

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2003 MTWCC 21

WCC No. 2002-0587

MARILYN ROCKETT

Petitioner

vs.

TRAVELERS INSURANCE COMPANY

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Claimant suffered a work-related herniated cervical disk which required surgery. Since her surgery she has experienced debilitating headaches and arm and neck pain. Her treating physician released her to work on a limited basis but at trial testified that her condition probably prevents her from working even four hours a day and even then she would have to miss work due to unpredictable headaches. He also testified that she should be further evaluated by a neurosurgeon specializing in pain and that her condition may be improved by further treatment.

Held: Claimant is not presently permanently totally disabled since she needs further evaluation for possible treatment that may materially improve her medical condition.

Topics:

Benefits: Permanent Total Disability Benefits. Where credible testimony by the claimant's treating physician establishes that further medical evaluation by a neurosurgeon with expertise in treatment of pain may lead to further treatment which may materially improve her cervical condition, claimant is temporarily totally disabled and is not presently permanently totally disabled.

¶1 The trial in this matter commenced on August 26, 2002, at the offices of Linnell, Newhall, Martin & Schulke, P.C., in Great Falls, Montana, with the testimony of Dr. Patrick Galvas. Trial continued in the Commission Chambers, Civic Center, in Great Falls, Montana, on September 13, 2002. Petitioner, Marilyn Rockett (claimant), was present and represented by Mr. Richard J. Martin. Respondent, Travelers Insurance Company (Travelers), was represented by Mr. Thomas A. Marra.

¶2 Exhibits: Exhibits 1 through 24 were admitted without objection.

¶3 Witnesses and Depositions: Claimant and Dr. Patrick Galvas testified. In addition, depositions of claimant, Dr. Dale M. Schaefer, and Juanita Hooper Addy were submitted to the Court for its consideration. Dr. Galvas' testimony was also transcribed.

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

- Whether Petitioner/Claimant is permanently totally disabled.
- Petitioner/Claimant's entitlement to ongoing medical treatment including prescriptions and doctor visits.
- Whether Petitioner/Claimant is entitled to an award of attorney fees, costs as well as a 20% penalty for Respondent/Insurer's unreasonable refusal to convert her benefits to permanent total disability and refusal to pay for ongoing medical treatment.

(Pretrial Order at 2.)

¶5 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

¶6 Claimant is forty-seven years old and has a ninth grade education. She has worked as a fast food worker, waitress, nurses aide, supervisor and manager for fast food, and shoe manager.

¶7 Claimant worked as a manager in the restaurant and fast food businesses for approximately thirteen and one half years. Her managerial experience includes hiring, firing, and scheduling of employees, and doing the banking. She did not do payroll or bookkeeping.

¶8 Claimant's last job was as manager of Medesco Shoes, which is an independent seller of shoes operating in K-Mart stores. She was in charge of shipping, receiving, and stocking at the Great Falls K-Mart.

¶9 On April 9, 1999, she was sent by her employer to help out at the Butte K-Mart store. She was stocking shelves at the Butte store when she felt pain in her left arm and shoulder while lifting 30 to 55 pound cartons of shoes. (Ex. 1; Rockett Dep. at 14-15.) Her arm pain thereafter continued and increased to the point she could hardly move her left shoulder or head. (Rockett Dep. at 16.) However, she continued working for another couple of months until she could not bend over to put her shoes on. (*Id.*) It was at that point that claimant sought medical care. (*Id.*)

¶10 Claimant was subsequently diagnosed with a C-7 radiculopathy stemming from a herniated disk at the C6-7 in her neck. (Ex. 3 at 14, 35.) On November 18, 1999, claimant underwent a discectomy and fusion at the C6-7 level. (*Id.*)

¶11 Dr. Dale M. Schaefer, a neurosurgeon, performed the surgery. (*Id.* at 14.) Subsequent to the surgery, claimant tried to return to work but experienced neck and arm pain. (*Id.* at 56.) Dr. Schaefer took her off work again and on January 11, 2000, he referred claimant to Dr. Patrick E. Galvas, a board certified physiatrist (specializing in physical and rehabilitation medicine), for followup care. (*Id.*)

¶12 Dr. Galvas saw claimant for the first time on March 6, 2000 (Ex. 4 at 1), and he has continued to treat her since that time.

¶13 When Dr. Galvas first saw claimant on March 6, 2000, claimant's primary complaint was headaches in the occipital area, however, she also complained of neck pain and tingling down her left arm into her thumb. (*Id.*; Galvas Test. at 7.) He diagnosed "cervicogenic" headaches, i.e., headaches that originate in the neck as a result of her surgery. (*Id.* at 9, 10.)

¶14 Dr. Galvas treated claimant with medication. He testified that her condition improved somewhat but that she plateaued. On May 5, 2000, he declared claimant at maximum medical improvement (MMI) and rated her cervical impairment at 15% of the whole person. (Ex. 4 at 7.)

¶15 Claimant thereafter returned to Dr. Galvas on account of continued headaches and neck pain. (*Id.* at 11.) Dr. Galvas prescribed facet nerve blocks, which were done on August 2, 2000. (*Id.* at 12.) Dr. Galvas testified that the claimant had 70% improvement from the blocks, indicating that her cervical facet joints were involved in her pain. (Galvas Test. at 13; Ex. 4 at 14.)

¶16 On September 11, 2000, claimant returned to Dr. Galvas complaining of "irritability" of her nerves in her arm. (Galvas Test. at 14.) He palpated her arm and noted tenderness "reflective of either a radiculopathy or hypersensitivity to previous injury and known as dysesthetic pain or neuropathic pain." (*Id.*) He prescribed neurontin,⁽¹⁾ which is used to treat nerve injuries. (*Id.*) Dr. Galvas opined that claimant had suffered permanent nerve damage as a result of her accident. (*Id.* at 16-17.)

¶17 As a result of her continuing complaints, Dr. Galvas opined on September 13, 2000, that claimant had reverted to non-MMI and temporary total disability (TTD) status as of July 20, 2000. (Ex. 4 at 15; Galvas Test. at 15.)

¶18 Dr. Galvas continued to treat claimant for headaches and arm pain. (Ex. 4 at 16-19; Galvas Test. at 18.) He referred her to an orthopaedic surgeon because of shoulder complaints and to rule out the possibility that her problems were orthopedic in nature and unrelated to her cervical injury. (*Id.* at 18-19.) The referral was negative for an orthopedic problem. (*Id.* at 19-20.) He rejected a suggestion that claimant had developed reflex sympathetic dystrophy because her symptoms did not fit. (*Id.* at 20.)

¶19 On June 20, 2001, Dr. Galvas again declared claimant at MMI. (Ex. 4 at 27; Galvas Test. at 21.) However, he increased her impairment rating to 18% on account of her continuing headaches and recommended that she see Dr. William H. Labunetz for her headaches. (*Id.*) Dr. Labunetz saw claimant on June 22, 2001, and confirmed claimant's headaches were cervicogenic and "post-traumatic" in nature. (Ex. 5.) He modified her drug regimen. (*Id.* at 2.)

¶20 While declaring claimant again at MMI on June 20, 2001, Dr. Galvas limited claimant to sedentary work and noted that her "headaches are severely limiting her ability to return to work." (Ex. 4 at 27.) He doubted that she would work on a full-time basis and noted her limitations as follows:

I believe she would be more in the sedentary physical demand characteristics of work with limitations in use of her upper extremities above her head as well as limitations in

flexion of her neck. More importantly, I believe that she would be unable to tolerate eight hours a day, five days a week, secondary to the current instability of her cervicogenic headaches.

(Id.)

¶21 On November 16, 2001, Dr. Galvas opined that claimant could work "on a limited basis of about 4 hours a day with limitations." He limited her use of her hands and arms from "waist to chest level and then outside the shoulders." *(Id. at 35.)*

¶22 Dr. Galvas testified at trial. I found his testimony reasoned and persuasive.

¶23 Dr. Galvas testified that at present the claimant will have difficulty working on account of her headaches, which are exacerbated by her moving her arms. (Galvas Test. at 25.) He limited her to 4 hours a day and predicted that even then she will have flares which will require her to stop work. *(Id. at 25-26.)* On a more-probable-than-not basis, in his opinion claimant will not be able to even work 4 hours a day. *(Id. at 37.)* His opinion was expressed in response to my own question, as follows:

THE COURT: Maybe a simpler way to state that is should she try to find something, get her back to four hours [a day] and do a trial of that to see what would happen?

THE WITNESS: I understand. I think that it is more probable than not, based upon the patient's complaints of her functioning in her activities of daily living, that she won't be able to do the four hours.

I think she is probably going to get increasing headaches for one, and then also probably increasing neck pain.

(Id.)

¶24 Claimant's current complaints are of persistent, severe, migraine-type headaches, pain in her left shoulder, the middle of her back, and down her arm. Her headaches are unpredictable. She has trouble lifting and carrying, as well as pushing and pulling. She has had to limit her house work. The medication she takes causes drowsiness.

¶25 Claimant's testimony, which I found credible, along with that of Dr. Galvas, convinces me that she is presently unable to hold regular employment even on a part-time basis.

¶26 However, Dr. Galvas testified that claimant may gain material benefit from further medical evaluation and treatment. He recommended that claimant see Dr. John Oakley, a neurosurgeon in Billings, Montana. *(Id. at 39.)* Dr. Oakley has expertise in pain treatment and may be able to recommend further treatment which may improve claimant's condition.

¶27 As I indicated before, I found Dr. Galvas' testimony persuasive, and I am therefore persuaded that claimant may benefit from the referral. I am persuaded that Dr. Oakley may be able to provide further treatment which would materially improve her condition

and which may enable her to work. Claimant has a good work history and work ethic. I am convinced that if she can control her headaches, neck, and arm pain she will want to return to work.

¶28 I therefore find that claimant will benefit from further evaluation and may benefit from further treatment, thus I find that she is not presently at MMI. In light of this finding, any determination of permanent disability is premature.

¶29 Finally, I address the claimant's request for attorney fees. In light of my finding that she has not presently proved she is permanently totally disabled, Travelers denial of her request for permanent total disability (PTD) benefits was not unreasonable.

CONCLUSIONS OF LAW

¶30 This case is governed by the 1997 version of the Montana Workers' Compensation Act since that was the law in effect at the time of the claimant's industrial accident. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶31 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).

¶32 Claimant is requesting PTD benefits. Those benefits are governed by section 39-71-702, MCA (1997). Eligibility for PTD benefits is fixed in the first subsection, as follows:

39-71-702. Compensation for permanent total disability. (1) If a worker is **no longer temporarily totally disabled** and is permanently totally disabled, as defined in 39-71-116, the worker is eligible for permanent total disability benefits. Permanent total disability benefits must be paid for the duration of the worker's permanent total disability, subject to 39-71-710. [Emphasis added.]

Thus, in the first instance, claimant must show that she is no longer temporary totally disabled.

¶33 Temporary total disability (TTD) is defined in section 39-71-701, MCA (1997), and section 39-71-116(34), MCA (1997). Section 39-71-701, MCA, provides in relevant part:

39-71-701. Compensation for temporary total disability -- exception. (1) Subject to the limitation in 39-71-736 and subsection (4) of this section, a worker is eligible for temporary total disability benefits:

(a) when the worker suffers a total loss of wages as a result of an injury and until the worker reaches maximum healing; or

(b) until the worker has been released to return to the employment in which the worker was engaged at the time of the injury or to employment with similar physical requirements.

Section 39-71-116(34), MCA, provides:

(34) "Temporary total disability" means a physical condition resulting from an injury, as defined in this chapter, that results in total loss of wages and exists until the injured worker reaches maximum medical healing.

Under both provisions, "maximum medical healing" is the benchmark for taking an injured claimant out of the TTD status.

¶34 "Maximum medical healing" is a term of art, also defined by statute. Section 39-71-116(18), MCA (1997), provides:

(18) "Medical stability", "maximum healing", or "maximum medical healing" means a point in the healing process **when further material improvement would not be reasonably expected from primary medical treatment.** [Emphasis added.]

In the present case, Dr. Galvas' testimony establishes that further evaluation may lead to further treatment that will materially improve the claimant's condition. Claimant has therefore not reached MMI or healing. Her request for PTD benefits is therefore premature.

¶35 As to the claimant's request for further medical benefits, I am not sure what the dispute is over. It does not appear that Travelers is denying liability for further care. In any event, I have found Dr. Galvas' referral to Dr. Oakley reasonable and Travelers is liable for that referral.

¶36 With respect to the claimant's request for attorney fees and a penalty, she must show that Travelers unreasonably denied the benefits she requests. §§ 39-71-611, -612, -2907, MCA (1997). Since she has failed to prove that she is presently entitled to PTD benefits or that Travelers has unreasonably denied medical benefits, she is therefore not entitled to either attorney fees or a penalty.

JUDGMENT

¶37 Claimant is entitled to a continuation of her TTD benefits, however, she is not presently entitled to PTD benefits. Her request for PTD benefits is **dismissed without prejudice.**

¶38 Claimant is entitled to continued medical benefits for the conditions identified by Dr. Galvas as related to her industrial accident.

¶39 Claimant is not entitled to attorney fees or a penalty.

¶40 Claimant is entitled to her costs and shall file her memorandum of costs in accordance with Court rules.

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

¶42 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 13th day of March, 2003.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Richard J. Martin
Mr. Thomas A. Marra
Submitted: October 25, 2002

1. The transcript of Dr. Galvas' testimony indicates "neuronlin" was prescribed but my notes indicate it was "neurontin" and Dr. Galvas' office notes confirm that indeed neurontin was the drug prescribed.