IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 117

WCC No. 9409-7140

JANNA PULLIAM

Petitioner

vs.

LIBERTY MUTUAL INSURANCE COMPANY

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Parties disputed whether claimant's 1991 and 1993 back surgeries were related to her 1988 back injury while unloading boxes for Hennessy's Department Store.

Held: Claimant's 1990 fall and resulting disc herniation, which led to the surgeries, resulted from her leg giving way, which was a condition caused by her industrial accident. In addition, claimant's physician opined that her industrial injury weakened her back, making her subject to the aggravations leading to the surgery. The insurer is liable for the surgeries and for claimant's condition.

Topics:

Injury and Accident: Aggravation: Generally. Where claimant's 1990 fall and resulting disc herniation resulted from her leg giving way, which was a condition caused by her 1988 industrial accident, and her physician opined that her industrial injury weakened her back making her susceptible to later injury, the insurer is liable for 1991 and 1993 surgeries caused by the aggravation.

Benefits: Medical Benefits: Surgery. Where claimant's 1990 fall and resulting disc herniation resulted from her leg giving way, which was a condition caused by her 1988 industrial accident, and her physician opined that her industrial injury weakened her back making her susceptible to later injury, the insurer is liable for 1991 and 1993 surgeries caused by the aggravation.

The trial in this matter was held on December 1, 1994, in Helena, Montana. Petitioner, Janna Pulliam (claimant), was present and represented by Mr. Norman H. Grosfield. Respondent, Liberty Mutual Insurance Company (Liberty), was represented by Mr. Larry W. Jones. Claimant testified on her own behalf. Michael K. Stevens and Loren Hartman also testified. The depositions of Dr. Brooke Hunter and Dr. Allen Weinert were submitted for the Court's consideration. Exhibits 1 through 7 were admitted.

A transcript of the proceedings has not been submitted to the Court.

Issues Presented: The issue in this case is whether Liberty is liable for back surgeries performed in 1991 and 1993. Liberty contends that the surgeries were unrelated to claimant's March 16, 1988 industrial accident.

Briefs: Prior to trial the claimant filed a Trial Brief and Liberty filed proposed findings of fact and conclusions of law. Both parties agree that post-trial briefing is unnecessary.

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

FINDINGS OF FACT

1. On March 16, 1988, claimant suffered an industrial injury while working for Hennessy's Department Store (Hennessy's) of Helena, Montana. She was unpacking a box of towels when she felt a pop in her back.

2. Claimant was thereafter diagnosed as suffering a small central herniated disc at the L4-5 vertebral level. (Ex. 3 at 1.) On November 4, 1988, Dr. Brooke Hunter, an orthopedic surgeon, performed a hemilaminectomy and diskectomy at the L4-5 level. (Ex. 3 at 2.) By the time of the surgery, the disc herniation had become larger and was prominent to the right side. (Ex. 3 at 5.)

3. Liberty accepted liability for claimant's injury and paid various compensation and medical benefits, including the cost of claimant's November 4, 1988 surgery.

4. In July of 1990, claimant settled her claim with Liberty for the sum of $5,500.00. The settlement agreement reserved medical benefits for the claimant.

5. On December 14, 1990, claimant fell near her mailbox, landing on her "rear end." (Pulliam Dep. at 17.)

6. Claimant experienced severe pain in her low back, radiating into her legs, and on December 15, 1990, she sought treatment at the St. Peter's Hospital Emergency Room in Helena. (Ex. 3 at 12-13.) She was examined by Dr. Hunter on December 18, 1990, and he prescribed physical therapy. (Ex. 2 at 14; Ex. 3 at 14.) Claimant was thereafter diagnosed as suffering from a herniated disc at the L5-S1 vertebral level. (Ex. 3 at 20; Ex. 2 at 15.) On April 22, 1991, Dr. Hunter performed a hemilaminectomy and diskectomy at the L5-S1 level.

7. In 1993 claimant suffered a recurrent herniation of the remaining disc material at the L5-S1 level. On November 17, 1993, claimant underwent a second hemilaminectomy and diskectomy at the L5-S1 level. (Ex. 3 at 25.)

8. Liberty has denied liability for the second and third surgeries on the basis that they were unrelated to the industrial injury and they were caused by claimant's December 1990 fall.

9. Claimant testified that her fall on December 14, 1990, was a result of her leg buckling underneath her. (Pulliam Dep. at 17) She further testified that her leg has buckled repeatedly since her 1988 industrial accident. (Pulliam Dep. at 15-16.) At trial Liberty's attorney agreed that if the Court finds that the fall was due to her leg buckling or giving way, and that the buckling was a sequelae to claimant's 1988 industrial injury, then Liberty is liable for the second and third surgeries.

10. While the evidence is conflicting, the Court is persuaded by a bare preponderance of the evidence that claimant's fall on December 14, 1990 was attributable to her leg giving way or her stumbling, and that her leg giving way was in turn attributable to her 1988 industrial injury. Dr. Hunter had no reference anywhere in his notes that claimant's leg or knee was buckling, and he stated that he would have recorded such complaints. (Hunter Dep. at 23-24.) Dr. Hunter's testimony is not consistant with claimant's testimony that her leg buckled repeatedly following her 1988 injury. While claimant did not immediately report that she had fallen because her leg buckled, and while Dr. Hunter stated in a report dated January 21, 1991, that claimant had fallen on ice, other evidence persuades me that her claims regarding her leg giving way are true based on the following:

a. The Court found claimant to be a credible witness.

b. In a report dated January 24, 1991, Dr. S. Wayne Chamberlin, an anesthesiologist who treated claimant with epidural steroid injections, noted a history of multiple falls since claimant's 1988 injury.

> Her pertinent history includes a lumbar laminectomy L4-5, 11-88 and an epidural steroid injection performed by me during a

> hospitalization in April of '89 at the L4-5 interspace. She had good relief of her pain after her surgery for a period of time. She also had relief of her typical sciatica-like pain for about 6 weeks after her previous epidural steroid injection. **However, she had a history of multiple injuries specifically falls, since her laminectomy and this has exacerbated her pain.** [Emphasis added.]

(Ex. 3 at 20.)

c. Throughout Dr. Hunter's notes for 1989 and 1990 are references to right leg pain. (Ex. 2.)

d. In a note of July 14, 1989, Dr. Hunter refers to a "paresthesia feeling" claimant was experiencing in her leg. Paresthesia is an "abnormal sensation, as burning, prickling, formication." *Dorland's Illustrated Medical Dictionary (27th Ed.).* ("Formication" is the "sensation of tiny insects crawling over the skin." *Id.)*

e. In a March 14, 1989 note, Dr. Hunter stated that claimant reported that "her foot is now flopping again like it was pre-operatively. **Feels that she is tripping more often**." (Ex. 2 at 8; emphasis added.)

f. Dr. Hunter's March 28, 1990 note states: "She heel and toe walks well although she does have a bit of a funny kind of an antalgic limp off the left." (Ex. 2 at 13.) Antalgic means "counteracting or avoiding pain, as a posture or gait assumed so as to lessen pain." *Dorland's Illustrated Medical Dictionary (27th Ed.)*. Dr. Hinde, who treated claimant in a pain management program in September of 1989, similarly referred to claimant's "antalgic gait pattern" at the time of admission to the program. (Ex. 7 at 3.)

g. Although Dr. Hunter's notes do not reflect complaints by claimant of falling, Dr. Hunter confirmed that some patients with claimant's condition do complain of falling. (Hunter Dep. at 19.)

h. Dr. Hunter's note of December 18, 1990, states that claimant had fallen but does not mention that the fall was due to ice. The emergency room record of December 15, 1990, also does not mention ice. Dr. Hunter's January 21, 1991, note about ice may well have been in error.

i. In his testimony, Dr. Allen Weinert testified that claimant's 1988 injury would not have resulted in her "knee buckling" but went on to state: "If there

is some buttock-muscle weakness, **then there could be some gait difficulty and possibly falling with that**." (Weinert Dep. at 18; emphasis added.) In addition to frequent reference to back and leg pain, Dr. Hunter's notes specifically mention buttock pain on July 14, 1989, December 6, 1989, and March 28, 1990.

11. Dr. Allen Weinert, a physiatrist who has treated claimant for pain since November 11, 1993, testified in his deposition that the second surgery was not "a direct result of " claimant's industrial injury. However, Dr. Weinert also stated in his deposition that he would defer to Dr. Hunter "in regards to an opinion as to whether the second surgery was related to either the industrial injury in 1988 or surgeries relating to that particular injury." (Weinert Dep. at 24-25.)

12. Dr. Hunter performed all three surgeries on claimant and has been claimant's primary treating physician since her 1988 industrial accident. In his opinion claimant's second and third surgeries were causally related to her industrial injury in 1988. (Hunter Dep. at 22.) Dr. Hunter's testimony on this matter is as follows:

> Q. Doctor, I would like you to give an opinion based on a more likely than not standard as to whether Janna's second surgery was more likely than not the result of the industrial injury that she suffered in 1988?
>
> A. I think it was and I think there's more than what we've talked about here, actually, as a link. We've talked about the original injury and how that affects things. The first time she really got -- I believe it was the first time -- or the major time that she got in trouble after her first surgery was actually in work hardening rehab, and I suspect that that work hardening or physical therapy-related injury played a part in it as well.
>
> I think the injury, waiting the however many months it was before her surgery, rehabing from her surgery, becoming deconditioned before she became reconditioned, those kind of things all take their toll on every level of the spine.
>
> She obviously had an underlying predisposition toward multiple level disc disease, and it's impossible to point with great accuracy at one particular thing that pushed her over the edge on any one of those things. I have a real tough time separating out once somebody starts down this road. She's a real classic example when things don't go well of separating

out spine problems at one level from spine problems at another level and really look at it as a black box, you've got the lumbar disc disease problem and it's also interconnected. I really have a tough time separating one particular part from the other, and I think it's almost an artificial separation saying that you can classify a disc at 4-5 disease being different from a disc at 5-1. It's all lower lumbar disc disease.

Q. I guess it would follow then, Doctor, as far as the third surgery, that was related to the condition that was addressed in the second surgery?

A. That's actually a much cleaner and clearer connection in that the same problem that caused the first L5-S1 disc rupture and subsequent surgery certainly predispose it towards further problems.

Q. As I understand your answer that you would say it's more likely than not that the need for the second surgery was a result of the initial industrial injury in 1988?

A. I think of anything that we can look through, I think that's as great a factor as any of them that we've talked about.

Q. So your answer would be yes?

A. Yes.

(Hunter Dep. at 20-22.)

13. The Court finds Dr. Hunter's opinions persuasive that claimant's 1988 industrial accident predisposed her to the second injury and was as great a factor in that injury as anything else that occurred.

14. Both Drs. Weinert and Hunter agree that the third surgery was necessitated by claimant's second surgery. (Hunter Dep. at 21-22; Weinert Dep. Ex. 5.)

15. Liberty did not act unreasonably in denying payment for claimant's second and third surgeries because there was a legitimate dispute concerning the relationship of the L5-S1 disc herniation to claimant's 1988 industrial injury. Dr. Weinert gave Liberty a written opinion that claimant's L5-S1 disc herniation was "not a direct result of her March 16, 1988 injury." (Weinert Dep. Ex. 5.) There was also a legitimate factual dispute concerning the

circumstances of claimant's 1990 fall, and specifically whether it was attributable to her slipping on ice or her leg buckling.

CONCLUSIONS OF LAW

1. Claimant was injured on March 16, 1988. Therefore, the 1987 version of the Workers' Compensation Act governs her entitlement to benefits. ***Buckman v. Montana Deaconess Hospital,*** *224 Mont. 318, 730 P.2d 380 (1986)*.

2. Claimant has the burden of proving by a preponderance of the evidence that she is entitled to compensation. ***Ricks v. Teslow Consolidated,*** *162 Mont. 469, 483-484, 512 P.2d 1304 (1973);* ***Dumont v. Aetna Fire Underwriters,*** *183 Mont. 190, 598 P.2d 1099 (1979).* Claimant must prove that her second and third surgeries are causally related to her 1988 industrial injury. The Court finds that she carried her burden of proof.

3. Initially, the Court is persuaded that claimant's fall on December 14, 1990, and a resulting herniation of the L5-S1 disc, was caused by claimant's leg buckling or giving way. It is further persuaded that claimant had a history of her leg giving way following her 1988 industrial accident and that the buckling was attributable to pain or weakness of the leg, or to claimant's antalgic gait. Thus, there is a direct relationship between the 1988 industrial accident and the claimant's 1991 and 1993 surgeries.

4. Irrespective of the buckling leg, case law requires a holding in claimant's favor.

In ***Belton v. Carlson Transportation,*** *220 Mont. 194, 714 P.2d 148 (1986),* the Supreme Court held that an insurer is not liable for a subsequent work-related aggravation of a condition caused by an initial industrial accident where the claimant has reached maximum healing prior to the second injury. A different rule applies, however, where the subsequent aggravation is caused by a non-work related event. A subsequent non-work aggravation of a preexisting work-related injury is compensable even though the claimant has reached maximum healing. ***Guild v. Rockwood Insurance****, 229 Mont. 466, 747 P.2d 217 (1987) and* ***see Rightnour v. Intermountain Insurance Co****., 225 Mont. 187, 732 P.2d 829 (1987). I*n ***Guild*** the Montana Supreme Court held:

> We hold that under the law of Montana, the fact that a claimant has reached maximum healing does not eliminate the employer's future liability for temporary total disability benefits where, as here, a subsequent non-employment related event causes aggravation of the first injury. Such a case is not comparable to a case where there is a second industrial injury covered by workers' compensation.

***Guild**, 229 Mont. at 470.*

In this case, the Court has found Dr. Hunter's opinions persuasive, in part because of the deference usually afforded the opinions of the primary treating physician. It is proper to defer to the opinion of the doctor with the greater knowledge of the claimant's medical condition. ***Pepion v. Blackfeet Tribal Industries**, 257 Mont. 485, 489-490, 850 P.2d 299 (1993).* Dr. Weinert also testified that he would defer to Dr. Hunter's opinion regarding the causation question.

In Dr. Hunter's opinion, claimant's 1988 industrial accident predisposed her to the second injury and was as great a factor in that injury as anything else that occurred. He noted that her initial accident caused her to become deconditioned, and that attempted work hardening following her first surgery triggered additional difficulties of the lower back.

Dr. Hunter's testimony was remarkably similar to the testimony in ***Rightnour***, a case in which the Supreme Court held an insurer liable for an aggravation caused by a subsequent non-work related fall. In that case the claimant suffered a work-related low-back injury on January 19, 1982. She underwent a laminectomy at the L4-L5 level on September 30, 1982, and a second surgery at the same level on March 30, 1983. She reached maximum healing on November 22, 1983, and settled her claim on January 20, 1984, reserving medical benefits. In March 1984 she tripped over a dog's chain at home causing a subluxation of the lower lumbar vertebrae over one another. A third surgery, unrelated to the first two, was performed to fuse claimant's L4 vertebra to her sacrum. When asked about a causal connection between the third surgery and the industrial accident, Rightenour's surgeon testified that "the fall of 1984 could have caused the subluxation because the previous operation[s] had weakened her spine." ***Rightnour,** 225 Mont. at 190 (brackets and quotes in original).* The doctor further testified:

> "[F]rom the time she lifted the patient in the nursing home and injured herself to the time she had surgery this last time is just one continuous line that might have direct ties or indirect ties. But it is the same injury."

Id. Based on that testimony the Workers' Compensation Court found

> "[t]hat the claimant has proven . . . that the original compensable injury of January 19, 1982 and the two subsequent surgeries weakened her back, and combined with the fall in her home in March, 1984, resulted in a third surgery being required. Such surgery and other medical bills related to that fall are the natural consequence of the original injury."

Id. In this case, we have similar testimony establishing that the original industrial injury weakened claimant's back and predisposed her to the subsequent injury, and testimony establishing a continuity from the original injury to the third surgery. Under ***Rightnour***, Liberty is liable for claimant's second and third surgeries.

5. Attorney fees and a penalty may be awarded only if Liberty's refusal to pay for the second and third surgeries was unreasonable. §§ 39-71-611 and -2907, MCA (1991). Liberty's denial of claimant's medical benefits was reasonable even though it has not prevailed. There was a legitimate factual dispute concerning the reason for her fall in December of 1990. Liberty also sought a medical opinion from Dr. Weinert concerning causation and was entitled to rely on his opinion in disputing the claim. Claimant is not entitled to a penalty or attorney's fees.

6. Claimant is entitled to costs.

JUDGMENT

1. Liberty is liable for payment of claimant's second and third surgeries.

2. Claimant is not entitled to a penalty or attorney's fees.

3. Claimant is entitled to costs. She shall have fourteen (14) days in which to submit her affidavit of costs. Liberty shall then have ten (10) days in which to file any objections.

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

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

Dated in Helena, Montana this 22nd day of December, 1994.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Norman H. Grosfield
Mr. Larry W. Jones