

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 39

WCC No. 9310-6925

MISCHELLE SCHELSKE

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer for

J.C. PENNEY COMPANY, INCORPORATED

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The trial in this matter was held on February 16, 1994, in Helena, Montana. The Honorable Mike McCarter, Judge of the Workers' Compensation Court, presiding. Petitioner, Michelle Schelske (claimant), was present and represented by Mr. John C. Doubek. Respondent, Liberty Northwest Insurance Corporation (Liberty), was represented by Mr. Michael C. Prezeau.

Claimant, her husband (Rick Schelske) and Harry Etter, M.D., testified. The testimony of Dana Headapohl, M.D., was presented by deposition. Exhibit Nos. 1 through No. 3 were admitted into evidence by agreement of the parties.

Having considered the Pretrial Order, the testimony presented at trial, the demeanor of the witnesses, the deposition testimony of Dr. Headapohl and the exhibits, the Court makes the following:

FINDINGS OF FACT

1. Claimant is 30 years old and married to Rick Schelske. She is extremely intelligent, articulate and medically literate.
2. From September of 1984 to December of 1992, claimant was employed at the J.C. Penney Beauty Salon in Helena, Montana. Claimant started her employment as a cosmetologist and was promoted to the position of manager.
3. Over the years claimant was exposed to numerous chemicals at her place of work.

4. During the past several years claimant has suffered from multiple medical problems and seen numerous physicians. Her problems are genuine but have been difficult to diagnose and treat. Understandably, she has experienced frustration and anxiety over her health.
5. Although claimant has seen numerous physician specialists over the years, Dr. Loretta Meske, a Helena internist, was claimant's primary treating physician from 1984 or 1985 until January 1993.
6. In January 1992, claimant began experiencing cough, nasal and sinus congestion and sore throat. (Ex. No. 3 at 343.) According to medical records, she had been suffering recurrent sore throats since as early as August 1991. (Ex. No. 3 at 187.) Over the next few months her nasal and sinus congestion and sore throat continued, and she was examined and treated by several physicians.
7. On or about October 5, 1992, claimant filed a claim for compensation stating that she was suffering an occupational disease caused by her exposure to chemicals at her workplace. (Ex. No. 2.)
8. The claim was accepted by claimant's employer, which is self-insured under Plan I of the Workers' Compensation Act. While Liberty Northwest Insurance Corporation is listed in the caption as the insurer, Liberty Northwest is apparently a third-party administrator for the employer, J.C. Penney Company. Therefore, reference to "insurer" throughout these findings shall mean either or both Liberty Northwest and J.C. Penney.
9. Although *not* agreeing that all of claimant's medical conditions are related to her occupational disease, the insurer has expressly stipulated that claimant suffers from an occupational disease resulting from her employment. (Respondent's Proposed Findings of Fact, No. 3.)
10. The present controversy relates to certain medical expenses which were incurred by the claimant without authorization of the insurer. The largest expense was for evaluation at the Environmental Health Center in Dallas, Texas (Dallas Clinic), where claimant underwent testing for sensitivity to various chemicals. Claimant also seeks reimbursement for an air purifier, a respirator, oxygen, chiropractic visits, medications, and fees paid to four different medical practitioners, along with interest charges she has incurred by charging the expenses to her credit cards. The following is an itemized list of expenses for which claimant seeks reimbursement:

Expense Amount

Dallas Clinic	\$3,325.49
Travel expenses	1,110.23
Air purifier	620.00

Long distance telephone	797.00
Respirator and exchanger	75.00
Oxygen	301.00
Chiropractor	475.00
Blood tests	525.00
Prescriptions	173.00
Dr. Martin	1,491.00
Dr. Nelson	1,055.00
Dr. Kurtz	80.00
Dr. Johnson	<u>45.00</u>
	\$10,072.72

(Tr. at 34-36; Ex. No. 1.) The expenses for travel, long distance telephone charges, blood tests, prescriptions, and Dr. Johnson's services all relate to the claimant's evaluation at the Dallas Clinic. (Tr. at 34-35.)

11. On or about September 9, 1992, claimant was examined by Dr. Dana Headapohl, a physician practicing in Missoula, Montana. Dr. Headapohl specializes in occupational and environmental medicine and is board certified in that field. In addition to her medical training, she has a masters degree in public health, specifically relating to occupational and environmental disease, and a masters of science degree in environmental engineering. She is a member of the Montana Occupational Disease Panel and is the medical director of the Occupational Health Center at St. Patrick Hospital. She spends approximately half of her professional time dealing with persons with occupational illnesses.

12. Claimant, rather than the insurer, selected Dr. Headapohl.

13. Dr. Headapohl examined claimant and diagnosed upper respiratory irritation and sensitization secondary to work exposures. On a form dated October 16, 1992, Dr. Headapohl stated that claimant should be able to return to work, provided adequate ventilation was available. (Ex. No. 3 at 274, 280-281.) The return to work authorization was on a trial basis. (Ex. No. 3 at 281.)

14. Dr. Headapohl did not assume claimant's regular care. Dr. Meske continued to be claimant's primary treating physician.

15. In a letter dated October 14, 1992, Dr. Meske reported that claimant had returned to work, but "[i]f recurrent symptoms continue, she will be advised to discontinue work unless some alternative can be arranged regarding the chemical exposure." (Ex. No. 3 at 279, 282.)

16. Claimant attempted to return to work but her symptoms did not improve. She was unable to continue working at the beauty salon.

17. In a report dated December 11, 1992, Dr. Meske stated that claimant would have to work in some capacity that did not involve exposure to hair salon chemicals. (Ex. No. 3 at 464.)

Dallas Clinic Evaluation

18. In a letter dated January 21, 1993, Dr. Headapohl recommended to the insurer that claimant be evaluated at the National Jewish Occupational Health Clinic in Denver, Colorado. Dr. Headapohl was familiar with National Jewish and had a positive opinion of its program. (Ex. No. 3 at 668; Headapohl Dep. at 28.) She recommended the evaluation "to see what chemicals seemed to cause most of her problems so that we would know for job placement purposes what jobs would most likely be safe." (Headapohl Dep. at 28.)

19. The insurer did not accept Dr. Headapohl's recommendation and refused to authorize evaluation of claimant at National Jewish. On her own, claimant also decided against testing at National Jewish because she believed that the facility would not test her for sensitivity to formaldehyde. (Tr. at 25-26.) Dr. Headapohl, however, indicated her belief that National Jewish *does* perform dermal (skin) testing for formaldehyde, although it does not do respiratory testing for formaldehyde. (Headapohl Dep. at 29.)

20. Claimant began her own inquiries regarding facilities which test for sensitivity for chemicals. She learned of the Dallas Clinic.

21. Claimant then sought medical approval for her attendance at the Dallas Clinic. She made inquiries of Dr. Headapohl and also sought the telephonic advice of Dr. Bob Harrison of the University of California at San Francisco, who is an expert on chemical sensitivity. According to claimant, both doctors approved the Dallas Clinic as appropriate. According to claimant, Dr. Harrison "said he felt that Dallas would be the best thing for me with the kind of problems that I was having" and Dr. Headapohl "gave me a verbal recommendation to Dallas but [said] that it would have to come through my treating physician. . . ." (Tr. at 29, 26.)

22. Dr. Headapohl disputed claimant's assertion that either she (Dr. Headapohl) or Dr. Harrison had approved Dallas, and testified that in fact both she and Dr. Harrison would not recommend the Dallas Clinic and had serious reservations about the clinic's testing methodology. According to Dr. Headapohl:

I have reservations about that particular clinic. Time may show that the methods are valid but I can't, in good conscience, recommend any treatment facility that doesn't provide well-documented methodology. In my opinion, at that time, Dr. Rea's clinic [the Dallas Clinic] did not provide that to me.

(Headapohl Dep. at 30.) Dr. Headapohl went on to say:

I felt that Ms. Schelske should have a further workup. I do not feel now, nor did I feel then, that Dr. Rea's clinic was the diagnostic clinic of choice. In fact, I had told her that I would **not** be making that referral, that she was -- that I was advising her if she wanted to do it, to have somebody else make that referral. I do not make referrals lightly and I cannot make it to Dr. Rea's clinic. [Emphasis added.]

(Headapohl Dep. 50-51.) Dr. Headapohl did suggest that claimant talk with Dr. Harrison, and Dr. Headapohl herself also talked to Dr. Harrison.

I did refer her to a Dr. Bob Harrison at UCSF who handles many of the multiple chemical sensitivity patients now for the State of California. She talked to him directly and I had talked to him both before and after she had called. His advice to her was that it was unlikely that an insurance company would pay for this clinic as, again, there wasn't good medical and scientific documentation that these methods worked or that they were indicated but that, of course it would be up to her whether she wanted to go or not and that, in fact, some individuals had found some relief by going to the clinic. He did not support her going. He did not, however, warn her against going, but he did not recommend going.

(Headapohl Dep. at 30, 31 and see also 51.)

23. The statements attributed to Dr. Harrison by both claimant and Dr. Headapohl are, of course, hearsay, and are ordinarily entitled to little if any weight. However, in this case they provide evidence of the claimant's coloring of her conversations with the doctors.

24. Although the Court did not personally observe the testimony of Dr. Headapohl, it was present for claimant's trial testimony. After hearing claimant's testimony, it had, and still has, the firm impression that claimant was determined to go to the Dallas Clinic, ignored the express reservations both doctors had about the clinic, and interpreted the doctor's failure to specifically tell her she could not attend the clinic as approval for her attendance. In other words, she filtered their statements through a sieve of her own steadfast determination to attend the Dallas Clinic, and interpreted what the doctors said according to what she **wanted** to hear.

25. Sometime after early January 1992, the claimant became dissatisfied with Dr. Meske and specifically asked Dr. Meske to refer her to Dr. Harry Etter, a board certified internist.⁽¹⁾ Dr. Etter has no formal training in occupational or environmental medicine.⁽²⁾ His practice does not include treatment of patients suffering occupational diseases; he is not a member of the Montana Occupational Disease Panel; and he recognizes Dr. Headapohl as a respected expert in occupational and environmental medicine and has referred patients to her. (Tr. at 93, 94.)

26. Claimant first saw Dr. Etter in the spring of 1993. In April 1993, claimant sought Dr. Etter's approval for her evaluation at the Dallas Clinic. She provided Dr. Etter with literature she collected regarding the clinic. (Tr. at 26.)

27. By letter of April 23, 1993, John C. Doubek, acting as claimant's attorney, asked Dr. Etter to write a letter: "What I need from you is a letter and I have dictated the following language which, if acceptable to you, we would like you to include in such a letter." (Ex. No. 3 at 672.) Mr. Doubek then set out the proposed text of the letter, consisting of four paragraphs or approximately one page. Among the proposed paragraphs were the following:

Mischelle and I have done a considerable amount of investigation as to the medical care and attention which she very strongly requires.

It is my belief that her medical condition would be best served and that she requires services which are not available here in Montana. The Environmental Health Center in Dallas, Texas, has an excellent program which would enable all of us to get to the root of Mischelle's work related condition. Services at that facility are medically required in this instance. If I may be of any further assistance please let me know.

(Ex. No. 3 at 673.)

28. Mr. Doubek also provided the proposed letter on a separate page, which Dr. Etter signed on April 26, 1993. (Ex. No. 3 at 665.)

29. Dr. Etter's willingness to sign-off on the Dallas Clinic was based on the information and materials provided by claimant regarding the clinic. (Tr. at 98, 99, 102.) Dr. Etter did not do any independent investigation of the clinic and was not personally familiar with the facility. He agreed that he was in no position "to quarrel with Dr. Headapohl with respect to any opinions that she might have about the Environmental Health Center in Dallas."⁽³⁾

30. Having considered the facts leading up to Dr. Etter's sign-off, and his testimony at trial, I find that Dr. Etter acted as little more than a rubber stamp for claimant's decision to seek evaluation at the Dallas Clinic. He did not exercise independent medical judgment when he affixed his signature to the letter prepared by Mr. Doubek.

31. Claimant was told prior to her attendance at the Dallas Clinic that the insurer would not authorize or pay for an evaluation at the clinic. (Ex. No. 3 at 420-21.)

32. Notwithstanding the insurer's refusal to agree to an evaluation by the Dallas Clinic, claimant drove to Dallas with two friends in May of 1993, and attended the Dallas Clinic on an outpatient basis from May 14, 1993 through June 7, 1993. Petitioner's trip to Dallas lasted from May 7, 1993 through June 9, 1993. (Ex. No. 1 at 29, 30, 35; Ex. No. 3 at 638, 645.)

33. No one from the Dallas Clinic testified in this proceeding either at trial or by deposition. Dr. Headapohl, however, reviewed the reports of the Dallas Clinic evaluation. Her opinion about the Dallas Clinic was not changed. (Headapohl Dep. at 31, 50, 51.)

34. I find Dr. Headapohl's testimony concerning the Dallas Clinic credible and persuasive. I am not persuaded that evaluation at the Dallas Clinic was reasonable or appropriate; the preponderance of credible evidence is to the contrary.

Respirator and Oxygen

35. Petitioner began using a respirator pursuant to a recommendation she received over the telephone from a Dr. Lisk at Cornell University. Claimant was never examined or actually treated by Dr. Lisk. (Tr. at 27, 57.)

36. In November of 1993, Dr. Alfred Johnson of the Dallas Clinic prescribed an oxygen tank and regulator and an air purifier for claimant. Dr. Johnson did not testify either by deposition or at trial. However, these items were later prescribed by Dr. Etter, who admitted at trial that he was merely agreeing with the recommendation of Dr. Johnson. (Ex. No. 3 at 656, 666; Tr. at 57, 102.) When asked by the Court if he had an opinion as to whether the items were benefitting claimant, he answered:

Uncertain I'd say at this point. The whole idea is that if she's breathing her own supply of oxygen and doesn't have chemicals that she'd be sensitive to since she's not breathing. To be honest, **I don't know if they're helping her or not.** [Emphasis added.]

(Tr. at 103.)⁽⁴⁾

37. When asked about the purifier and the oxygen tank and mask, Dr. Headapohl said: "I would not prescribe such treatment." (Headapohl Dep. at 39.)

38. What Dr. Lisk may have told claimant over the telephone is not credible, reliable evidence. Dr. Johnson did not testify. Dr. Headapohl, on the other hand, testified that she would not prescribe the equipment and Dr. Etter, who wrote a prescription for the equipment after Dr. Johnson recommended it, appears to again have perfunctorily signed off on someone else's recommendation rather than exercising independent medical judgment. Despite signing off on the prescription pad, at trial Dr. Etter gave his honest opinion that he did not know if the equipment was of any benefit.

39. I again find Dr. Headapohl's testimony the most credible and reliable. I am not persuaded that the equipment was medically reasonable. The evidence preponderates in favor of the contrary conclusion.

Dr. Kurtz' Bill

40. There is \$80 owed to Dr. Kurtz, who assumed claimant's regular care after Dr. Etter withdrew from private practice in late 1993 to become a staff physician at the Fort Harrison Veterans' Administration Hospital in Helena. Dr. Etter referred claimant to Dr. Kurtz at claimant's request.

41. The insurer does not discuss Dr. Kurtz' bill in its proposed findings and it is not clear why it is opposing payment for his charges. On the other hand, it is clear that claimant was forced to change treating physicians and selected Dr. Kurtz.

Dr. Martin and Dr. Nelson

42. The bills for both Dr. Martin and Dr. Nelson were incurred *after* mediation. The dispute regarding the bills therefore has not been mediated.

Chiropractor

43. According to claimant, she injured her back in the course of a functional capacity exam that was part of an independent medical evaluation requested by the insurer. As a result she underwent three weeks of chiropractic treatments. (Tr. at 35.)

44. No contradictory evidence was offered, and the insurer does not mention this item in its proposed findings.

45. The expenses incurred in chiropractic treatment were reasonable.

CONCLUSIONS OF LAW

1. The Court is without jurisdiction to consider the medical bills of Drs. Martin and Nelson. Claimant testified that these bills were incurred **after** mediation. Mediation is a prerequisite to an exercise of this Court's jurisdiction over disputes involving benefits, including medical benefits. The mandatory mediation requirements of Part 24, Chap. 71, Title 39, expressly apply to occupational disease disputes arising under Chap. 72. Sections 39-71-2401, 2406 and 2408, MCA. It does not appear that the medical expenses for these two doctors, one of whom is a psychologist and the other a neurologist, are inextricably intertwined with the other medical issues litigated in this case. Therefore, they must be mediated before the Court can consider them.

2. The insurer contests the remaining medical expenses on the grounds that the services and equipment giving rise to the expenses did not amount to "treatment" of claimant's occupational disease and in any event were **not** "reasonable" medical services. The Court need not determine whether testing is part of "treatment" since it has determined that the Dallas Clinic was not an appropriate and reasonable place of testing.

Section 39-72-704, MCA, provides:

39-72-704. Medical and hospital expenses. In addition to the compensation provided by this chapter, an employee who becomes either totally or partially disabled from an occupational disease is entitled to receive for treatment of the occupational disease, without limitation as to length of time or dollar amount, **reasonable** medical services, hospitalization, medicines, and other treatment approved by the department. [Emphasis added.]

What is reasonable is a question of fact which must be resolved by this Court based on the circumstances and medical testimony. *Cf. Chapman v. Research Cottrell*, 259 Mont. 329, 856 P.2d 234 (1993) (*finding that the Workers' Compensation Court's determination that the expense of a YMCA membership was not a reasonable physical therapy expense was supported by substantial credible evidence*).

The party asserting a right has the burden of proving the claim by a preponderance of the evidence. *Ricks v. Teslow Consolidated*, 162 Mont. 469, 512 P.2d 1304, 1312 (1973); *Dumont v. Wickens Bros. Constr. Co.*, 183 Mont. 190, 598 P.2d 1099 (1979). Thus, claimant has the burden of proving that the expenses incurred were for "reasonable medical services."

Excepting the medical expenses for Dr. Kurtz and the chiropractor, the evidence does not preponderate in claimant's favor; rather it preponderates against her contentions. Dr. Headapohl testified persuasively, and without contradiction, that the Dallas Clinic was controversial and has failed to provide a well documented methodology which would show that its methods are valid. She testified emphatically that she did not and would not recommend the Dallas Clinic. Dr. Etter, who signed off on a letter recommending the Clinic, exercised no independent medical judgment in doing so, and, in any event, was far less qualified than Dr. Headapohl to determine the appropriateness of that facility. Similarly, the credible medical evidence preponderated against the extreme measures (respirator, oxygen tank and air purifier) taken by claimant to protect herself from airborne agents. Dr. Etter admitted he did not know if these appliances were helping and Dr. Headapohl opined that they were not.

Claimant is conversant in medical terminology and conducted her own investigation into the clinic. She is not, however, a medical professional capable of making medical determinations. While she has talked to other medical professionals, whom she claims support her expenditures, none of those individuals testified in this matter. Moreover, as the Court has found, claimant may have colored what was told to her.

Claimant was emphatically advised by the insurer that it would not approve or pay for the Dallas Clinic.⁽⁵⁾ There was no emergency requiring immediate evaluation. Claimant could have sought mediation and then petitioned this Court for a determination of reasonableness prior to incurring the expenses for which she now seeks reimbursement.

Her decision to attend the clinic, and then petition the Court, does not change the standard by which the expenses are judged.

The medical bills for Dr. Kurtz and the chiropractor stand on different footing. Dr. Kurtz is claimant's current treating physician. The chiropractic bills were incurred as a result of a back strain claimant suffered while undergoing a physical capacities examination requested by the insurer. The insurer offered no evidence and has presented no argument in opposition to these claims. They are therefore allowed.

3. Claimant is not entitled to either attorney fees or a penalty. She has prevailed on only a very small part of her claim for reimbursement. The evidence she offered concerning Dr. Kurtz's and the chiropractic bills amounted to less than one paragraph of testimony at trial. (Tr. at 35.) In her proposed findings and post-trial briefs the claimant did not even address these expenses. Also, no evidence was presented concerning the circumstances of the denial of those expenses.

4. Claimant is entitled to costs even though she did not prevail on most of her claim. See section 25-10-101(3), MCA (providing for an award of costs in a civil action in which the plaintiff recovers more than \$50.

JUDGMENT

1. This Court has jurisdiction of this matter pursuant to section 39-72-203, MCA and ARM 24.29.1404.

2. Claimant is not entitled to reimbursement for the medical expenses claimed in this case except for \$80 for Dr. Kurtz and \$475 for the chiropractic care, or a total of \$555, which amounts she shall recover against the respondent.

3. Claimant is not entitled to an award of attorney fees or to the assessment of a 20% penalty against respondent.

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

5. Pursuant to ARM 24.5.344, any request for rehearing or for amendment of the Court's decision shall be filed within 20 days.

DATED in Helena, Montana, this 21st day of April, 1994.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. John C. Doubek

Mr. Michael C. Prezeau

1. Claimant was still being treated by Dr. Meske as late as January 8, 1993. (Ex. No. 3 at 669.)

2. He testified:

The only training I did [in occupational and environmental medicine] was I was a head of a submarine squadron in the Navy and I did extensive testing on submarines and environmental things in the Navy but no specifically formal training.

(Tr. at 92-93.)

3. The question and answer were as follows:

Q. Do you feel that you would be in a position to quarrel with Dr. Headapohl with respect to any opinions that she might have about the Environmental Health Center in Dallas?

A. Actually, I wouldn't, no.

(Tr. at 100.)

4. The answer was given in the following context:

BY MR. DOUBEK:

Q. The O2 and air purifier are to relieve symptoms, is that the principal purpose of those prescriptions?

A. Yes.

MR. DOUBEK: Thank you.

THE COURT: Mr. [sic] Etter, I just have a couple of questions in regard to the oxygen and the air purifier.

EXAMINATION

BY THE COURT:

Q. Do you have an opinion as to whether or not those are beneficial to her symptom-wise?

A. Uncertain I'd say at this point. The whole idea is that if she's breathing her own supply of oxygen and doesn't have chemicals that she'd be sensitive to since she's not breathing. To be honest, **I don't know if they're helping her or not.**

(Tr. at 102-103, emphasis added.)

5. The insurer suggests, without arguing, that claimant should have sought a hearing before the DLI after she was notified of the insurer's disapproval. It states that the rules of the

Department of Labor and Industries, specifically provided: "Except in an emergency, approval of the insurer must be obtained before referral of a worker to a medical specialist for consultation," citing ARM 24.29.1403(3). (Respondent's Proposed Findings of Fact, Conclusions of Law and Judgment at 11.) The cited regulation was repealed effective April 1, 1993, prior to Dr. Etter's letter (April 23, 1993) or claimant's trip to the Dallas clinic (May 14 to June 7, 1993). In any event, a denial of a medical expense on the ground that it is unreasonable is not one of the matters for which the DLI's medical rules provide a hearing. ARM 24.29.1404(1) provides:

DISPUTED MEDICAL CLAIMS (1) Disputes arising over the following issues are resolved by a hearing before the department upon written application of a party to the dispute or the injured worker:

(a) Amounts payable to medical providers, when benefits available directly to claimants are not an issue,

(b) Access to medical records,

(c) Timeliness or payments to medical providers. **All other disputes arising over medical claims, including travel expense reimbursement to injured workers, shall be brought before a department mediator as provided in part 24 of the Workers' Compensation Act.** [Emphasis added.]