IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

WCC No. 9305-6795

INDUSTRIAL INDEMNITY INSURANCE COMPANY

Petitioner

vs.

ROBERTA RYAN

Claimant/Respondent/Cross-Petitioner.

ORDER ADOPTING FINDINGS OF FACT AND CONCLUSIONS OF LAW OF HEARING EXAMINER AND ENTERING JUDGMENT

The above-entitled matter was duly heard by Court-appointed Hearing Examiner, CLARICE V. BECK, who conducted the hearing, considered the evidence and prepared and submitted Findings of Fact and Conclusions of Law and Proposed Judgment for consideration by the Court.

Thereupon, the Court considered the record in the above-captioned matter, considered the Findings of Fact and Conclusions of Law and Proposed Judgment of the Hearing Examiner and does hereby make and enter the following Order and Judgment.

IT IS HEREBY ORDERED the Findings of Fact and Conclusions of Law and Proposed Judgment of the Hearing Examiner are adopted.

IT IS FURTHER ORDERED the Judgment is to be entered as follows:

JUDGMENT

1. This Court has jurisdiction over this matter pursuant to section 39-71-2905, MCA.

2. Claimant is not entitled to further compensation benefits on account of her August 25, 1986 injury.

3. Claimant is not entitled to attorney fees, costs or a penalty.

4. The JUDGMENT herein 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 this Order Adopting Findings of Fact and Conclusions of Law and Proposed Judgment of the Hearing Examiner and Entering Judgment.

DATED in Helena, Montana, this 30th day of November, 1994.

(SEAL)

/s/ Mike McCarter
JUDGE

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

WCC No. 9305-6795

INDUSTRIAL INDEMNITY INSURANCE COMPANY

Petitioner

vs.

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Respondent/Claimant/Cross-Petitioner.

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The trial in this matter was held on October 11, 1994, in Missoula, Montana before Court-appointed Hearing Examiner, Clarice V. Beck. Petitioner, Industrial Indemnity Insurance Company (Industrial Indemnity), was represented by Mr. Charles E. McNeil. Respondent\claimant\cross-petitioner, Ms. Roberta Ryan (claimant or Ryan), did not appear at trial or provide any information regarding her failure to appear. At trial no witnesses were called. Exhibits 1-41 were admitted into evidence. The depositions of Dr. Stephen Ellis, Sue Hash and Nancy Conley were admitted and will be considered in the decision. (Claimant participated in all three depositions.)

Industrial's Petition for Hearing was filed on May 21, 1993. A pretrial conference was scheduled for July 27, 1993, and the trial was set for August 30, 1993, in Missoula, Montana. Claimant did not appear at the time set for the pretrial conference and petitioner requested the trial be vacated and reset. Subsequently, by motion filed August 2, 1993, claimant also requested a continuance. The trial was reset to November 8, 1993. On September 8, 1993, due to the appointment of a new Workers' Compensation Judge, the trial was reset to January 17, 1994.

In her initial response Ryan questioned the appropriateness of the insurer petitioning for a determination of her benefits. To address this question, on November 3, 1993, the Court

ordered Industrial Indemnity to show cause why its petition should not be dismissed, and vacated the trial setting. In response to this order Ryan filed a motion for an emergency telephonic hearing requesting a lump sum advance and raising numerous other issues for the Court's consideration. Due to the ambiguity of Ryan's request, the Court ordered Ryan to clarify her position. Ryan was specifically advised that should she wish to pursue her requests, her issues would be treated as a counter-petition. On December 13, 1993, Ryan requested that her issues be considered as a counter-petition, thus placing the issue of her entitlement to benefits before the Court.

On January 24, 1994, claimant advised the Court of her preference to have the trial held in Billings, Montana during the week of April 25, 1994. This request was granted. On March 21, 1994, claimant requested a further continuance. The request was granted and the trial was reset to the week of August 15, 1994, in Billings, Montana.

Thereafter a telephonic conference was arranged by the Court and conducted by Judge McCarter. The claimant requested that the venue be changed and the trial reset in Missoula. This request was granted and the trial was reset to October 11, 1994, in Missoula, Montana. An Order Regarding Scheduling was issued by the Court on August 3, 1994. The parties were advised that no further continuances would be granted.

A pretrial conference was held as scheduled on October 3, 1994, in Missoula, Montana. Counsel for Industrial Indemnity, Mr. Charles E. McNeil, was present. Claimant did not attend and did not inform the Court why she failed to do so.

On October 11, 1994, the trial was convened as scheduled at 9:00 a.m. in Missoula, Montana. Claimant was not present. The Court recessed and reconvened the trial at 1:00 p.m. to avoid any confusion which may have occurred as the result of the Pretrial Order indicating the trial was scheduled for 1:00 p.m. rather than 9:00 a.m. Ms. Ryan did not appear and did not contact the Court. Industrial Indemnity presented its case through exhibits and depositions. At the close of the proceeding the parties were directed to file proposed findings of fact and conclusions of law on or before October 31, 1994. (Trial Minutes; Memo of October 14, 1994.) The Court file shows the certified mail containing the minutes of the trial and the memo of October 14, 1994, were signed for by John Ryan, claimant's spouse. The time has expired for the filing of proposed findings of fact and conclusions of law. The Court has received proposed findings from Industrial Indemnity but not from Ryan. The matter is deemed submitted.

Issues Presented: Industrial Indemnity requests a determination of its further liability, if any, on account of claimant's August 25, 1986 injury. Ryan in her pleadings requested temporary total or permanent total disability benefits, 500 weeks of permanent partial disability benefits, a lump sum conversion of any benefits to which she may be entitled, attorney fees and costs, and a twenty (20%) percent penalty. Ryan did not appear at trial or

at the pretrial conference and did not present any witnesses, exhibits or other evidence in support of her requests.

Having considered the Final Pretrial Order, the deposition testimony, the trial exhibits and petitioner's brief, the Court makes the following:

FINDINGS OF FACT

1. At the time of trial claimant was 55 years old (Ex. 20-1) and living in Newcastle, Wyoming. (See July 22, 1994 document entitled Claimant Will Not Be Filing Any Other Responses or Pleadings until Further Notice.)

2. Claimant completed high school. Beginning in 1960 she worked five years for an insurance company performing typing, filing and general office duties. From 1965 to 1975 she was self-employed by "Ace Import Hdq.'s" doing bookkeeping and general office work. From 1983 to 1985 she was self-employed at "John Ryan Mtr. Co." in Corvallis, Montana as a receptionist, bookkeeper. Additionally, she performed general office duties. (Ex. 2-3.)

3. Beginning January 14, 1986, claimant worked as a nurse's aide for Valley View Estates. (Ex. 4-1.) An Employee Performance Evaluation of the claimant dated May 21, 1986, rated her overall performance as good and noted she was a "good worker - always cheerful!" (*Id.)*

4. Valley View Estates was enrolled from January 1, 1986 to January 1, 1987, under Plan II and Industrial Indemnity was its insurer.

5. On August 25, 1986, claimant reported two incidents involving the lifting of patients. The first incident occurred when claimant was lifting a resident from a chair to a walker and the resident leaned back instead of standing. The second incident occurred as claimant and another aide were lifting a patient from a bath chair. Claimant reported the second aide did not lift properly. (Exs. 5, 6, and 7.) These incidents resulted in injury to the claimant's lower back. (Ex. 7.)

6. Dr. Stephen S. Ellis was the claimant's treating physician prior to and after the August 25, 1986 injuries. Dr. Ellis first treated claimant for her injury on September 4, 1986. (Ellis Dep. at 6.) His physical examination revealed:

Exam shows the pain is localized in the upper lumbar area. Exam is compatible with Para Lumbar spasms. I think she has Myofascial syndrome. Will treat with Naprosyn, Flexeril, C.A.S.E. . . . If not better in a week, return to clinic, sooner if she gets worse.

Ex. 1-1. Dr. Ellis completed an Attending Physician's First Report following this exam. He noted that permanent disability would "[p]robably not" result from this injury. (*Id.* at 4.)

7. Claimant returned to work without any lost time. She continued working as a nurse's aide.

8. On October 29, 1986, claimant returned to Dr. Ellis. She complained of "some back pain again and now is having some pain in both arms." Flexeril and Motrin were prescribed. (*Id*. at 1.) Dr. Ellis did not think she had carpal tunnel syndrome as her complaints were of "arm" pain, not "wrist pain." (Ellis Dep. at 8, 13.) Dr. Ellis wrote a prescription stating "No heavy lifting 2 wk." (Ex. 9.)

9. Claimant was off work beginning on October 29, 1986. (Exs. 9 and 10.) She was paid temporary total disability benefits from October 28, 1986 through November 15, 1986, a period of 2 and 5/7 weeks, at the rate of $108.00 per week. (Ex. 11.)

10. Claimant returned to Dr. Ellis for a complete physical on November 3, 1986, at which time she told the doctor her back and arms were improving. (Ellis Dep. at 9; Ex. 1-2.)

11. Thereafter, claimant returned to work at Valley View Estates in her regular position as a nurse's aide. An employee performance evaluation in January, 1987, sets forth an overall rating of "excellent" as well as "excellent" ratings for job performance, dependability, and cooperation. The reviewing officer on behalf of the employer was Linda Sue Hash. (Ex. 12-1.)

12. Following the November 3, 1986 examination by Dr. Ellis, claimant did not seek medical treatment again until March 2, 1987. The purpose of her March 2 visit was to consider hormone treatment. She did not complain to Dr. Ellis about her neck, back or upper extremities. (Ellis Dep. at 9-10; Ex. 1-2.)

13. On March 13, 1987, the adjuster for Industrial Indemnity wrote to Dr. Ellis and requested his professional opinion as to whether the claimant had reached maximum healing and whether there was an impairment rating, and if so, what percentage of an impairment rating. (Ex. 12.) Dr. Ellis responded by letter dated March 18, 1987.

It is my opinion that this patient has reached maximum healing. I do not feel there will be any impairment rating or any significant disability from this condition.

(Ex. 14.) Dr. Ellis further noted his belief that claimant had been back to full activity since about November 10th and that she still needed muscle relaxants when she did heavy lifting. He suggested that if she had further problems she should have an evaluation by a neurologist.

14. Dr. Ellis, the treating physician throughout the relevant time periods, testified to his opinions to a reasonable degree of medical certainty. (Ellis Dep. at 5-6.) He testified that all conditions for which he treated claimant following the injury of August 25, 1986, had reached maximum healing prior to April 3, 1987, and in fact prior to March 18, 1987. Dr. Ellis testified as follows:

Q: Did you indicate in that letter [Exhibits 1-5, 14-1] that her back condition, her neck condition and upper extremities had reached maximum medical healing?

A: Yes.

(Ellis Dep. at 10.)

Q: [A]s to your opinion whether maximum medical healing was achieved by your letter of March 18, 1987, did that opinion relate to all conditions for which you treated her?

A: Yes.

(Ellis Dep. at 69.)

15. On May 28, 1987, the claimant signed both a Claim for Compensation and a Combination Employer's Report of Notice and Employee's Claim for Compensation for an injury occurring on April 3, 1987. (Exs. 19 and 20.) These forms described the injury as "arms started going numb. Gradually got worse and increased [in] pain." This description comports with an incident report describing an April 3, 1987 injury. The report was signed by the claimant on May 14, 1987 and attributes the injury to heavy lifting. (Exs. 17 and 21.)

16. Royal Insurance Company (Royal) insured Valley View Estates at the time of the April 3 , 1987 injury. Royal accepted liability and paid medical and disability benefits to the claimant. (Ex. 24.)

17. Claimant returned to Dr. Ellis on April 13, 1987. She complained that her right wrist was bothering her quite a bit and that her back was still bothering her. Dr. Ellis prescribed Motrin 800 mg to see if it would help her back and her wrist. Dr. Ellis testified that it was more likely than not that claimant's wrist, neck and back were aggravated by heavy lifting in April 1987 (Ellis Dep. at 13) and that her complaints on April 13th were consistent with a worsening of her back condition due to heavy lifting in early April 1987. (Ellis Dep. at 11-13.)

18. Claimant's wrist condition was diagnosed as carpal tunnel syndrome caused by lifting in April 1987. Dr. Ellis testified that the carpal tunnel syndrome was related to claimant's work, but not to her August 1986 back injury.

Q: By that, do you mean her condition which was the focus of treatment in May 1987 was not related to her injury back in August 1986?

A: Correct. She -- she did say in August of '86 that her wrist was . . . I guess it was October of '86 she had some pain in both wrists --in her <u>arms</u> at that time, but did not mention wrist pain.

Q: At that point in time, though, did she have any carpal tunnel syndrome?

A: No, she did not.

(Id. at 13, emphasis added.)

19. Claimant underwent carpal tunnel release surgeries in May of 1987 on the right wrist and in June of 1987 on the left wrist. (Ellis Dep. at 15.) Later, a MRI revealed a C5-6 herniated disc. On September 30, 1987, Dr. Gary performed a cervical discectomy and fusion on the claimant. (Ex. 1 at 12, 24 and 25.)

20. By letter dated January 3, 1989, Industrial Indemnity advised the claimant that according to Dr. Ellis she had reached maximum healing from her injury of August 25, 1986, and that the medical reports stated she did not have an impairment as a result of that injury.

21. On January 30, 1989, Roger M. Sullivan (Sullivan), attorney at law, notified the Division of Workers' Compensation of his representation of claimant for her injuries of August 25, 1986 and April 3, 1987.

22. Claimant petitioned for and received two partial lump sum advances from Royal following the April 1987 injury. (Exs. 26 and 30.) In conjunction with the petitions for lump sum advances, claimant submitted affidavits which confirmed an injury occurring on April 3, 1987. Her affidavit dated January 31, 1989, attests to having "sustained an industrial injury to my back and neck on April 3, 1987, during the course and scope of my employment as a nurses [sic] aide with Valley View Estates Nursing Home." (Ex. 31.)

23. Royal and the claimant entered into a Full and Final Compromise Settlement respecting the April 3, 1987 injury. The settlement was approved by order of the Insurance Compliance Bureau, Division of Worker's Compensation, on September 27, 1989. (Ex. 35.)

24. By letter dated May 13, 1992, Sullivan withdrew from representation of the claimant in connection with her claims for compensation respecting both her injury of August 25, 1986 and her injury of April 3, 1987. (Ex. 38.) This Court by order dated August 6, 1993, denied claimant's request that her husband, John Ryan, who is not licensed to practice law, be allowed to represent her.

25. Claimant elected to represent herself in these proceedings. She offered no witnesses, exhibits or other evidence in support of her counter-petition in this matter. She did not appear for the pretrial or trial and offered no explanation for her decision not to participate.

26. Prior to April 3, 1987, the claimant had reached maximum medical healing with respect to her August 25, 1986 injuries. On April 3, 1987, heavy lifting by claimant aggravated her low-back condition and injured her neck and wrists.

27. The conduct of Industrial Indemnity has not been unreasonable.

CONCLUSIONS OF LAW

1. Through her cross-petition, the claimant requested additional benefits. She has the burden of proving that she is entitled to benefits, ***Ricks v. Teslow Consolidated,*** *162 Mont.*

469, 512 P.2d 1304 (1973), and must prove her entitlement by a preponderance of the probative, credible evidence. ***Dumont v. Wicken Bros. Construction Co.****, 183 Mont. 190, 598 P.2d 1099 (1979).* That burden extends to proof that the injury was the "proximate cause of his disabling condition." ***Eastman v. Transport Ins.,*** *255 Mont. 262, 843 P.2d 300 (1992).* The claimant has not carried her burden of proof.

2. The claimant failed to present any evidence in support of her request for additional benefits. The record is clear that proper notice was given to the claimant by certified mail, with return receipt signed by the claimant of: (1) all deadlines for the exchange of witnesses and exhibits; (2) the date and time of the pretrial conference; and (3) the date, time and location of trial. Claimant failed to exchange the names of witnesses she intended to call at the time of trial or to identify the exhibits which she intended to offer for inclusion in the Pretrial Order. Claimant did not appear at the time set for pretrial conference and did not notify the Court concerning the reasons for her failure to attend. Claimant, without explanation, did not appear at the time set for trial by this Court's Order.

3. Resolution of this case is controlled by ***Belton v. Carlson Transportation,*** *202 Mont. 384, 658 P.2d 405 (1983)*.

The rule in *Belton* controls a situation where an employee has been injured more than once and different employers' insurance carriers are at risk for the separate injuries. If the first injury has not reached maximum healing, the insurer at risk at the time of the first injury will be responsible for the second injury as well. <u>If the claimant is medically stable or has reached maximum healing, the insurer at risk at the time of the second injury is responsible for Workers' Compensation benefits.</u>

Stangler v. Anderson Meyers Drilling Co., *229. Mont.251, 255, 746 P.2d 99 (1987)*. (Emphasis added.) The established rule under Montana law is that "once a claimant has reached maximum healing or a medically stable condition the insurer at risk at the time of the original injury is no longer responsible for any subsequent injuries or conditions." ***Id***. at *257*.

Dr. Ellis testified to a reasonable degree of medical certainty that by March 18, 1987, claimant had reached maximum healing. A second, significant injury occurred on April 3, 1987. Claimant's own affidavits establish that she injured her back, neck, and wrists on April 3, 1987. Royal was at risk at that time. Moreover, Dr. Ellis testified there was no significant or permanent disability caused by the injury of August 25, 1986.

Thus, claimant has failed to prove that she is entitled to temporary total, permanent total or permanent partial disability benefits on account of her August 25, 1986 injury.

4. Industrial Indemnity has prevailed. Claimant is not entitled to attorney fees, costs or a penalty.

PROPOSED JUDGMENT

1. Claimant is not entitled to further compensation benefits on account of her August 25, 1986 injury.

2. Claimant is not entitled to attorney fees, costs or a penalty.

DATED in Helena, Montana, this 30th day of November, 1994.

(SEAL)

/s/ Clarice V. Beck
HEARING EXAMINER

c: Mr. Charles E. McNeil
Ms. Roberta Ryan (Certified Mail)