IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2004 MTWCC 2

WCC No. 2002-0717

JONNI PEKUS

Petitioner

vs.

UNINSURED EMPLOYERS' FUND

Respondent

and

MIKE YACOS

Uninsured Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Claimant seeks benefits on account of a herniated disk, alleging that her condition arose as a result of work at her stepfather's sawmill. Her stepfather was uninsured. He and the UEF deny liability on two grounds. First, they assert that he was exempt from workers' compensation requirements and liability since claimant resided in his household and was listed as a dependent on his and her mother's joint tax returns. Second, they allege that the condition arose from a non-work fall.

Held: While claimant may not have qualified as a dependent in 2001, making any exemption questionable, the Court is unpersuaded that the claimant's condition arose on account of her work at the sawmill. The medical opinion relating it to her work was based on erroneous assumptions that claimant had not suffered a non-work fall and that she had worked as a "logger for years." The opining doctor agreed that a traumatic event, had it occurred, could have caused the condition.

Topics:

> **Proof: Conflicting Evidence: Medical.** The medical opinion relating claimant's condition to repetitive work is based on an erroneous history given by the claimant indicating she worked much harder and longer than in fact she did, and where, more importantly, the doctor agreed that a single traumatic fall could have caused the condition but assumed no such fall had taken place. The opinion is not persuasive

where in fact there was a significant fall and the claimant's symptoms began immediately following the fall.

¶1 The trial in this matter was held on April 30, and May 19, 2003, in Kalispell, Montana. Petitioner, Jonni Pekus, was present and represented by Ms. Laurie Wallace. Respondent, Uninsured Employers' Fund, was represented by Ms. Brenda Wahler. The alleged employers, Mike and Susan Yacos, were represented by Ms. Shelly F. Brander.

¶2 Exhibits: Exhibits 1 through 24, 28, 30, and 31 were admitted without objection. Exhibit 25 was admitted over objection. Exhibits 27 and 29 were withdrawn. The Court reserved ruling on Exhibit 26 but indicated it would be admitted if a proper foundation were laid. My trial notes do not indicate it was ever re-offered or admitted. After looking at the proposed exhibit, even if I admitted and considered the exhibit, it would not alter or affect my decision in this case.

¶3 Witnesses and Depositions: Claimant, Anita Vincent, Ruth Vincent, Chris Pohle, Jill Frampton, Susan Yacos, Mike Yacos, Joselyn Pekus, and Margaret Matters testified at trial. In addition the depositions of claimant, Susan Yacos, Mike Yacos, and Dr. John M. McGlothlin were submitted to the Court for its consideration.

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

> 4a Whether Petitioner suffered an occupational disease arising out of and in the course and scope of her employment with Mike Yacos.
>
> 4b Whether Petitioner is entitled to temporary total disability benefits and reasonable medical expenses related to the treatment of the occupational disease.
>
> 4c Whether Petitioner is entitled to an increase in award for unreasonable delay or refusal to pay proper workers' compensation benefits pursuant to §39-7l-2907, MCA.
>
> 4d Whether Petitioner is entitled to costs and attorney's fees pursuant to §39-71-611 and/or 612, MCA.

(Pretrial Order at 5.)

¶5 Dismissal of Susan Yacos: At trial Susan Yacos moved to dismiss on the ground that she had no ownership interest in the sawmill operation at which the petitioner alleges her occupational disease arose. Uncontroverted evidence showed that the sawmill is owned and operated by Mike Yacos as a sole proprietor. Counsel for both claimant and the UEF agreed Susan had no interest in the business and that she should be dismissed from the action. I granted the request.

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

FINDINGS OF FACT

Introduction

¶7 This case involves a claim of Jonni Pekus (Jonni) against her mother, Susan Yacos (Susan), her stepfather, Mike Yacos (Mike), and the Uninsured Employers' Fund (UEF). In December 2001, Jonni experienced severe low-back pain with numbness in her legs. She was ultimately diagnosed as suffering from a herniated disk at the L5-S1 level and underwent two back surgeries. Jonni alleges that her herniated disk was caused by repetitive trauma associated with her work at her stepfather's sawmill and seeks occupational disease benefits. At the time of the alleged disease, Mike was uninsured, therefore the claim found its way to the UEF, which denied liability.

¶8 The present litigation raises two questions. First, is Mike exempt from workers' compensation requirements and liability because Jonni lived with him and her mother for at least six months in each of 2000 and 2001 and was taken as a dependent on their income tax returns? Second, was her condition caused by her work at Mike's sawmill? While there is no question that Jonni suffered a herniated disk at the L5-S1 level, Susan and Mike urge that her condition is due to a non-work slip and fall at their residence in late December 2001. Jonni admits she slipped and fell, however, she testified that her back condition antedated the fall and that the fall was insignificant. The medical opinion attributing her condition to her work is predicated on that history.

¶9 Based on the demeanor of the witnesses testifying at trial, and my evaluation of their testimony, I came away from trial with strong impressions regarding the credibility of the trial witnesses, especially of Jonni, Susan, Mike, Jill Frampton (Jill), and Chris Pohle (Chris). My impressions were negative with respect to Jonni, Jill, and Chris, and positive with respect to Susan and Mike. My further consideration of their trial testimony, the depositions, and exhibits, has not changed my evaluation of their credibility.

Background

¶10 Jonni is presently twenty-one years old. Her date of birth is May 2, 1982.

¶11 Jonni's mother is Susan Yacos, who is divorced from Jonni's father. Susan married Mike Yacos when Jonni was eleven years old.

¶12 Jonni initially lived with her mother in California following Susan's divorce from Jonni's father. When Jonni was fourteen she went to live with her natural father, who also lived in California.

¶13 While in high school and still living with her father, Jonni started using illegal drugs, including, by her own admission, speed, heroin, and marijuana. (Pekus Dep. at 73.)

¶14 Jonni dropped out of high school in her senior year. Jonni's father contacted Susan and said he could no longer deal with Jonni.

¶15 By that time Susan and Mike were living near Bigfork, Montana on several acres of land. They have their residence there and Mike operates a small sawmill on the property. He buys logs and saws them into quarter rounds for house siding which he then sells in California. Mike also operates a small art gallery called the Echo Lake Gallery through which he markets log furniture and art.

¶16 Susan and Mike invited Jonni to come live with them but only on the conditions that she obtain her GED, obtain counseling to overcome her drug addiction, avoid drugs and alcohol, and get a job.

¶17 Jonni came to Montana in May or early June 2000, shortly after turning eighteen years old. She lived with the Yacoses from that time until sometime in July 2001. Since the end of July she has lived with her girlfriend, Jill Frampton, at Jill's residence.

Income and Support

¶18 Mike and Susan made a concerted effort to keep Jonni busy and out of trouble. Mike put her to work peeling logs and assisting with the operation of a portable band saw. He had her do other odd jobs, including staining and sanding furniture, running errands, and gathering "sticks" of two inches and under for use in building furniture. He also had her do jobs unrelated to his businesses, including helping paint the family home and helping restore old cars.

¶19 Jonni kept track of her own hours of work and gave them to Mike at the end of each week. He initially paid her $8 an hour but eventually raised her pay to $10 an hour.

¶20 The Yacoses testified that they also gave Jonni additional money to help her out with her expenses. (*See* summary in Exhibit 6.) The checks written to Jonni are found in Exhibit 3. A review of those checks, which is summarized in the Addendum to this decision, shows that most of them have specific notations indicating that the amounts were for her work. The work-related checks cover the entire period Jonni says she worked for her stepfather and the notations appear with regularity, indicating that it was Mike's and Susan's practice to memo checks that were remuneration for Jonni's work. Although Jonni testified to her "belief" that the total amounts of the work-related checks understated her work-related income, I am unpersuaded by her testimony and find that the memoed checks accurately reflect what was in fact paid to Jonni for her work, including the work unrelated to the sawmill.

¶21 Jonni lived with Mike and Susan from May or early June 2000 to sometime in July of 2001, which was more than six months during each year. Mike and Susan also provided Jonni with food and housing, directly paid some of her expenses, including her counseling bills, and, while they could, maintained medical insurance coverage for her.

¶22 Jonni's sole income in 2000 was from Mike and Susan.

¶23 In 2001 Jonni earned $1,770.72 from third parties - $906.72 working for Showthyme (a restaurant), $104.00 doing cleanup work for Margaret Matters, $500.00 helping David Lail restore an old car, and $260.00 for sticks she collected and sold to Bob Morris.[(1)] She earned $7,021.00 for work for Mike and at the Yacoses' residence. She reported only the $906.72 from Showthyme on her 2001 income tax returns.

¶24 Mike and Susan filed joint tax returns in 2000 and 2001. For each year Mike filed a Schedule C listing the income and expenses associated with his business. He did not deduct payments made to Jonni in either year.

¶25 In considering claimant's status for tax purposes, I also find that claimant was never a full-time student in either 2000 or 2001. She did go to some evening classes to obtain her GED, but those classes lasted only a few weeks. She obtained her GED in May 2001.

Workers' Compensation Coverage

¶26 Sometime prior to or shortly after Jonni started working for Mike, the Yacoses contacted the Department of Labor and Industry and inquired about the need to maintain workers' compensation coverage for Jonni. Based on the information they received, they understood that they did not have to provide coverage so long as they claimed Jonni as a dependent on their income tax returns.

Physical Requirements of Jonni's Sawmill Work

¶27 Jonni told various medical practitioners that she had worked as a "logger", stating to one that she had been a logger "for years" and to another that she had worked as a logger for two years. (Exs. 10b at 3, 10f at 26, and 28.) In fact, claimant's work as a "logger" - one who cuts down trees[(2)] - was limited to "sticks", which were small trees 1" to 2" in diameter, perhaps 3" or 4" at the outside. Mike did not log (cut down) larger trees, rather he purchased the larger "logs" from others. Jonni's work cutting small trees and in Mike's sawmill was limited to just over a year (June 2000 to the Fall of 2001), and even then was not on a full time basis. (*See* Addendum.)

¶28 Jonni's work at the sawmill did involve some heavy and repetitive labor. She peeled logs six to twenty-four inches in diameter and several feet long; "choked logs" (chained them for moving); rolled logs over; and at least in 2001, used a chain saw to cut logs to length. She also did clean-up around the mill.

¶29 Jonni portrayed her heavy work with logs as extensive. She testified that in both 2000 and 2001, Mike received two semi-truck loads of logs a week. Chris Pohle, a neighbor, testified on behalf of Jonni and supported her testimony. He testified that logging trucks were coming and going onto Mike's place all of the time, thus suggesting that Mike's mill business, and Jonni's work, involved a large volume of logs.

¶30 Jonni's and Chris' testimony concerning the volume of logs processed by Mike was not credible. In addition to my assessment of their demeanor and my impression of their overall credibility, their testimony is refutted by other evidence as follows:

> ¶30a Mike provided convincing testimony based on checks he wrote that he received two loads of logs in 2001.
>
> ¶30b Jonni's hours of work in 2001, calculated by dividing $8 an hour into her pay,[(3)] do not support the volume of logs she asserts were received and processed at the mill. As shown by the Addendum, in 2001 she worked half-time or less.
>
> ¶30c Moreover, a significant part of the work for which Jonni was paid in 2001 was non-mill work. The checks paid to Jonni in 2001, show that some of her hours were specifically related to her work at the Echo Lake Gallery. (*See* Addendum.) Mike also testified credibly that Jonni spent significant time in 2001 working around the family home, painting and chinking the home, and sanding and staining furniture, for which she was paid. He also paid her for assisting him in restoring old cars and to build furniture for herself.

¶31 Jonni's heavy and repetitive lifting was not limited to her job with Mike. While living with Mike and Susan, she frequented a gym in Kalispell and lifted weights. Weighing only 120 pounds, she bench pressed 120 to 125 pounds. (Pekus Dep. at 60.) She also engaged in other vigorous physical activities. In 2001, she biked, played softball throughout the summer, water skied, drove stock cars, hunted, helped haul out downed antelope in the Fall, and snow boarded in November.

Low-Back Problems and Treatment

¶32 After going to work with Mike, Jonni experienced back soreness. Mike specifically recalled her complaining of a sore back on one occasion during the first year and giving her the rest of the day off. (Mike Yacos Dep. at 87.) However, Jonni continued her usual activities and treated her sore back with sit-ups and exercise at the gym (*Id*.)

¶33 On June 20, 2001, Jonni sought chiropractic care. The chiropractic note for that visit states that she was complaining of parasthesias of both **arms**, aggravated by sleeping and abduction of the arms, as well as stiffness and soreness of the lumbar of the back. (Ex. 10a at 3.) There is no indication of which complaint was the more significant, and her arm numbness is clearly not connected to the present controversy. The office note also records

a history of multiple bike accidents, concussions, and a right hip dislocation.[4] The notes recorded her significant activities as "peeling logs *and* lifting," as well as "biking, [and] lifting wts [weights]." (*Id*.)

¶34 Jonni was treated a second time on June 22, 2001. At that time the chiropractor noted, "Still Painful SI jts [sacroiliac joints]" but indicated she was "better overall." (Ex. 10a at 1 and *see* Ex. 14a.)

¶35 Claimant did not return to the chiropractor until October 3, 2001, when she sought care for neck, shoulder, and thoracic pain following a stock car racing accident. (Ex. 10a at 1.) She did not mention low-back or leg pain in that visit. (*Id*.)

¶36 In December 2001, Jonni fell outside the Yacoses' house. Jonni admits she fell and that she was at the house on a social visit. She admits she laid on the floor following the fall. However, she alleges that she was experiencing leg numbness prior to the fall and that the fall occurred **after** a December 28, 2001 doctor visit which is discussed in the next paragraph. Her testimony regarding the time of the fall and the time she first experienced leg pain was disputed by Mike, Susan, and Joselyn Pekus, Jonni's younger sister.

¶37 On December 28, 2001, Jonni went to Dr. Lea Cornell,[5] a family practitioner, for back pain and numbness. (Ex. 10g at 2.) Jonni's complaints were new and different from the soreness she reported in her June chiropractic visits. The history provided to Dr. Cornell by Jonni was as follows:

> Here with a **1-week history** of severe low back pain associated with some leg numbness. Patient is very physically active and works as a log worker/millwright. She reports having off-and-on back strains for the last two years but none this severe. She has sought chiropractic care in the past, last visit one month ago.[6] She has been doing back exercises and taking Ibuprofen 800 mg but it is no longer helping. She has been unable to sleep. She reports no motor dysfunction in her lower extremities, no urinary or bowel dysfunction.

(*Id.,* emphasis added.) After examining Jonni, Dr. Cornell concluded that "her lower extremity numbness is from muscle spasms . . . " and prescribed physical therapy, pain relievers, and a muscle relaxant. (*Id*. at 1.)

¶38 On January 3, 2002, Jonni went to a nurse practitioner in Kalispell on account of "back pain x 5 days." The nurse's note states that "both leggs [sic] are going numb **started last week**." (Ex. 10k at 1, emphasis added.)

¶39 On January 9, 2002, Jonni underwent a physical therapy evaluation. At that time she reported a two-year history of "intermittent back pain" coinciding with "the logging business that she currently participates in." However, Jonni reported that her leg numbness began "**2 weeks ago**." (Ex. 10c at 9, emphasis added.)

¶40 On January 11, 2002, Jonni returned to Dr. Cornell, who recorded that Jonni "continues to have severe pain in the paraspinous muscles as well as along the iliosacral joints on both sides to palpitation. . . . She does have some numbness, particularly in the right upper thigh." (Ex. 10g at 1.) Dr. Cornell thereafter ordered an MRI and referred Jonni to Dr. J. Mark McGlothlin, a physiatrist.

¶41 Dr. McGlothlin examined claimant on February 7, 2002, after an MRI was done. At that time Jonni reported her history of back problems as follows:

> She states she has suffered for approximately a year and a half with significant stiffness in her low back, though **over the past 3 months her pain changed significantly and intensified as detailed below**.

(Ex. 10e at 35, emphasis added.) The intensification of symptoms referred to in the quoted language was **severe lumbar pain, left greater than right, with leg numbness and symptoms of ankle weakness**. (*Id*., emphasis added.)

¶42 Dr. McGlothlin reviewed the MRI and noted it "delineated evidence of central L5-S1 disc protrusion, abutting thecal sac and quite possibly impacting the transiting S1 root, though interestingly her symptoms are predominately noted in the L5 root level distribution, L [left] side only." (*Id*. at 38.)

¶43 In March 2002, Jonni underwent a discogram and CT scan. Those studies showed the bulging disk and an annular tear in the disk. (Dep. of Dr. McGlothlin, at 23, *see also, e.g.* Ex. 10h at 4; Ex. 10f at 24; Ex. 10i at 2.)

¶44 Jonni was then seen by Dr. Max Iverson, an orthopedic surgeon in Helena. On May 2, 2002, Dr. Iverson performed an Interdiscal Electro Thermal Annuloplasty (IDET). (Ex. 10j.) The procedure involves the application of high heat directly to the inside of the disk. (McGlothlin Dep. at 25.)

¶45 The IDET procedure initially reduced Jonni's pain (*see* Exs. 10i at 1 and 10c at 24), however, her pain thereafter rebounded (*see* Ex. 10e at 21). Dr. McGlothlin, who followed claimant after the IDET, ordered a repeat MRI on July 1, 2002. (*Id*.) The MRI disclosed "desiccation at the L5-S1 level" (Ex. 10e at 18, original capitalized), and persistent "protrusion at L5-S1 with posterior annular enhancement, compatible with her diagnosed annular tear." (*Id*. at 20.)

¶46 On November 11, 2002, Jonni underwent an L5-S1 decompressive laminectomy,[(7)] repair of a psudomeningocele,[(8)] and a posterior lumbar interbody fusion at the L5-S1 level.

Jonni's Fall and Homeowner's Insurance

¶47 As noted earlier, in December 2001, Jonni slipped and fell at the Yacoses' residence in late December 2001. Jonni testified that in March or April of 2002, **she** suggested to Susan

and Mike that they consider filing a claim for her with their homeowner's insurance company.

¶48 On April 19, 2001, Susan notified her homeowner's insurer of the accident. (Ex. 28 at 101.) She gave a date of December 10, 2001, as the date of the fall. (*Id*.) At trial, she testified that later on she reviewed her December 2001 calendar and determined that the December 10th date was erroneous. Based on the fact that she was in Arizona at the time of the fall, and that she returned the day after Jonni's fall, she determined that the fall actually occurred on December 19, 2001.

¶49 On May 9, 2002, an adjuster for the homeowner's insurance company met with Jonni and took her statement. In that statement Jonni said that December 10th sounded "about right" as the date of her fall. (Ex. 28 at 124.) She told the adjuster that prior to the fall she had soreness in her back due to heavy lifting when helping her stepfather build a house. (Ex. 28 at 129.) When asked "what happened" when she fell on December 10th, she responded that she fell on her back going up the steps to the Yacoses' house. (Ex. 28 at 128-29.) She went on to say:

> I was going outside to look at my stepfather's he rebuilds classic cars and my back had already been bothering me from just helping him out around the house and as I was coming back to the house as I was going up the stairs I fell really hard. **I couldn't get up. I felt numbness in my legs**. He [Mike] had to end up carrying me into the house and you know **I laid down for a while and a few days later that's when I started to see a doctor.** [Sic.]

(Ex. 28 at 125, original capitalized, emphasis added.)

¶50 Jonni was interviewed a second time on July 11, 2002, by a private investigator hired by the Yacoses' homeowner's insurance company. At that time, Jonni told the investigator that she had been having back pain since September 12, 2000, as a result of ongoing physical labor while working for her stepfather; however, **she again confirmed that she had fallen at the Yacoses' house, she "thought" on December 22, 2001.** (*Id*. at 146-48.) **She again said she fell "going up the stairs."** (*Id*. at 148, original capitalized, emphasis added.) **She told the investigator that she was "laying on the stairs in pain" when Mike saw her.** (*Id*. at 149, original capitalized, emphasis added.) **She said she experienced "sharp pains from the middle of my back all the way down my legs," and "intense throbbing sharp pain through the middle of my back and down my legs."** (*Id.,* original capitalized, emphasis added.) She said **she did "not want to move much" and went into the house and "layed down for a little bit."** (*Id*., original capitalized, emphasis added.) **She also told the investigator that she went to see a doctor on December 28th, after the fall**. (*Id*. at 150.

¶51 In a general discussion following the formal interview, the investigator told Jonni he could not tell her whether the homeowner's insurance would provide coverage. (Ex. 28 at 172-72a.) During that discussion, Jonni queried him about the possibility of a workers' compensation claim against Mike. (*Id*. at 172a -173.)

Workers' Compensation Claim

¶52 The day after the interview with the private investigator, attorney Diana Frampton,[(9)] wrote a letter to the Yacoses. In that letter she notified them, "Our firm has been retained to represent Jonni Pekus regarding injuries that she received while working for you." (Ex. 25 at 1.) The letter went on to state, "During her employment with Mike, Jonni injured her back and has been having severe medical problems because of those injuries." (*Id*.) The letter demanded payment for Jonni's medical bills.

¶53 Jonni testified that she consulted Diana Frampton prior to the July 11th interview.

¶54 On July 23, 2002, Jonni filed a claim for workers' compensation. (Ex. 24.) The claim described the injury as follows:

> Due to heavy repetitive lifting, minor stress fractures, where caused, in my L5-S1 Disc. After a period of time the stress fractures caused an Annular tear/Herniation to my L5-S1 Disc. Injury started On Sept. 12, 2000.

(*Id*.) Susan, on behalf of Mike, responded that the claim was "Completely Untrue." (*Id*.)

¶55 Jonni filed a second claim, received by the Uninsured Employers' Fund on August 29, 2002, listing a date of injury of January 21, 2002. It provided the following description of the alleged injury:

> Due to Repetitive heavy lifting minor stress fractures occurred to my L5-S1 Disc. After a period of time the Disc gave out. The diagnoses for my injury is Now called an Annular Tear w/ A severe herniation.

(Ex. 22.) The UEF denied liability for the claims.

Medical Opinion as to Causation

¶56 Dr. McGlothlin, who treated Jonni prior to and after her surgeries, testified by deposition. He was asked if he had an opinion as to whether the condition which led to her surgeries arose from a September 12, 2000 injury or was the result of repetitive trauma due to her work at the sawmill. (McGlothlin Dep. at 18.) Specifically, he was asked:

> Q Do you have an opinion whether Jonni's condition which led to the surgery and all the things we've been discussing, arises from the September 12th, 2000 injury or, conversely to that, whether it's a result of a repetitive trauma or occupational

> disease claim that occurred subsequent to that. And that's a yes-or-no question, do you have an opinion.
>
> A Yes.

As can be seen from the above, Dr. McGlothlin was provided with only two alternatives regarding causation, both of which were work related. The September 2000 date was obviously based on the date listed in Jonni's second claim.

Dr. McGlothlin responded to the question as follows:

> THE WITNESS: The key is basically the history that my patient provided me. She did not provide me history of a notal specific injury event. We sat down and reviewed her data when we first met.
>
> I guess the other key issue in terms of information that I've got, is she described participation on a repetitive basis and high-risk very physical work activity and described the onset of symptomotolgy that gradually worsened and worsened and worsened as she progressed through her activity profile.
>
> Q (By Mr. Lauridsen.) So your opinion, then, is what?
>
> A Is given the information that I have available, it would appear to be an occupational disease, without a particular notal event.

(*Id*. at 18-19.)

¶57 Dr. McGlothlin conceded in cross-examination that Jonni's condition was also consistent with a single trauma, including a slip and fall on ice. (*Id*. at 20, 24-25.) However, Jonni did not inform him of her December 2001 fall (*id*. at 9-11, 14, 49), even though she told an insurance investigator on July 11, 2001, that she had told Dr. McGlothlin about the fall but that "he did not seem to put that into his records." (Ex. 28 at 153, original capitalized.) Dr. McGlothlin also relied on Jonni's statement, that she had worked "for years" as a "logger," testifying:

> And I was impressed with the fact that she had said - she told me that she had worked for years as a logger.

(*Id*. at 10.) Dr. McGlothlin further testified that a herniated disk, such as Jonni suffered,

> "can develop as a result of a specific focal traumatic event or they can occur through a cascade of degenerative changes. So there's really not any way to discriminate. **We really end up having to rely on history, I think, to pin that down**."

(*Id*. at 15, emphasis added.)

¶58 As set forth in the preceding paragraph, the factual predicates to Dr. McGlothlin's opinion were his understanding that Jonni did not suffer trauma which might explain her condition and that she worked at hard labor as a "logger" for "several years." If those predicates are in fact untrue, Dr. McGlothlin's causation opinion is entitled to little if any weight.

Resolution of Causation Issue - A Question of Credibility

¶59 Resolution of the causation depends on (1) whether Jonni fell prior to the onset of her significant symptoms; if so, (2) whether the fall was significant; and, (3) whether the physical demands and duration of her work for Mike was consistent with Dr. McGlothlin's understanding. The answers to these questions depend on my assessment of the credibility of the lay witnesses who testified in this case, most importantly on my assessment of Jonni's testimony.

¶60 In considering Jonni's credibility, I initially note that if her statements to the insurance adjuster and private investigator are believed, then she suffered a significant fall **before** December 28, 2001, and that the fall triggered severe back pain and numbness in her legs. At trial, Jonni testified that she lied to the adjuster and investigator and then blamed her lies on her mother.

¶61 Some of Jonni's statements to the homeowner's insurance adjuster and investigator were clearly false. She told the adjuster on May 9th that she had moved from her mother's house only a month before the interview (Ex. 28 at 130), but testified at trial that she moved out in early July.[(10)] She also told the adjuster that she had never seen a doctor about her back prior to her fall (Ex. 28 at 129-130), yet she had seen a chiropractor in June 2001 and clearly recalled doing so. When asked by the adjuster whether she was working before the fall, she said she "rebuilt classic cars . . . working on my own" and had also done some bartending "on the side" (*id*. at 130-31), which at best was a half truth. She also told the adjuster that she had developed back soreness helping her stepfather build a house and barn. (*Id*. at 129, 134.) Significantly, she did not mention working at the sawmill.

¶62 If her trial testimony is believed, Jonni also lied about the date of her fall and her leg numbness coming on immediately after the fall. In her first interview she said that she felt numbness in her legs immediately *after* falling (Ex. 28 at 125, 150) and denied prior back problems other than the "usual soreness" (*id*. at 129). In the second, July 11th interview she said that the fall occurred on December 22nd, thus her visit to the doctor on December 28th was *after* the fall. (*Id*. at 148-150.) But at trial she claimed that her leg numbness started *before* the fall and that the fall was after her December 28th doctor's visit. In both interviews she said she fell on the stairs. (*Id*. at 125, 148.) At trial, she denied falling on the stairs, testifying that she fell about 100 yards from the house.

¶63 I do not believe Jonni's present claim that her severe back and leg pain arose prior to her fall and that her fall was insignificant. My disbelief is based on my assessment of her demeanor and credibility at trial, as well as my assessment of the credibility of the other witnesses. That assessment is supported by specific credible evidence. More specifically, but not exhaustive:

> ¶63a Jonni never repudiated the fact that she fell at her mother's and stepfather's house or that following the fall her pain was so severe that she had to lay down.
>
> ¶63b In statements to her physicians, Jonni exaggerated the extent and duration of her work for Mike. For example, she said on at least one occasion that she had been a logger for years.
>
> ¶63c Jonni exaggerated her work for Mike. She portrayed her work as full time or better and as involving lots of heavy labor. Checks for her work show that on average she worked only part time. Her claim that Mike was obtaining two loads of logs a week in 2001 is contradicted by actual purchases of logs.
>
> ¶63d According to her own testimony, Jonni lied about some of the facts concerning her fall at the Yacoses' house, thus calling her own credibility into question.
>
> ¶63e The December 19th date of the fall which Jonni provided to the investigator during her July 11th interview closely corresponds to the December 22nd day ultimately fixed by her mother. **Significantly, at the time Jonni provided the investigator with the December 22nd date of her fall, Jonni had stopped speaking to her mother[(11)] and had already visited with an attorney.**
>
> ¶63f In the summer of 2001, there was a falling out between Jonni and her mother, and the Yacoses asked Jonni to leave. While there is a dispute over why they kicked her out, there is substantial and persuasive evidence that it was on account of Jonni's continued drug use (she admitted continuing to use marijuana, including smoking it with Chris Pohle, one of the witnesses testifying on her behalf), and her driving home drunk, a fact Jonni admitted. Without regard to the Yacoses' justification for kicking her out, and assuming that they did so on account of her relationship with Jill, as Jonni asserts, the Yacoses continued to provide substantial support to Jonni in the form of continued work, gifts, access to the family home, and help with her expenses, including substantial payments for her medical bills. At least they did so until the Spring of 2001. It was after they stopped their support of Jonni that this action ensued.
>
> ¶63g Jonni testified that Susan and Mike just laughed about her smoking marijuana. Chris testified that Jonni told him that her parents were okay with her smoking marijuana in the car but not in the house. Jonni's testimony and the statement attributed to her by Chris are incredible in light of the rules laid down by Susan and

Mike concerning her use of drugs and counseling. Such statements are totally out of character for them and I do not believe either statement attributed to them by Jonni.

¶63h Jonni's physical activities in the summer and fall of 2001 are inconsistent with the degree of back problems she claims she suffered during that period. As noted earlier, during the summer of 2001 she played softball regularly, although she asserts she missed two games on account of back soreness. She water skied and drove stock cars that summer, and hunted and snow boarded in the fall.

¶63i Jonni also continued to work out in the gym. Although she claims she stopped working out at the gym after moving out of her mother's house, an office note of her family physician on September 28, 2001, contradicts her testimony and is a further instance of Jonni's recorded statements being at odds with her testimony. The medical note reflects:

> She . . . is extremely physically fit. She exercises **two hours a day five days a week with a combination of aerobics and weights.**

(Ex. 10b at 3, emphasis added.)

¶63j The September 28, 2001 office note referred to in the preceding paragraph also records:

> She [Jonni] works as a millwright at her father's lumber mill in Bigfork. She will be assuming full ownership as he will be retiring in the near future to pursue his art career. She has been in the logging business for several years now.

(*Id*.) This statement to her physician is plainly an exaggeration.

¶63k Jonni and Jill have portrayed Jonni as having severe back and leg pain prior to December 2001. Jonni testified that her back was sore all the time during the summer of 2001, and that by the end of the summer she had leg pain. According to Jill, claimant was constantly sore throughout the summer and further testified that by November Jonni was limping. Jill was the only witness indicating that Jonni was limping. This testimony was inconsistent with Jonni's physical activities during that time and I find it incredible.

¶63l The lack of medical attention for back complaints from late June until December 28, 2001, is inconsistent with Jonni's and Jill's testimony and especially with Jill's tetimony that Jonni began limping in November. Jonni's visits to a chiropractor in June and on October 3, 2001, and to a family physician on September 28, 2001, indicate that she was not hesitant about seeking medical care, yet there is no record of her seeking treatment for back pain from June 22, 2001 until December 28, 2001. Significantly, she did not report back pain to her chiropractor

on October 3, 2001, or to her family physician on September 28, 2001. The September 28, 2001 visit to her family physician is especially significant in this regard. The office note shows that she reported her prior bike racing accidents and her heavy workouts. It also notes that she "reports increased fatigue and decreased stamina . . . over the past several weeks." (Ex. 10b at 3.) Jonni testified that she in fact reported back pain to the doctor on the September 28th visit, but claims that the information was overlooked by the doctor. With the sort of detail reflected in the doctor's office note, especially the report of Jonni's continued vigorous exercise and weight lifting, it is difficult for me to believe that the doctor would have overlooked complaints of back pain. I am convinced that Jonni did **not** in fact report back pain and in fact was not suffering back pain to any significant degree.

¶63m Jill's testimony about Jonni limping by November also flies in the face of the history Jonni provided to medical providers on December 28, 2001 and in January. Dr. Cornell's office note of December 28, 2001, indicates a one-week history of numbness. Moreover, Jonni testified that the numbness began only several days prior to December 28th. The nurse practitioner's record of a January 3, 2002 visit indicates back pain of five days duration and leg numbness beginning "last week." A physical therapy record of January 9, 2002, noted that Jonni "reports approximately 2 weeks ago she had the onset of numbness in bilateral legs . . . ." (Ex. 10c at 9.)

¶64 In her proposed findings of fact, Jonni attacks the credibility of Mike and Susan, noting numerous discrepancies between their testimony and prior statements. I have examined the alleged discrepancies, and there certainly are some, but they are not of the nature and magnitude of Jonni's, and many were satisfactorily explained. For example, Jonni alleges that Susan asserted in an interview with the insurance investigator that she paid $20,000.00 of her medical bills, whereas she paid only $5,304.58. (Ex. 28 at 200.) A careful reading of Susan's statement does not corroborate the assertion. Rather, I read it as indicating the Yacoses spent a total of $20,000.00 on claimant, not just in medical bills, an assertion that is close to the mark.

¶65 Moreover, the bottom line in this case is whether *Jonni was telling the truth* at trial about her severe back pain and leg numbness arising prior to the fall at her mother's and stepfather's house, about the fall being insignificant, and about her work for Mike.

¶66 The medical opinion relating Jonni's condition to her work was expressly predicated on the **lack** of any traumatic event which might explain her condition and on her history of being a "logger for years." Those factual assumptions were not true. In light of Dr. McGlothlin's testimony that a single traumatic event, including a slip and fall on ice, could have caused Jonni's condition and his express reliance on the lack of a history of such a fall, his causation opinion is unpersuasive. Jonni has failed to persuade me by a

preponderance of credible evidence that the back condition for which she sought treatment on December 28, 2001, was caused by her work for Mike.

Conclusions of Law

¶67 This case arose either under the 1999 or 2001 version of the Occupational Disease Act (ODA) since claimant's alleged occupational disease arose and was reported during that time frame. It makes no difference which one applies since the applicable provisions of the ODA were the same under both versions.

¶68 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).

¶69 Initially, there is an issue of whether Mike was exempt from workers' compensation coverage requirements. If he was then neither the UEF nor Mike is liable for Jonni's condition even if it is deemed an occupational disease.

¶70 Mike relies on section 39-71-401(2)(c), MCA (1999-2001), as exempting him from the ODA. That section, which applies to both the Montana Workers' Compensation Act and the ODA, provides as follows:

> (2) Unless the employer elects coverage for these employments under this chapter and an insurer allows an election, the Workers' Compensation Act does not apply to any of the following employments:
>
> . . .
>
> (c) employment of a dependent member of an employer's family for whom an exemption may be claimed by the employer **under the federal Internal Revenue Code;** [Emphasis added.]

¶71 The applicable Internal Revenue Code provisions are found in Title 26 USC §§ 151 and 152. The sections govern exemptions for dependents. Section 151(c)(1) provides in relevant part:

151. Allowance of deductions for personal exemptions.

> **(a) Allowance of deductions.** --In the case of an individual, the exemptions provided by this section shall be allowed as deductions in computing taxable income.
>
> . . .
>
> **(c) Additional exemption for dependents.** --

> **(1) In general.** --An exemption of the exemption amount for each dependent (as defined in section 152)--
>
> **(A)** whose gross income for the calendar year in which the taxable year of the taxpayer begins is less than the exemption amount, **or**
>
> **(B)** who is a child of the taxpayer and who (i) has not attained the age of 19 at the close of the calendar year in which the taxable year of the taxpayer begins, or (ii) is a student who has not attained the age of 24 at the close of such calendar year. [Emphasis added.]

Subsections (c)(1)(A) and (c)(1)(B) provide alternative tests for determining whether there is an exemption.

¶72 Mike and Susan filed their tax returns on a calendar year basis. In 2001 Jonni qualified as a "member of the employer's family" under section 39-71-401(2)(c), MCA (1999-2001). 26 USC § 142 (a)(1) and (2).[(12)] However, she did not qualify for an exemption under section 26 USC 151(c)(1)(B) since she had "attained the age of 19" prior to the "close of the calendar year" 2001 and she was not a student as defined in subsection (c)(4) of section 151, which provides as follows:

> **(4) Student defined.** --For purposes of paragraph (1)(B)(ii), the term "student" means an individual who during each of 5 calendar months during the calendar year in which the taxable year of the taxpayer begins-
>
> **(A)** is a **full-time student** at an educational organization described in section 170(b)(1)(A)(ii); or
>
> **(B)** is pursuing a **full-time course of institutional on-farm training** under the supervision of an accredited agent of an educational organization described in section 170(b)(1)(A)(ii) or of a State or political subdivision of a State. [Emphasis added.]

Thus, she must qualify as a dependent, if at all, under subsection (c)(1)(A) of section 151.

¶73 Assuming she otherwise met the definition of "dependent", subsection (c)(1)(A) requires that Jonni's gross income for the tax year in question was less than the amount of the exemption. The amount of the exemption specified in 26 USC section 151(d)(1) is $2,000,[(13)] however that amount is subject to an inflationary clause,[(14)] which Jonni concedes has increased to $2,900 in 2001. (Petitioner's Proposed Findings of Fact and Conclusions of Law, ¶ 95.) The question then is whether Jonni's gross income for 2000 was greater than $2,900.

¶74 Gross income for federal tax purposes is defined in 26 USC § 61(a). As applies to this case, the section provides:

> (a) General definition.--Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:
>
> (1) Compensation for services, including fees, commissions, fringe benefits, and similar items;
>
> . . .

As set forth in the findings of fact, Jonni received compensation for services from her parents as well as from others. While the compensation from others did not exceed $2,900 in 2001, her total compensation did. Thus, if the income she earned from working for her stepfather is considered reportable gross income, her 2001 earnings of $7,021 for work for her stepfather must be added to the $1,770 she earned from others. The resulting amount exceeds the $2,980 exemption amount which would allow her mother and stepfather to take her as a dependent in 2001.

¶75 Thus, the final question in this analysis is whether the Internal Revenue Code allows exclusion from her gross income of the income she "earned" for services provided to her stepfather. I do not dismiss that possibility as 26 USC § 152(a) states that a dependent is a child who receives one-half from her parents during the tax year. Does support include amounts paid for work performed for the parents? If so, does the definition of income in 26 USC § 152(a) nevertheless require the inclusion of such amounts in the child's gross income?

¶76 These are intriguing questions, ones that I would research if compelled to do so. Indeed, I have made an initial research effort. I have reviewed the section titles of the Internal Revenue Code which deal with "Items Specifically Excluded From Gross Income." The sections are 26 USC §§ 101 through 139. Based on the section titles, none appear to exempt income received for services rendered to a parent. Thus, at first glance, it appears Jonni did not qualify as a dependent under 39-71-401(2)(c), MCA (1999-2001), and therefore was not an exempt employee. But given the fact that none of the parties have addressed these questions and my ultimate resolution of the substantive issue in this case, I have not embarked on further research. I therefore make no final decision on the matter. In that light, I also decline consideration of Jonni's constitutional challenge to section 39-71-401(2)(c), MCA (1999-2001).

¶77 I turn to the question of whether Jonni's herniated disk was caused by her work for Mike. Under the ODA, the claimant must prove that her condition was caused by work-related exposures or trauma occurring over more than one work shift. Section 39-72-102 (10), MCA (1999-2001), provides in relevant part,

> (10) "Occupational disease" means harm, damage, or death as set forth in 39-71-119(1) **arising out of or contracted in the course and scope of employment and**

> **caused** by events occurring on more than a single day or work shift. . . . [Emphasis added.]

The ODA also contains a proximate cause provision, found at section 39-72-408, MCA (1999-2001). The section provides in relevant part:

> **39-72-408. Proximate causation -- determination by treating physician**. (1) Occupational diseases are considered to arise out of the employment if:
>
> (a) there is a direct causal connection between the conditions under which the work is performed and the occupational disease;
>
> (b) the disease can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment;
>
> (c) the disease can be fairly traced to the employment as the proximate cause;
>
> (d) the disease comes from a hazard to which workers would not have been equally exposed outside of the employment.

Subsections (a) and (c) were not satisfied in this case as claimant failed to prove by a preponderance of the evidence that her condition was directly caused by and is fairly traceable to her employment with Mike. The medical opinion relating her condition to her work was expressly predicated on the claimant's representation that she had worked for many years as a logger and, more importantly, on the lack of any traumatic event which could have caused her condition. In fact, the evidence in this case shows that in late December 2001, the claimant suffered a significant trauma which could explain her condition. Moreover, her significant symptoms followed on the heels of that event. The factual predicates for the medical opinion supporting her claim are therefore lacking and she has failed to carry her burden of persuasion.

Judgment

¶79 The parties agree that Susan Yacos had no interest in the sawmill operation at which the claimant asserts she suffered an occupational disease. Therefore, Susan Yacos is dismissed as a respondent.

¶80 Claimant has failed to persuade the Court that her herniated disk is the result of an occupational disease suffered while she worked for Mike Yacos. She is not entitled to any relief and her petition is **dismissed with prejudice**.

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

¶82 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 12th day of January, 2004.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Ms. Laurie Wallace
Ms. Brenda Wahler
Ms. Shelley F. Brander
Attached: Addendum
Submitted: June 3, 2003

CHECKS FROM MIKE & SUSAN YACOS TO JONNI PEKUS

2000	**Memo entry**	**Amount - work**	**Amount - other**	**Work hours @ $8**	**Hours of work**
06/30/00	06/23	$175		21.875	
07/05/00			$175		21.875
07/08/00	Log clearing	$235		29.375	
08/11/00	33 hours	$297		37.125	
08/07/00	cell & July ins		$180		22.5
08/24/00	wk 14-18	$234		29.25	
09/04/00	peeling logs	$261		32.625	
09/16/00	lumber mill	$472		59	
10/01/00			$265		33.125
10/11/00	15 hours	$135		16.875	
10/06/00	work	$800		100	
11/19/00	labor	$575		71.875	
12/11/00	labor	$927		115.875	
01/03/01	labor	$503		62.875	
TOTALS		**$4,614**	**$620**	**576.75**	**77.5**
2001					
01/10/01	labor	$396		49.5	
01/19/01			$300.00		37.5
01/22/01	work	$459		57.375	
02/08/01			$200		25

03/12/01	work	$700		87.5	
04/09/01	labor	$149.00		18.625	
04/21/01	labor	$247.00		30.875	
			$234.00		29.25
05/21/01			$20.00		2.5
06/05/01	work	$350.00		43.75	
06/16/01			$214.00		26.75
07/05/01	work	$224.00		28	
07/10/01	labor - logs	$252.00		31.5	
07/24/01	labor	$447.00		55.875	
07/27/01	labor	$356.00		44.5	
08/13/01	labor	$356.00		44.5	
08/18/01	labor	$500.00		62.5	
08/28/01	labor	$387.00		48.375	
09/01/01	labor	$399.00		49.875	
09/08/01	labor	$525.00		49.5	
09/14/01			$912.00		114
09/22/01			$373.50		46.6875
09/22/01			$503.00		62.875
10/05/01			$638.50		79.8125
10/19/01	work	$387.00		48.375	
10/23/01			$346.00		43.25
10/30/01	Contracting	$200.00		25	
11/02/01	Echo Lake Gallery	$205.00		25.625	
11/09/01	Echo Lake Gallery	$111.00		13.875	
11/14/01	Echo Lake Gallery	$100.00		12.5	
11/16/01	Echo Lake Gallery	$106.00		13.25	
12/02/01	Echo Lake Gallery	$95.00		11.875	
12/10/01			$300.00		37.5
12/12/01	Echo Lake Gallery - sticks	$70.00		8.75	
12/23/01			$200.00		25

TOTALS	**$7,021.00**	**$4,241.00**	**861.5**	**530.125**

1. She sold some sticks to Bob Morris (Morris) in December of 2001, for which she received direct payment of $60. (Ex. 11 at 5.) She also testified that she sold some sticks to Morris earlier but that Morris paid Mike for those sticks and then Mike paid her. There is a check from Mike to Jonni for $200 dated October 30, 2001, which is for "contracting." I infer and find on a more likely-than-not basis that the check was for the sticks she collected and sold to Morris.

2. Encyclopedia Britannica, 2003 Electronic Edition, defines a logger as one engaged in logging. Logging is defined as the harvesting of trees. The definition accords with the common understanding of the term.

3. I did not factor in her raise to $10 an hour.

4. Jonni raced mountain bikes as a teenager and suffered several concussions and hip injuries in 1995 and 1996. (Ex. 10b at 3; Pekus Dep. at 91-94.) However, there is no evidence of specific back injuries due to those incidents.

5. The visit in question is part of what is labeled by the parties as records of Dr. Jenko. However, the physician's initials for this visit and for a subsequent January 11, 2002 visit are "LC." A quick internet telephone book search shows that Dr. Jenko is with the Bigfork Medical Clinic. Two other physicians are listed as practicing with the clinic. One is Dr. Lea Cornell, whose initials are "LC." Moreover, a February 7, 2002 letter of Dr. J. Mark McGlothlin, a physiatrist, is addressed to Dr. Cornell and indicates that Dr. Cornell was in fact treating claimant.

6. The reference in Dr. Cornell's note is probably to the October 3rd visit. (*See* ¶ 35.) That visit, however, was **not** for low-back pain, rather it involved treatment for neck, shoulder, and thoracic pain suffered by claimant following a car crash in a stock car race. (Ex. 10a at 1.)

7. A decompressive laminectomy is the removal of the lamina and spinus process to relieve nerve root pressure.

8. A pseudomenigocele is a collection or pocket of spinal fluid.

9. Diana Frampton is a cousin of Jill Frampton, with whom Jonni has lived since the end of July 2001.

10. Other testimony establishes that she in fact moved out sometime in July, but probably later in the month. Susan thought it was as late as August because she would not have allowed Jonni to take the truck after she moved out on account of insurance considerations. However, other testimony indicates that Jonni did not take the truck with

her when she moved out and only started driving it again after the insurance issue was ironed out.

11. Jonni testified she stopped speaking to her mother in May 2002.

12. 26 USC § 152(a) provides in relevant part:

> (a) General definition.--For purposes of this subtitle, the term "dependent" means any of the following individuals over half of whose support, for the calendar year in which the taxable year of the taxpayer begins, was received from the taxpayer (or is treated under subsection (c) or (e) as received from the taxpayer):
>
> (1) A son or daughter of the taxpayer, or a descendant of either,
>
> (2) A stepson or stepdaughter of the taxpayer,
>
> . . .

13. 26 USC § 151(d)(1) provides in relevant part:

> **(d) Exemption amount.** --For purposes of this section--
>
> **(1) In general.** --Except as otherwise provided in this subsection, the term "exemption amount" means $2,000.

I have reviewed the exceptions to the $2,000 amount and none of them apply.

14. 42 USC (d)(4) provides in relevant part:

> **(4) Inflation adjustments.** --
>
> **(A)** Adjustment to basic amount of exemption.--In the case of any taxable year beginning in a calendar year after 1989, the dollar amount contained in paragraph (1) shall be increased by an amount equal to--
>
> **(i)** such dollar amount, multiplied by
>
> **(ii)** the cost-of-living adjustment determined under section 1(f)(3) for the calendar year in which the taxable year begins, by substituting "calendar year 1988" for "calendar year 1992" in subparagraph (B) thereof.