IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2004 MTWCC 43

WCC No. 2004-0970

MARJORIE McCAULEY

Petitioner

vs.

LIBERTY NORTHWEST

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: On February 25, 1999, the claimant injured her neck and right shoulder while lifting at work. She subsequently was diagnosed as suffering from a tear within the shoulder joint, for which she had surgery; carpal tunnel syndrome, for which she had surgery; and a cervical disk herniation and foraminal narrowing, for which she had surgery. Her last surgery was in 2001. In 2002 she worked for a month in a school kitchen, and from the fall of 2003 to March 2002 worked Monday and Tuesday nights as a bartender at a small bar in Clyde Park, Montana, a bar that on a good Monday or Tuesday night grossed $100. During her time as a bartender, a lateral epicondylitis flared in her right elbow and forearm, and in April 2002 she sought medical care for the condition. She alleges the condition is attributable to her 1999 industrial accident and is supported in her claim by her treating physicians. An IME doctor disputes the contention, opining that although her condition is job related it is the result of repetitive use and not her 1999 injury and became symptomatic as a result of her bartending.

Held: The claimant's conditions was caused by her industrial accident and the insurer is liable for her condition.

Topics:

> **Causation: Medical Condition.** "Causation is an essential element to benefit entitlement. The claimant has the burden to prove a causal connection by a preponderance of the evidence." *Hash v. Montana Silversmith,* 256 Mont. 252, 257, 846 P.2d 981, 983 (1993).
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> **Proof: Conflicting Evidence: Medical.** It has been a long standing rule that, while not conclusive, the treating physician's opinions are entitled to "greater evidentiary

weight" than the testimony of non-treating physicians. *Kloepfer v. Lumbermen's Mutual Casualty Co*., 276 Mont. 495, 498, 916 P.2d 1310, 1312 (1996). At minimum, the rule requires this Court to defer to the treating physician where the evidence is evenly balanced. *Key v. Liberty Northwest Ins. Co.*, 2001 MTWCC 53, ¶ 30.

Proof: Conflicting Evidence: Medical. Facts concerning the claimant's history of symptoms are considered in evaluating medical opinions which are driven by that history.

¶1 The trial in this matter was held in Bozeman, Montana, on April 9, 2004. Petitioner was present and represented by Mr. James G. Edmiston. Respondent was represented by Mr. Larry W. Jones.

¶2 Exhibits: There are two trial exhibits - Exhibits 4 and 5 - attached to the Pretrial Order. Additional exhibits are attached to the depositions. There are no objections to any of the exhibits and they are all admitted.

¶3 Witnesses and Depositions: Petitioner was the only witness at trial. In addition, the parties submitted the depositions of petitioner, Penny McNeill (2), Diana Berlin, Dr. Michelle Cameron-Donaldson, and Dr. Bill S. Rosen for the Court's consideration.

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

> ¶4a Whether Petitioner's right forearm/elbow condition of lateral epicondylitis is a compensable consequence of the original injury, so that Liberty is responsible for paying medical and indemnity benefits.
>
> ¶4b Whether Petitioner is entitled to an award of attorney fees and costs pursuant to §§39-71-611/612, MCA (1997) (bifurcated for later trial).
>
> ¶4c Whether Petitioner is entitled to an award of the twenty percent penalty under §39-71-2907, MCA (1997) (bifurcated for later trial).

The parties agreed at trial to proceed with the first issue and severed the latter two issues for later trial if needed. I am therefore bifurcating the second and third issues and certifying the judgment as to the first issue. Further delay in entering judgment may delay treatment of the condition and lead to further harm.

¶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 On February 25, 1999, while working as a housekeeper for Boyne USA (Boyne) at its Big Sky Resort, the claimant injured her shoulder, arm, and neck while lifting a bag of linen. (Ex. 5.)

¶7 At the time of her injury, Boyne was insured by Liberty Northwest (Liberty). (Uncontested Fact 2.) Liberty accepted liability for the claimant's accident. It has paid medical benefits with respect to a cervical fusion, carpal tunnel surgery, and right shoulder surgery. It has also paid indemnity benefits. *See Brodie v. Liberty Northwest Ins. Corp.*, 2001 MTWCC 30.[(1)]

¶8 The claimant is currently suffering from lateral epicondylitis of the right forearm and elbow. The condition is characterized by right forearm pain. (*See* Rosen Dep. Ex. 2.) The claimant testified that the degree of pain is related to her activities. Lifting with her arm stretched out especially exacerbates her pain.

¶9 The question presented in the present case is whether her condition was caused by her 1999 industrial accident. The testimony on the question is conflicting.

¶10 Some further history of the claimant's other injuries provides background to the present controversy.

¶11 Initially, the claimant's predominant problem appears to have been with her right shoulder. She was initially treated by Dr. John D. Campbell, an orthopedic surgeon from Bozeman, Montana. Dr. Campbell performed arthroscopic surgery on the claimant's right shoulder for a SLAP lesion repair on June 15, 1999.[(2)] (*Id*. Ex. 1.)

¶12 Following the shoulder repair, the claimant had tingling and numbness in her hands and underwent carpal tunnel releases. (*Id*.) The Court does not have the claimant's full medical records so the precise date of the surgery is unknown.

¶13 Following the carpal tunnel surgery, the claimant's numbness and tingling apparently continued and she was eventually diagnosed as suffering from a cervical radiculopathy. On August 20, 2001, Dr. Robert C. Wood of the Billings Clinic performed an "anterior cervical fusion with bilateral foraminotomy and anterior cervical diskectomy." (*Id*.)

¶14 According to the claimant, at the time of her original injury her pain encompassed her shoulder and went all the way down her arm, however, the pain down her arm was principally on the underside of the arm.

¶15 While a diagnosis of epicondylitis was not entertained or made until 2003, Dr. Wood's clinic note of August 6, 2001, specifically notes that the claimant was complaining of "aching into the right forearm" which was "increased with activity." (Ex. 4 at 4.) At that time, however, the claimant was also suffering from "cervical spondylosis with possible nerve root or spinal cord compression." (*Id*.) It is unclear whether her right forearm aching was from the cervical condition or from the epicondylitis, or from a combination of both. The claimant did testify that the discomfort she was experiencing at the time was similar to her

present pain only milder. She also reported that she has had "right elbow pain off and on since the original injury." (Cameron-Donaldson Dep. Ex. 2.)

¶16 The claimant was off work until August 2002 due to her shoulder, carpal tunnel, and cervical conditions. It was after her return to work in August 2002 that her right forearm pain flared and became truly troublesome.

¶17 In late August or early September 2002 claimant went to work as a kitchen worker for the central kitchen of the Bozeman School District. She worked approximately seven hours a day for four to five days a week. She worked there for approximately a month, and quit because of the long drive to and from work.

¶18 The claimant testified that while employed in the kitchen she had trouble lifting pans and trays with her arms extended. Her right forearm and elbow bothered her.

¶19 The claimant's next employment began in September or October 2002 when she went to work at the Lucky Penny Bar in Clyde Park. She worked Monday and Tuesday evenings as a bartender, mixing and serving drinks, providing poker machine change, and microwaving an occasional pizza.

¶20 Clyde Park is a small town with a population of 310 per the 1990 census.[(3)] The Lucky Penny is one of two bars in town. The claimant served approximately ten customers on an average evening, and most of the drinks were beer. The limited nature of the bar's business, and, more importantly, of the claimant's work, is best illustrated by bar revenues: the bar was lucky to rake in $100 on a Monday or Tuesday evening.

¶21 The claimant's job involved little more than lifting individual glasses and bottles of beer. Her husband changed out the beer keg when needed, cleaned, and took out garbage. She stocked the cooler but that involved putting individual bottles into the cooler.

¶22 The claimant's employment at the Lucky Penny lasted until March 2003. She testified that her right arm bothered her during her employment and that she finally quit because it was bothering her and she disliked the drive to and from work.

¶23 In March 2003, the claimant requested permission to change treating orthopedic doctors. (Ex. 4 at 26.) Her old treating physician, Dr. Campbell, was in Bozeman. By March 2003, a new orthopedic surgeon - Dr. Michelle Cameron-Donaldson - had established a practice in Livingston, Montana, which is much closer to the claimant's home. The claimant requested permission to see Dr. Cameron-Donaldson. (*Id*.) Liberty approved her request.

¶24 Dr. Cameron-Donaldson's medical credentials are set out in her CV. (Cameron-Donald Dep. Ex. 1.) She completed her residency in orthopedic surgery at Johns Hopkins Hospital in Baltimore, Maryland. She then participated in a year long sports medicine fellowship at Stedman Hawkins Clinic in Vail, Colorado, completing the fellowship in 2001. She has

authored numerous papers, some of which have been published and others which have been submitted for review. She received several awards for her research and one for a paper on the upper extremity.

¶25 The claimant was first seen by Dr. Cameron-Donaldson on April 15, 2003. (Cameron-Donaldson Dep. Ex. 2.) Her complaint at that time was right elbow pain. (*Id*.) The doctor's history records the claimant's February 25, 1999 injury and her subsequent surgeries. With respect to the claimant's elbow complaints, Dr. Cameron-Donaldson wrote, "She has been having pain in her right elbow off and on since the original injury, but it has been exacerbated since she has been working 2 days a week." (*Id*.)

¶26 Dr. Cameron-Donaldson diagnosed "[r]ight lateral epicondylitis" (*id*.) and opined that it was "connected to changes in the biomechanics of her upper extremity after her right shoulder injury." (*Id*. at Ex. 3). She prescribed physical therapy, anti-inflammatory medications, and stretching exercises, to be followed by a strengthening regimen. (*Id*. at Ex. 2.)

¶27 Dr. Cameron-Donaldson sent her findings to Montana Workman's [sic] Comp [Liberty]. (Cameron-Donaldson Dep. Ex. 2.) Following receipt of those findings, Liberty requested the claimant to return to Dr. Campbell, her original treating physician for examination.

¶28 Dr. Campbell saw the claimant on June 10, 2003. (Cameron-Donaldson Dep. Ex. 4.) He agreed that the claimant was suffering from lateral epicondylitis and agreed that it "was related to her shoulder injury." (*Id*.) He recommended a tennis elbow brace and physical therapy. He also recommended that the claimant's care be transferred to Dr. Cameron-Donaldson since she was geographically closer to the claimant. (*Id*.)

¶29 Apparently dissatisfied with the opinions of both Drs. Campbell and Cameron-Donaldson, Liberty then required the claimant to submit to an independent medical examination (IME) by Dr. Bill S. Rosen, a physiatrist at the Billings Clinic. (Ex. 4 at 31.) Dr. Rosen had previously seen the claimant a year and a half previously to evaluate her with respect to maximum medical improvement (MMI) and render an impairment rating. (Rosen Dep. Ex. 1.)

¶30 Dr. Rosen examined the claimant on October 16, 2003. In his history, he recorded:

> Today, Ms. Brodie [claimant] tells me that the symptoms of right forearm pain began approximately six months prior to the onset of her evaluation with Dr. Donaldson. She notes that her symptoms worsened in December when she began working part time as a bartender. She reports that because the symptoms worsened to such a degree, she eventually quit the job.

(Rosen Dep. Ex. 2 at 1-2.) Dr. Rosen also noted that in his exam of the claimant a year and a half before, she had not reported forearm pain. (*Id*. at 2.)

¶31 Following his examination, Dr. Rosen concurred with the diagnosis of lateral epicondylitis but disagreed with Drs. Campbell and Cameron-Donaldson as to the cause. He opined that the condition was a "preexisting condition due to years of hard work, which eventually became symptomatic." (*Id*. at 3.) He further noted that it "would appear" that the claimant's recent job bartending "either caused a rather significant temporary aggravation or a permanent worsening." (*Id*.)

¶32 Both Drs. Cameron-Donaldson and Rosen testified by deposition.

¶33 Dr. Cameron-Donaldson adhered to her opinion that the claimant's epicondylitis is due to a change in extremity mechanics due to her shoulder injury. She testified that it is quite common to suffer additional conditions of the arm as a result of a shoulder injury:

> 8 A. Yes. I was of the opinion that it was
> 9 related to her original injury in her shoulder.
> 10 The reason why I was of this opinion was
> 11 because I see this quite commonly. Once you have one
> 12 part of your extremity go bad, you start to have
> 13 problems with other parts either upstream or
> 14 downstream from it as a result of altering your usage
> 15 patterns of the arm and overstressing them in ways
> 16 they weren't really designed to be stressed.
> 17 So to compensate for the problems she had
> 18 with her shoulder previously as well as issues with
> 19 her neck, she developed problems with her arm.

(Cameron-Donaldson Dep. at 11.)

¶34 Dr. Cameron-Donaldson was asked about the contribution of the claimant's work at the Lucky Penny but was unable to comment, noting that it could have caused an exacerbation of symptoms or flare-up. (*Id*. at 19.) She also noted, however, that activities of daily living could cause a natural progression of the claimant's symptoms.

¶35 With respect to Dr. Wood's 2001 office note concerning aching in the claimant's forearm, Dr. Cameron-Donaldson testified that it could have been due to either the claimant's neck condition or from epicondylitis, but she went on to point out that aching due to neck problems is more typically in the shoulders rather than the arm, although the aching can run into the arms. Her testimony in this regard, which is unrefuted, weakly supports a conclusion that claimant's epicondylitis was mildly symptomatic prior to her return to work. The conclusion is strengthened by claimant's testimony that she experienced off-and-on elbow or arm pain after the industrial accident and prior to her returning to work.

¶36 Dr. Cameron-Donaldson testified that Dr. Campbell was in the best position to assess causation because he had treated her for some time following her original injury. (*Id.*)

¶37 As noted earlier, Dr. Rosen also testified. He affirmed his conclusion that the claimant developed epicondylitis over a period of years but became symptomatic while she was bartending. (Rosen Dep. at 14-16.) Later in his deposition he testified that the claimant was "predisposed" to epicondylitis but that the condition actually arose when it became symptomatic while working at the Lucky Penny as a bartender. (*Id*. at 26-27.)

¶38 Dr. Rosen disagreed with Dr. Cameron-Donaldson's mechanical compensation theory of causation. He testified that he spent one-half hour doing a Medline search and could not find articles supporting her theory. He also added some "lunchroom" discussion he had with two orthopedic surgeons as buttressing his opinions, however, I do not know what details they were provided and they did not testify, so I give the lunchroom talk little weight.

Resolution

¶39 This case presents the perennial problem concerning conflicting medical testimony: How does a court, sitting as fact-finder, resolve the conflict, especially where the conflicting opinions are by eminently qualified physicians and none appear illogical or biased?

¶40 Medical literature is of course one measure which can be used in judging the validity of opinions, especially, in cases where the condition is non-traumatic and the case for causation involves review of epidemiological evidence. However, it is of limited use in this case for several reasons. First, Dr. Cameron-Donaldson was not asked about supporting literature and based her opinions on actual experience and knowledge concerning the treatment of shoulder injuries. While some causation questions are best answered by scientific research and epidemiological studies, I did not have evidence in this case indicating the sort of causation at issue here has been studied. Second, Dr. Rosen's search apparently did not turn up evidence refuting Dr. Cameron-Donaldson's theory.

¶41 Dr. Cameron-Donaldson, who picked up the claimant's treatment in 2003, expressly deferred to Dr. Campbell, and I agree with her deference. It has been a long-standing rule that while not conclusive, the treating physician's opinions are entitled to "greater evidentiary weight" than the testimony of non-treating physicians. *Kloepfer v. Lumbermen's Mutual Casualty Co.*, 276 Mont. 495, 498, 916 P.2d 1310, 1312 (1996). At minimum, the rule requires this Court to defer to the treating physician where the evidence is evenly balanced. *Key v. Liberty Northwest Ins. Co.*, 2001 MTWCC 53, ¶ 30. Although the parties did not provide complete medical records showing the extent Dr. Campbell saw the claimant over the time subsequent to her 1999 shoulder surgery, he was the initial treating physician for the claimant's industrial injury, and certainly followed the claimant for at least some period of time following her SLAP surgery. He was therefore in the best position to evaluate the

relationship between her epicondylitis and her industrial injury**.** With the evidence provided by Dr. Cameron-Donaldson in support of Dr. Campbell's opinion, and lacking, I find this is an appropriate case to defer to the treating physician.

¶42 Moreover, I think the facts of the case are more consistent with Dr. Campbell's and Dr. Cameron-Donaldson's causation opinions, although that factual support is somewhat weak. Among those facts is the limited nature of the claimant's employment in 2002 and 2003. She worked for only a month in the school district kitchen. While working for several months as a bartender, a full explication of her bartending work shows that the physical requirements of her work were little different than ordinary household chores or everyday living activities. I find little indication in the depositions or medical records that either Dr. Cameron-Donaldson or Dr. Rosen fully appreciated the limited extent of her physical activities while bartending. In light of the nature of her bartending activities, the increase in her symptoms during her employment are likely coincidental and is more consistent with a natural progression of a preexisting condition than due to work-related trauma. Claimant's complaints to Dr. Wood in 2001 and her recollection of some mild waxing and waning of forearm pain over the years following her industrial accident are fully consistent with that conclusion.

¶44 I therefore find that the claimant's lateral epicondylitis of the right arm is causally related to her February 25, 1999 industrial injury.

CONCLUSIONS OF LAW

¶45 This case is governed by the 1997 version of the Montana Workers' Compensation Act since that was the law in effect at the time of the claimant's industrial accident. *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶46 The claimant bears the burden of proving by a preponderance of the evidence that she is entitled to the benefits she seeks. *Ricks v. Teslow Consolidated,* 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wicken Bros. Construction Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

¶47 An insurer is liable only for those medical conditions caused or materially aggravated by an industrial accident. "Causation is an essential element to benefit entitlement. The claimant has the burden to prove a causal connection by a preponderance of the evidence." *Hash v. Montana Silversmith,* 256 Mont. 252, 257, 846 P.2d 981, 983 (1993); *followed in, e.g., Dolan v. American Protection Ins. Co.*, 2004 MTWCC 9, ¶ 36; *Markovich v. Helmsman Management Services*, 2003 MTWCC 4, ¶ 30. Thus, an insurer is not liable for a new condition caused by a subsequent injury or events. *Anderson v. Zurich American Ins. Co.*, 2003 MTWCC 45, ¶¶ 37-38.

¶48 In this case, the evidence, though far from overwhelming, preponderates in favor of a finding and conclusion that the claimant's epicondylitis was caused by her 1999 industrial injury. Accordingly, Liberty is liable for that condition.

JUDGMENT

¶49 The claimant's lateral epicondylitis was caused by her 1999 industrial injury for which Liberty is responsible. Liberty is therefore liable for and shall pay all reasonable medical expenses related to the condition and shall pay any indemnity benefits which are due on account of disability arising from the condition.

¶50 The penalty and attorney fee issues are bifurcated and are therefore not addressed.

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

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

DATED in Helena, Montana, this 27th day of May, 2004.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. James G. Edmiston
Mr. Larry W. Jones
Submitted: May 17, 2004

1. At the time of the accident, the claimant's last name was Brodie. She has since married and taken her husband's last name.

2. "SLAP lesions (superior labrum, anterior to posterior) are detachments of labrum (the lining of the glenoid socket of the shoulder)." From the WEB site of the University of Washington Department of Orthopedics and Sports Medicine found at http://www.orthop.washington.edu

3. http://www.city-data.com/city/Clyde-Park-Montana.html.