worker was engaged at the time of the injury or to employment with similar physical requirements.

¶71 On May 1, 2001, the insurer paid claimant back TTD benefits and commenced such benefits through July 25, 2001. At that point, Dr. Dube's recommendation for a significant therapy program and Dr. Schaefer's recommendation for treatment by a physiatrist had been made. On August 20, 2001, Dr. Chrzanowski wrote that claimant's symptoms were severely limiting work capacity and "comprehensive rehab and physical therapy program in efforts to hopefully be able to return her back to work. " The evidence failed to persuade me that claimant is currently capable of returning to her time-of-injury job or any similar job. Therefore, since she is not at MMI, she is entitled to reinstatement of TTD benefits retroactive to July 25, 2001.

JUDGMENT

¶72 Claimant is entitled to compensation for reasonable medical services received since termination of medical benefits, to payment for further evaluation by Dr. Galvas, and to additional reasonable medical services consistent with this opinion.

¶73 The insurer shall reinstate temporary disability benefits retroactive to July 25, 2001.

¶74 Claimant is entitled to her costs, but not to attorneys fees or penalty.

¶75 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.

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

DATED in Helena, Montana, this 17th day of January, 2002.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Richard J. Martin
Mr. Robert E. Sheridan
Submitted: November 7, 2001