

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1997 MTWCC 5

WCC No. 9602-7504

NANCY LEE PASHA

Petitioner

vs.

NATIONAL UNION FIRE OF PITTSBURGH

Respondent/Insurer for

AMERICAN RED CROSS

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: 54 year-old registered nurse injured in automobile accident sought evaluation at the Mayo Clinic in Minnesota and ruling that the insurer was liable for her leg complaints as well as her neck, arm, and headache pain.

Held: Further evaluation is medically reasonable and necessary where three different physicians recommended the evaluation, several additional tests have been recommended by various physicians, physicians treating claimant have expressed uncertainty as to the nature of her condition, and treatment to date has been largely ineffective. Also relevant is the Court's impression that claimant will never return to work unless effective treatment is found and that evaluation at the Mayo Clinic, even if it provides no better diagnosis and treatment, will provide closure to the medical investigation. If the only reason for the referral to the Mayo Clinic were claimant's desire for the evaluation, the Court would not order the evaluation. The insurer is not responsible for treatment relating to claimant's legs and feet where medical records do not support her assertion that pain in those areas emerged at the time of the accident and remained constant. Rather, the records demonstrate claimant's symptoms in those areas have varied and have not been explained by any physician.

Topics:

Benefits: Medical Benefits: Liability. Insurer is not responsible for treatment relating to claimant's legs and feet where medical records do not support her assertion that pain in those areas emerged at the time of the compensable automobile accident and remained constant. Rather, the records demonstrate

claimant's symptoms in those areas have varied and have not been explained by any physician.

Benefits: Medical Benefits: Out-of-state Treatment. Out-of-state evaluation for claimant's chronic neck and arm pain, and headaches, is medically reasonable and necessary where three different physicians recommended the evaluation, several additional tests have been recommended by various physicians, physicians treating claimant have expressed uncertainty as to the nature of her condition, and treatment to date has been largely ineffective. Also relevant is the Court's impression that claimant will never return to work unless effective treatment is found and that evaluation at the Mayo Clinic, even if it provides no better diagnosis and treatment, will provide closure to the medical investigation. If the only reason for the referral to the Mayo Clinic were claimant's desire for the evaluation, the Court would not order the evaluation.

The trial in this matter was held in Billings, Montana, on August 20, 1996. Petitioner, Nancy Lee Pasha (claimant), was present and represented by Mr. Marvin L. Howe. Respondent, National Union Fire of Pittsburgh (National Union), was represented by Mr. Peter J. Stokstad.

Exhibits: Exhibits 1 through 3 were admitted at trial by stipulation.

Witnesses and Depositions: Claimant was sworn and testified. In addition the parties submitted depositions of Dr. Gary D. Cooney and Dr. Dale M. Peterson for the Court's consideration.

Issues Presented: The following issues are presented:

- (1) Is National Union liable for an evaluation of claimant at the Mayo Clinic in Rochester, Minnesota?
- (2) Is National Union liable for claimant's leg complaints?
- (3) Is claimant is entitled to attorney fees, costs, and a penalty?

* * * * *

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

FINDINGS OF FACT

1. Claimant is 54 years old and resides in Hathaway, Montana. She is a registered nurse and received part of her nurses training at the Mayo Clinic in Rochester, Minnesota.
2. In January 1992, and for the 19 previous years, the claimant was employed by the American Red Cross (Red Cross).

3. On January 9, 1992, claimant was traveling in a Red Cross van in Miles City, Montana, when the van made a sudden stop to avoid a collision with another vehicle. Claimant was wearing a lap belt but not a shoulder belt. She was thrown forward in the vehicle but remained belted in her seat.

4. Immediately following the accident claimant experienced pain in her right cervical area and right arm.

5. At the time of the accident, Red Cross was insured by National Union. National Union accepted liability and has paid medical and disability benefits to claimant.

6. Dr. Gary D. Cooney, claimant's treating physician, found her to be at maximum medical improvement in February 1996. (Ex. 1 at A-60.) However, National Union acknowledges that claimant is presently permanently totally disabled as a result of her industrial injury.

Claimant's Request to Attend the Mayo Clinic

7. Since the accident the claimant has experienced severe headaches and pain in her neck and both arms. She has also complained of pain in both legs and feet. She has seen numerous doctors concerning her complaints.

8. Dr. Tim A. Six, a chiropractor, examined claimant on January 10, 1992. (*Id.* at A-5.) He referred claimant to Dr. Gary D. Cooney in Missoula. (*Id.* at A-9.) Dr. Cooney is a neurologist.

9. Dr. Cooney initially examined claimant on January 13, 1992. (*Id.* at A-11.) His impression at that time was:

1. Cervical strain/sprain secondary to a motor vehicle accident on 1-9-92.
2. Right upper extremity paresthesias with sensory deficits in the C6 dermatome. A disc herniation at the C5-6 level merits consideration. She has no evidence of motor root weakness or reflex abnormalities however.

(*Id.* at A-12.) An x-ray taken at that time disclosed "[m]inimal disc disease at C5-6." Otherwise, the x-ray was normal. (*Id.* at A-13.) Dr. Cooney prescribed Valium and outpatient cervical traction four times a day. (*Id.* at A-12.)

10. Claimant continued to experience neck and arm pain, so Dr. Cooney admitted her to St. Patrick Hospital in Missoula on January 20, 1992, for treatment with cervical traction and injectable Toradol.⁽¹⁾ (Cooney Dep. at 9; Ex. 1 at A-19.) At that time, claimant's "predominant complaints were of pain in her neck and shoulder girdle and right upper extremity." (Cooney Dep. at 9.) A cervical MRI on January 21, 1992, disclosed "[m]inimal narrowing of the C5-6 disc with no other specific abnormality." (Ex. 1 at A-78.) Dr. Cooney discharged claimant on January 26, 1992. (*Id.* at A-14 to 15.)

11. During her January 1992 hospitalization claimant "developed some symptoms of pain in knees and ankles." (*Id.* at A-15.) The significance of those symptoms will be considered later in this decision.

12. Over the next year the claimant continued to experience chronic headaches, neck pain, and bilateral arm pain and numbness. (*Id.* at A-38.) Between January 1992 and February 1993, claimant was treated with various drugs. She also underwent decompressive right ulnar nerve surgery on May 19, 1992. (*Id.* at A-28, A-70.) The surgery alleviated some of her symptoms but overall her complaints continued. (*Id.* at A-28 to 38.)

13. Between January 1992 and February 1993, Dr. Cooney arrived at five primary impressions of claimant's medical condition. Four are reflected in his April 27, 1992 office note, as follows:

IMPRESSION: 1. Cervical strain/sprain secondary to a motor vehicle accident on 1-9-92.

2. Right upper extremity pain and tenderness, secondary to RUE trauma.

3. Right lateral epicondylitis secondary to #2.

4. Right tardy ulnar palsy, secondary to #2.

(*Id.* at A-27.) In his November 2, 1992 office note, he added the fifth:

5. Probable migraine headaches, post traumatic secondary to #1.

(*Id.* at A-30.)

14. Dr. Lawrence J. Toder, an orthopedic surgeon, recommended and performed the ulnar surgery on claimant. (*Id.* at A-68 to 69.) He followed her recovery from the surgery. His office notes indicate that claimant had continued complaints in her hands, arms and neck. (*Id.* at A-71 to 74.) His office notes demonstrate his uncertainty concerning the cause of her complaints. On May 28, 1992, he wrote, "I think the pt [patient] may be exhibiting early reflex dystrophy." (*Id.* at A-71.) On October 8, 1992, he recorded that she had multiple complaints in her right arm and neck and was "essentially dysfunctional." (*Id.* at A-73.) At that time he noted that she was returning to see Dr. Cooney and "suggest[ed] that she continue to pursue problems relating to her brachial plexus and neck which I think is a source of her problems." (*Id.*)

15. After examining claimant on November 11, 1992, Dr. Toder noted that she was "essentially no better." (*Id.*) He repeated his belief that claimant had some problem relating to her brachial plexus and neck. (*Id.*) His office note for this visit is the first mention of the Mayo Clinic.

The patient has either a brachial plexus or cervical spine problem. At the present time I will try to communicate with Dr. Gary Cooney to see if he has any suggestions for therapy. She has the opportunity to go back to the Mayo Clinic in

January and I suggest that if she if [sic] not feeling any better, which I suspect will be the case, that we arrange for her to have a neurologic and neurosurgical consult back there.

(*Id.* at A-73.)

16. On December 23, 1992, after discussing the case with Dr. Cooney, Dr. Toder indicated that he and Dr. Cooney had been unable to make any definitive diagnosis of claimant's condition or provide an effective treatment plan. He urged that she be examined by a "super expert" at the Mayo Clinic.

I had a discussion with Mary at Crawford Rehab about Mrs. Pasha's case. I feel that Mrs. Pasha at this present time continues to have symptomatology and does not have a diagnosis nor treatment plan provided by physicians she has seen including myself. I have discussed this case with Dr. Cooney and he and I both agree that a super expert opinion would be of great benefit in her case. Will try to make arrangements for her to get a neurological consult at Mayo Clinic in Rochester, Minnesota to further resolve her diagnostic and therapeutic problems.

(*Id.* at A-74.)

17. Dr. Toder's final note, dated February 8, 1993, states: "We are still expecting her to go to the Mayo Clinic for a full evaluation of her status." (*Id.*)

18. Dr. Cooney's first mention of the Mayo Clinic was in a letter he wrote on February 15, 1993, to an attorney representing claimant.

At the time of her last visit (2/8/93), she [claimant] broached the possibility that it might be worthwhile for her to be evaluated at the Mayo Clinic in regard to her persistent complaints of neck pain, right upper extremity pain and tenderness, and headaches. She indicated that she was most interested in being evaluated at the Mayo Clinic. I advised her that I certainly had no objection to such a referral.

(*Id.* at A-37.)

19. On March 25, 1993, Dr. Cooney wrote to Sandy Mayernik, who was adjusting the case for the insurer.

Mrs. Pasha is becoming quite frustrated at her lack of symptomatic improvement for her complaints of headaches, neck pain, and bilateral upper extremity pain and numbness which she relates to the injury she sustained on 1/9/92. Consequently, we have discussed referring her to a university medical center or a large multidisciplinary [sic] clinic to obtain a second opinion regarding the etiology and possible treatment of her multiple symptoms. She has expressed a desire to go to the Mayo Clinic, which certainly would appear to be an excellent choice for the sort of evaluation she seeks. Whether it would be more effective obtaining a second neurological or orthopedic opinion in Montana is uncertain. In view of the protracted duration of her symptoms, I personally would favor her getting a second opinion to determine whether anything else can be done to

alleviate the symptoms which have been plaguing her for over one year. It would seem appropriate that that be done at a university or large multidisciplinary [sic] clinic such as the Mayo Clinic.

(*Id.* at A-41.)

20. In an office note of April 12, 1993, Dr. Cooney reiterated his recommendation that claimant be examined at the Mayo Clinic.

At this point, I think it would be most appropriate for the patient to be evaluated by a neurosurgeon at the Mayo Clinic who could then refer her to other specialists (such as orthopedic surgeon, neurologist, podiatrist or psychiatrist), as he sees fit. I suspect that this approach would probably be substantially less expensive than a multi-disciplinary panel evaluation at this point.

(*Id.* at A-43 to 44.)

21. In part, Dr. Cooney has recommended that claimant be examined at the Mayo Clinic because claimant wishes to have such examination. (*Id.* at A-37; Cooney Dep. at 19, 36-37.) If that were the sole reason for the doctor's recommendation it would be insufficient. A complete reading of his medical records and deposition, however, convinces me that his recommendation is also for medical reasons. As he noted in his letter to Ms. Mayernik, claimant was not improving despite his prescribed treatment. During his August 12, 1996 deposition, he was specifically asked whether he still recommended the Mayo Clinic and, if so, why.

Q. Doctor, is it still your recommendation that Nancy be evaluated at the Mayo Clinic?

A. Yes, it is.

Q. Why is that?

A. Because I don't think that she is going to be satisfied that she has gotten the medical evaluation that she **needs** until she does go to the Mayo Clinic.

Q. Doctor, in your opinion, is this evaluation medically necessary for Nancy's care?

A. Yes, I think that it is.

Q. And do you base that upon a reasonable degree of medical certainty?

A. Yes, I do.

(Cooney Dep. at 21; emphasis added.) Thus, while claimant's desire to be examined at the Mayo Clinic has been one factor in Dr. Cooney's recommendation, he also made the recommendation because, in his medical opinion, it is medically necessary.

22. Dr. Catherine C. Capps, of the Northern Rockies Orthopaedic Specialists in Missoula, examined claimant on April 27, 1993. (Ex. 1 at A-102 to 107.) She was unable to find a specific cause for claimant's complaints and identified a number of possible conditions she felt should be ruled out, including connective tissue disease, such as lupus, myelopathy (disease of the spinal cord), an intercranial lesion, and a thyroid tumor. (*Id.* at A-105 to 106.) She recommended an MRI scan of the brain, a cervical myelogram, and further workups for lupus and a thyroid tumor. (*Id.* at A-106.) Dr. Capps noted that if the recommended testing and evaluation were negative then "I would not be able to explain her current symptomatology" (*Id.*) She did not express any opinion concerning referral of claimant to the Mayo Clinic.

23. Lupus and thyroid testing and an MRI of the brain were then done but the results were negative for disease or pathology. (*Id.* at A-47, A-82 to 84.) Cervical myelography has apparently never been done despite the further recommendation of the procedure by Dr. Fred G. McMurry, a neurosurgeon who examined claimant in 1995. (*Id.* at A-121.) According to a December 13, 1995 letter by Dr. McMurry, "Myelographic studies were never completed, *I believe*, because the patient was not anxious to have that study." (*Id.*, italics added.)

24. Dr. James E. Gouaux, an internal medicine specialist in Missoula, evaluated claimant for lupus and thyroid problems on May 17, 1993. (*Id.* at A-82, A-84.) As stated in the previous paragraph, his evaluations were negative. (*Id.* at A-84.) He was unable to diagnose the cause of claimant's complaints and he agreed with Drs. Toder and Cooney in recommending she be referred to the Mayo Clinic. In a May 17, 1993 letter, he wrote:

Because of difficulty in diagnosing and treating these symptoms, I recommended to Mrs. Pasha that she get medical consultation outside of Missoula, such as the Mayo Clinic, University of Washington, or other tertiary care center.

(*Id.* at A-82.) In an office note of the same date, he wrote:

Because of the possibility of undiagnosed spine abnormality causing neurological symptoms, I advised that she see a neurological consultant tertiary medical center such as University of Washington, Mayo Clinic.

(*Id.* at A-84.)

25. Despite the recommendations of the Drs. Cooney, Toder and Gouaux, the insurer refused to authorize evaluation of claimant at the Mayo Clinic.

26. During the ensuing three years, both claimant and the insurer continued to seek further medical answers from Montana physicians. Claimant was reexamined by Dr. Cooney on several additional occasions in 1993, on July 27, 1995, and on February 16, 1996. (*Id.* at A-40 to 65.) She was evaluated in 1995 by Dr. McMurry (*id.* at A-110 to 121) and his associate, Dr. John I. Mosely, who is also a neurosurgeon (*id.* at A-122 to 126). In April 1996 she was evaluated by Dr. Dale M. Peterson, a neurologist. (Ex. 3 at 2-7.) Despite those examinations, and numerous additional tests, claimant's condition

has still not finally and definitively been diagnosed, nor has she benefited from further treatment.

27. Following his last, February 16, 1996 examination of claimant, Dr. Cooney's impression of claimant's condition continued to be multifactorial. (Ex. 1 at A-63 to 64.) He continued to diagnose claimant as suffering "cervical strain/sprain." He again noted her right upper extremity and neck pain but added, "This most likely represents a post traumatic fibrositis." Reference to right lateral epicondylitis was deleted. Reference to "[r]ight upper extremity sensory and motor deficits, of uncertain etiology" was added. (*Id.*)

28. Dr. McMurry initially thought that claimant might be suffering from thoracic outlet syndrome, but Dr. Mosely, to whom Dr. McMurry referred claimant for further evaluation of that possibility, could not establish that diagnosis. (*Id.* at A-111, 121.) EMG testing and a cervical CT scan done at Dr. McMurry's direction failed to identify any operable cervical spine abnormality. (*Id.* at A-118, A-120.) In his final letter to the insurer's claims adjuster, Dr. McMurry noted that Dr. Mosely "has continued concerns regarding [the] possibility of radiculopathy"; that recommended myelographic studies had not been done; that claimant has "reached maximum medical healing barring a discovery of an obviously treatable diagnosis which has not been available to date"; and that his "[f]inal diagnostic considerations are those of an unresolved cervical radiculopathy." (*Id.* at A-121.)

29. Dr. Peterson, who at the request of the insurer performed the latest examination of claimant on April 29, 1996, indicated that claimant's case involved a "very difficult presentation" and recommended further MRI of her neck, a full EMG examination, and a neuropsychological evaluation.

In summary, this is a very difficult presentation. It sounds as if she had a to and fro type injury of her neck and initially had some muscular spasms in the neck and shoulders, worse on the right. The initial feeling was that she might have a C6 radiculopathy at least on the basis of sensory changes and on the basis on a somewhat incomplete EMG (only motor studies) she was felt to have a little slowing at the right elbow, but there is not anything about her history that would have suggested ulnar nerve damage at the elbow, as near as I can tell. Not surprisingly, the transposition of the ulnar nerve did little to improve the symptomatology.

Currently, her findings are kind of a mixture of pain behavior, a limitation of motion of shoulder and neck, and really no hard organic signs. By this time I would have expected when people are raising the question of a plexus lesion or a progressive neurologic impairment of some type, to have found some pretty clear cut findings.

I think that it is reasonable after this number of years to re-MRI her neck and have a full EMG examination of her right arm. If these studies really reveal little of note, as I suspect they will, then I think that her therapy needs to be done with a physical therapist who is willing to take the ?? pains to work with her and a gentle long range program trying to learn range of motion of the neck and shoulder

since I think that is mostly what is involved here. In most of the patient's [sic] I see who are this far out, I usually recommend a neuropsychological examination as well since there is usually a lot of emotional development and depression that comes along as part of this kind of situation.

(Ex. 3 at 6-7; ?? in original.) Dr. Peterson did not offer an opinion concerning evaluation of claimant at the Mayo Clinic.

30. The only medical opinion offered in opposition to referring claimant to the Mayo Clinic was in the form of a September 16, 1993 letter from Dr. Raymond G. Auger, who is apparently a physician at the Mayo Clinic. His letter was in response to a request by the insurer that he determine whether it would be beneficial for claimant to be examined at the Mayo Clinic. Dr. Auger's response, in its entirety, was as follows:

I have reviewed Ms. Nancy Pasha's records, and I do not believe that we would have any more to offer her here than the local physicians can accomplish. Therefore, I would not encourage further evaluation at our institution.

(*Id.* at A-108.) Dr. Auger's connection to the Mayo Clinic and his medical credentials and specialty have not been furnished to the Court. He provided no medical rationale for his response. He did not testify. Under these circumstances I give no weight whatsoever to his opinion.

31. The medical records and the claimant's testimony indicate that there has been little change in claimant's condition since her injury in 1992. She continues to suffer from pain and numbness which totally disables her from returning to work. The medical records reflect a poor prognosis for any future return to work.

32. Claimant has met her burden of proof with regard to her need for further evaluation at a tertiary medical center or teaching hospital. While there is no evidence that the Mayo Clinic is the only place which can conduct the further evaluation, the insurer's opposition to her request is to the further examination, not to the Mayo Clinic itself.

33. I am persuaded that further evaluation is reasonable and necessary for several reasons:

a. Three different physicians recommend the evaluation. The only physician who opposes the referral has provided a two sentence letter

which fails to set forth any reasons for his conclusion. Further, the Court has been provided no further information concerning the physician or even why the insurer solicited his opinion in particular.

b. Several additional tests have been recommended by various physicians, including physicians performing independent medical examinations at the insurer's request.

c. The physicians who have seen claimant have expressed uncertainty as to the nature of claimant's condition and treatment to date has been largely ineffective.

d. Unless more effective treatment is found it is unlikely the claimant will ever return to work. Claimant is seven to ten years from normal retirement age, thus she has several potential working years ahead of her if she can be rehabilitated.

e. The chronic nature of claimant's condition and her disability are factors which should be considered in determining whether one final comprehensive evaluation should be undertaken.

f. Even if the Mayo Clinic doctors provide no better diagnoses and treatment than Montana physicians, their opinions may provide closure to both the insurer and claimant by requiring them to acknowledge that there are no better answers or treatment alternatives.

Relationship of Claimant's Leg Symptoms to Her Injury

34. Claimant contends she suffers from pain and numbness in her lower extremities due to the January 9, 1992 accident. The insurer denies any relationship between her complaints and the accident.

35. At trial the claimant testified that ever since the accident she has had pain in her legs and that her leg pain has essentially remained the same ever since the accident. The medical records, however, do not support her testimony. Rather, they show that claimant's symptoms have varied. The medical records, as well as the testimony of Drs. Cooney and Peterson, also reflect a total inability of the physicians examining and treating claimant to diagnose or explain her condition.

36. The first record of lower extremity complaints is found in Dr. Six's records of his examination of January 10, 1992. (Ex. 1 at A-5.) In answering a questionnaire as to why she was seeking chiropractic care, claimant provided a detailed list of her complaints, especially as relating to her neck and arms. She also included, "Feet and ankle pain when reclining." (*Id.* at A-8.5.) She was provided human diagrams and asked to indicate the areas of her symptoms. She drew arrows to the right side of the neck and both ankles. (*Id.*) She did not indicate any pain in her legs.

37. Dr. Cooney's office note of his first examination of claimant on January 13, 1992, contains no mention of any lower extremity complaints. (*Id.* at A-12 to 13.)

38. In the history taken of claimant on January 20, 1992 by Dr. Cooney, there is similarly no mention of any lower extremity complaints on the part of claimant. (*Id.* at A-18 to 19.) Dr. Cooney's physical examination, however, extended to claimant's lower extremities and he noted:

DTR's [deep tendon reflexes] are slightly hyperactive in both upper and **lower extremities** (including biceps, triceps and brachial radialis.) No ankle clonus, Babinski signs or Hoffman signs are noted. . . . Vibratory sensation is diminished in the right leg compared to the left but the Romberg sign is absent.

(*Id.* at A-19, emphasis added.) The significance, if any, of the physical findings was not explained in the medical record or Dr. Cooney's deposition.

39. Dr. Cooney first reported lower extremity symptoms on January 25, 1992, after claimant had taken Lodine.⁽²⁾ (*Id.* at A-14 to 15.) Claimant reported pain in her knees and ankles. (*Id.* at A-15.) Dr. Cooney discontinued the Lodine but testified that it was not likely the cause of the pain. (Cooney Dep. at 25-26.) In the discharge summary he wrote, "Right knee and ankle pain, of uncertain etiology." (Ex. 1 at A-15.) In his deposition he testified that he thought at the time that she was suffering from "some kind of polyarthritis of uncertain etiology." (Cooney Dep. at 10.) He explained that polyarthritis is only a "descriptive diagnosis" indicating that she had joint pain. (*Id.* at 26.) In any event, claimant was still complaining of "pain in the knees and ankles, aggravated by activity" when she was discharged on January 26, 1992. (Ex. 1 at A-15.)

40. Dr. Cooney's office note of February 4, 1992, does not mention any ankle, knee or leg complaints by claimant. (*Id.* at A-22.)

41. On March 3, 1992, claimant complained of "experiencing some weakness in the hip flexors of her left lower extremity" but did not mention any ankle, knee or other leg symptoms. (*Id.* at A-23.)

42. Dr. Cooney's office notes for his examinations of claimant on April 27, 1992, May 28, 1992, and June 25, 1992, do not record any lower extremity complaints by claimant.

43. On July 23, 1992, Dr. Cooney noted that claimant dropped by his office complaining of "numbness of the LLE [left lower extremity] which appears to radiate down the dorsal aspect of the thigh and calf into the lateral aspect of the foot for the past three weeks." His office note further reflects that claimant reported, "This is not a particularly painful symptom, but does produce some tingling sort of sensations." (Cooney Dep. Ex. 1.)

44. On September 2, 1992, Dr. Cooney recorded that claimant continued to experience problems with "occasional bilateral lower extremity numbness" which "seem[s] to occur when she is lying down." (Ex. 1 at A-30.)

45. On October 8, 1992, Dr. Cooney recorded that claimant continued to complain of having problems sleeping and that "lying down seems to aggravate the pain in her neck, shoulder girdle, upper extremities, lower back, and **lower extremities**." (*Id.* at A-32, emphasis added.)

46. Dr. Cooney's notes for office visits on November 11, 1992, January 6, 1993, February 8, 1993, March 8, 1993, April 12, 1993, and May 10, 1993, do not reflect any lower extremity complaints by claimant. (*Id.* at A-35 to 36, A-38 to 40, A-43 to 45.)

47. Dr. Capps' report of her examination of claimant on April 27, 1993, states that claimant's "current" complaints included her legs.

She also states her arms and **legs** get numb according to her neck and head position. The patient also states she has bilateral leg pain that begins in the groins and can radiate down the anterior thighs and calves to the instep. She is occasionally weak. She has numbness in the same pattern. This is described as a dull ache of 3 to 4 on a scale of 1 to 10.

(*Id.* at A-103, emphasis added.)

48. Dr. Gouaux's note of his examination of claimant on May 17, 1993, similarly reflects claimant's leg complaints. He recorded that since claimant's accident she has continued to have pain in her neck and arms, "plus a feeling of numbness of the medial thighs, lower legs, and feet." (*Id.*) His neurological exam of the lower extremities adduced "diminished vibration perception in the distal feet and almost absent in the big toes, decreased proprioception of the big toes, decreased light touch perception in the medial aspect of both feet." (*Id.* at A-84.) However, he noted that claimant's lower extremity strength seemed "okay." (*Id.*)

49. On June 14, 1993, Dr. Cooney recorded that claimant "has recently been experiencing numbness in both lower extremities from the groin distally from time to time." (*Id.* at A-46.) He also reported that claimant "has a stocking hypalgesia of the lower extremities affecting both lower extremities symmetrically, beginning in the lateral thigh region and extending into the calf and foot." (*Id.*)

50. On July 19, 1993, Dr. Cooney recorded that claimant continued to complain of "numbness and pain in both lower extremities which radiate from the groin distally." (*Id.* at A-48.)

51. On September 9, 1993, Dr. Cooney recorded that claimant continued to "experience intermittent numbness of the right arm and both lower extremities, particularly at night." (*Id.* at A-52.)

52. On November 8, 1993, Dr. Cooney reported that claimant was complaining "of pain in the medial aspect of both thighs and calves." (*Id.* at A-53.) In his impressions he noted "[b]ilateral lower extremity pain and numbness, of uncertain etiology." (*Id.*)

53. Claimant continues to experience pain in her legs, especially at night. (Trial Test.)

54. On July 22, 1993, Dr. Cooney wrote to claimant's attorney concerning claimant's lower extremity complaints.

In reviewing my records, it appears that they [claimant's lower extremity problems] developed while she was hospitalized in January of 1992, initially affecting the right knee and ankle, subsequently involving both knees and ankles. This seemed to develop after she was started on Lodine 200 mgs tid for pain relief, but did not abate with discontinuation of the Lodine, although it appears that the pain did abate by the time she was seen for a recheck visit on 2-4-92. She again noted that she was experiencing numbness of the left lower extremity radiating down the dorsal aspect of the thigh and calf and into the lateral aspect of the foot of three weeks duration, when she dropped by my office on 7-23-92. She denied back pain at that time. **In my note, I note that she had this same symptom during her hospitalization.** She again was noted to have complaints of bilateral lower extremity numbness on lying down on 9-2-92. She complained of some achy discomfort in her lower back, but denied any typical sciatic symptoms when I saw her on 6-14-93, and again on 7-19-93. **In view of this, it appears to me that the patient's low back and lower extremity symptoms**

are more likely than not related to the injuries she sustained on 1-9-92. There is little question that these symptoms have been substantially overshadowed by her head, neck and upper extremity symptoms, however.

(*Id.* at A-50, emphasis added.)

55. As the quoted material in the previous paragraph indicates, Dr. Cooney reported that claimant had some low-back discomfort following the 1992 accident. (Cooney Dep. at 15.) In reviewing Dr. Cooney's medical records, it appears he first recorded low-back symptoms on June 14, 1993, when he wrote, "She has had some achy discomfort in the lower back, but denies typical sciatica." (Ex. 1 at A-46.) Dr. Cooney was unable to establish any link between claimant's back discomfort and her leg symptoms. (*Id.*)

56. In his deposition, Dr. Cooney confirmed the opinion he expressed in his July 22, 1993 letter to claimant's attorney. (Cooney Dep. 12-13.) He testified that claimant's lower extremity problems were directly related to the accident. (*Id.* at 13.) However, he did not offer any medical explanation for claimant's symptoms "only that there didn't seem to be any other explanation for her development of these symptoms, the cause of which I did not understand then, and which I do not understand now, only that there seemed to be a temporal relationship between the onset of those symptoms and her involvement in the accident" (*Id.* at 26-27.)

57. Dr. Cooney's July 22, 1993 opinion letter briefly outlined claimant's history of leg pain. He noted that she developed pain in her knees and ankles during her January hospitalization and that the pain had abated by February 4, 1992. (Ex. 1 at A-50.) He wrote that the next time claimant mentioned any leg symptoms was "when she dropped by my office on 7-23-92." (*Id.*) His note of that date stated that "she had this same symptom during her hospitalization." (*Id.*) However, his office note for that date recorded that claimant was complaining of numbness in her left leg which radiated "down the dorsal aspect of the thigh and calf into the lateral aspect of the foot" (Cooney Dep. Ex. 1.) During cross-examination at his deposition, Dr. Cooney conceded that the claimant's lower extremity symptoms in 1993, which consisted of leg numbness and pain radiating from her groin, were "very different" from the symptoms she reported in January 1992. (*Id.* at 28.)

58. Claimant had previously experienced leg pain in 1979 and 1980 in conjunction with sciatica. (*Id.* at 14.) However, Dr. Cooney testified that her symptoms at that time were different than her symptoms following her 1992 accident and that her sciatic symptoms had resolved prior to the accident. (*Id.*) The insurer presented no affirmative evidence to contradict his testimony in this regard.

59. On April 29, 1996, Dr. Dale M. Peterson, a neurologist with the Billings Clinic, performed an independent medical evaluation of the claimant at the request of the insurer. (Ex. 3 at 2.) He took a medical history, reviewed claimant's medical records, and performed a neurological examination. (Peterson Dep. at 7-11; Ex. 3 at 2-7.)

60. At the time of the examination claimant reported that during the day she occasionally had pain in the bottoms of her feet and that at night she had pain in both her feet and her legs. (Peterson Dep. at 10.)

61. The results of Dr. Peterson's neurological examination of claimant were normal. (*Id.* at 14.) Based on the location of claimant's leg symptoms and the "absence of findings referable to the symptoms," Dr. Peterson was unable to diagnose claimant's leg condition. (*Id.* at 23.) He opined that her leg symptoms were not related to her 1992 accident. (*Id.* at 18.)

62. There is no substantial evidence indicating that claimant's leg pain is in itself disabling or that any specific treatment is required.

63. The best that can be said concerning the claimant's leg pain and numbness is (1) no doctor has a clue as to what is medically causing it and (2) the type of pain and numbness which claimant experiences began approximately six months after her industrial accident. Even though Dr. Cooney is claimant's treating physician, I am not persuaded by his opinion that her symptoms are the result of her accident. He conceded that his opinion has no medical basis and is based entirely on the temporal relationship between the symptoms and the condition, i.e., the fact that the symptoms began shortly after the accident. In that regard, he is in no better position to judge cause and effect than the Court. Moreover, his inference that claimant's condition was caused by the accident is undermined by the fact that the symptoms at issue did not emerge until six months after the accident. He conceded that the pain and numbness in claimant's legs, which began in July 1992 and continue to present, were "very different" from the pain claimant had in her ankles and knees immediately following the accident. He did not provide any explanation as to why the symptoms would take six months to arise. Dr. Peterson's opinion that the condition is not related to the accident is more plausible.

Insurer's Conduct

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.

CONCLUSIONS OF LAW

1. Claimant's industrial accident occurred on January 9, 1992, thus the 1991 version of the Workers' Compensation Act applies in this case. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

2. Pursuant to section 39-71-704(1)(a), MCA (1991), the insurer is required to "furnish, without limitation as to length of time or dollar amount, reasonable services by a physician or surgeon, reasonable hospital services and medicines when needed, and such other treatment as may be approved by the department for the injuries sustained, subject to the requirements of 39-71-727." The first issue presented in this case is whether the proposed examination of claimant by physicians at the Mayo Clinic is

reasonable under the circumstances. Since I have found as fact that such examination is reasonable, the insurer is liable for and shall pay for such examination.

3. The second issue is whether claimant's leg pain and numbness is related to her industrial accident. Claimant must prove by a preponderance of the evidence that a causal connection exists between the 1992 industrial accident and her leg condition. *Brown v. Ament*, 231 Mont. 158, 752 P.2d 171 (1988). She has failed to do so. While the Court must give some deference to the treating physician's opinion, the treating physician's opinions are not conclusive. *Kloepfer v. Lumbermens Mut. Cas. Co.*, 276 Mont. 495, 498, 916 P.2d 1310, 1312 (1996). In this case, the treating physician's opinion was contradicted by an IME physician. Moreover, the sole basis for the treating physician's opinion was the fact that claimant's condition began after the accident and he failed to explain the six-month delay between the accident and the onset of symptoms.

4. Since claimant has prevailed she is entitled to her costs. § 39-71-611, MCA.

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.

JUDGMENT

1. Claimant is entitled to an evaluation at the Mayo Clinic and National Union shall pay for such evaluation.

2. Claimant's leg pain and numbness is not related to her industrial accident and she is not entitled to medical benefits for evaluation or treatment of those symptoms.

3. Claimant is entitled to costs in an amount to be determined by this Court. Claimant shall submit her memorandum of costs within 10 days of this decision. National Union shall then have 10 days in which to file its objections, if any. The Court will then assess costs.

4. Claimant is not entitled to attorney fees or a penalty

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

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

DATED in Helena, Montana, this 26th day of February, 1997.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Marvin L. Howe
Mr. Peter J. Stokstad
Date Submitted: September 6, 1996

1. Toradol is "a nonsteroidal anti-inflammatory drug (NSAID) that exhibits analgesic, anti-inflammatory, and antipyretic activity." Physicians' Desk Reference (46th ed.) at 2302.
2. Lodine is a nonsteroidal anti-inflammatory drug. Physicians' Desk Reference (46th ed.) at 2468.