

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1997 MTWCC 5A

WCC No. 9602-7504

NANCY LEE PASHA

Petitioner

vs.

NATIONAL UNION FIRE OF PITTSBURGH

Respondent/Insurer for

AMERICAN RED CROSS

Employer.

ORDER AMENDING FINDINGS OF FACT

Summary: Claimant requested amendment of Findings of Fact, Conclusions of Law and Judgment.

Held: Findings amended to provide further clarification for denial of relief sought by claimant.

Claimant has filed a Request for Amendment in which she asks the Court to modify its Findings of Fact, Conclusions of Law and Judgment to award her attorney fees and a penalty. The finding of fact at issue is Finding 64, which reads:

64. The insurer's denial of payment for an evaluation of claimant at the Mayo Clinic and its denial of liability for claimant's leg symptoms were reasonable. In both instances the insurer obtained medical opinions supporting its position. Moreover, as presented to the insurer, the recommendations that claimant be seen at the Mayo Clinic were in large part in response to claimant's urging that she be sent there. Dr. Cooney's recommendation was also based in large part on his opinion that patients with chronic medical problems will never be satisfied until they are evaluated at a major medical center. Both issues were reasonably debatable.

The conclusion of law at issue is Conclusion 5, which reads:

5. Claimant is not entitled to attorney fees or a penalty. A finding of unreasonable conduct on the part of the insurer is required to award either. §§ 39-71-611 and -

2907, MCA. The insurer's denial of claimant's request to attend the Mayo Clinic was not unreasonable. Its denial of liability for claimant's leg problems was not unreasonable.

Claimant argues that, because the Court gave no weight to Dr. Auger's opinion, which was that the Mayo Clinic could not offer claimant assistance, the insurer's refusal to approve an evaluation of claimant at the Mayo Clinic was unreasonable. Her argument is unpersuasive for two reasons.

First, the insurer requested a Mayo Clinic doctor to review claimant's medical records and provide his opinion concerning a Mayo Clinic referral. The doctor conducted the review and recommended against referral. The fact that I gave his opinion no weight because the doctor did not testify or otherwise provide specific information concerning the basis of his opinion does not vitiate the fact that the insurer obtained and relied on the opinion. Even the Montana Rules of Evidence do not require an expert to provide the factual basis or reasons for his or her opinion as a prerequisite to the admissibility of his or her opinions. Rule 705, Mont.R.Evid.⁽⁴⁾ In light of my rejection of Dr. Auger's opinion, it would certainly have been prudent for the insurer to have asked the doctor to outline the reasons and factual basis for his opinions. But, in view of the doctor's medical expertise, it was not unreasonable for the insurer to rely on his opinion.

Second, claimant's argument overlooks that I also found that Dr. Cooney's Mayo referral, as presented to the insurer, was "based in large part on his belief that patients with chronic medical problems will never be satisfied until they are evaluated at a major medical center." That rationale, without more, is insufficient. There has to be a good medical reason for the referral.

In addition to Dr. Cooney, two other physicians recommended that claimant be seen at the Mayo Clinic. One was Dr. Toder, an orthopedic surgeon, who made his recommendations in December 1992 and February 1993. (Findings 15 and 17.) The other was Dr. Gouaux, a specialist in internal medicine, who said on May 17, 1993, that because of the "possibility of undiagnosed spine abnormality" claimant should be seen by a "neurological consultant [at a] tertiary medical center such as University of Washington, Mayo Clinic." However, after those recommendations claimant was seen by other orthopedic surgeons and neurologists -- Drs. Capps, McMurphy, Moseley and Peterson, none of whom tendered a recommendation that claimant be seen at the Mayo Clinic. Dr. Auger's letter recommending against the referral was also subsequent to the recommendations of Drs. Toder and Gouaux. In that light, the insurer did not act unreasonably in rejecting the recommendations of Drs. Cooney, Toder and Gouaux.

I note that I did not discuss Dr. Toder's and Dr. Gouaux's recommendations or the significance of the subsequent examinations. In light of that, Finding 64 should be amended. Accordingly,

IT IS HEREBY ORDERED THAT Finding 64 of the Court's February 26, 1997, Findings of Fact, Conclusions of Law and Judgment be amended to read as follows:

64. The insurer's denial of payment for an evaluation of claimant at the Mayo Clinic and its denial of liability for claimant's leg symptoms were reasonable. In both instances the insurer obtained medical opinions supporting its position.

Moreover, as presented to the insurer, the recommendations that claimant be seen at the Mayo Clinic were in large part in response to claimant's urging that she be sent there. Dr. Cooney's recommendation was also based in part on his opinion that patients with chronic medical problems will never be satisfied until they are evaluated at a major medical center.

In addition to Dr. Cooney, two other physicians recommended that claimant be seen at the Mayo Clinic. One was Dr. Toder, an orthopedic surgeon, who made his recommendations in December 1992 and February 1993. (Findings 15 and 17.) The other was Dr. Gouaux, a specialist in internal medicine, who said on May 17, 1993, that because of the "possibility of undiagnosed spine abnormality" claimant should be seen by a "neurological consultant [at a] tertiary medical center such as University of Washington, Mayo Clinic." However, after those recommendations, claimant was seen by other orthopedic surgeons and neurologists -- Drs. Capps, McMurry, Moseley and Peterson, none of whom tendered a recommendation that claimant be seen at the Mayo Clinic. Dr. Auger's letter recommending against the referral was also subsequent to the recommendations of Drs. Toder and Gouaux. In that light, the insurer did not act unreasonably in rejecting the recommendations of Drs. Cooney, Toder and Gouaux.

The claimant's Request for Amendment is otherwise **denied**.

SO ORDERED.

DATED in Helena, Montana, this 23rd day of April, 1997.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Marvin L. Howe

Mr. Peter J. Stokstad

Submitted April 11, 1997

1. Rule 705 provides:

The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The

expert may in any event be required to disclose the underlying facts or data on cross-examination.