

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1997 MTWCC 45

WCC No. 9703-7733

PENNY STEVENS

Petitioner

vs.

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH

Respondent/Insurer for

KING'S TABLE

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Insurer accepted liability for claimant's arm and neck injury, but denied medical benefits following exacerbation of cervical condition. Prior to trial, insurer reversed position, authorized surgery, and paid related medical benefits. Claimant refused to drop claims for attorneys fees and penalty.

Held: Insurer's persistent denial of medical benefits was unreasonable. Three doctors consistently opined her condition was related to the injury. While the claims adjuster suspected another accident caused the exacerbation, she took no affirmative steps to investigate that possibility. Despite the finding of unreasonable conduct, claimant was not entitled to attorneys fees or costs under sections 39-71-611 or -612, MCA (1989) where the claim for benefits was settled without an order of the workers' compensation court. See, *Lasar v. E.H. Oftedal & Sons*, 222 Mont. 251, 252, 721 P.2d 352 (1986); *Yearout v. Rainbow Painting*, 222 Mont. 65, 68, 719 P.2d 1258 (1986). Claimant was entitled to a twenty-percent penalty on medical benefits under section 39-71-2907, MCA (1989). Although that statute refers to "an order by the workers' compensation judge" granting benefits, the Supreme Court has found the section ambiguous and construed it to allow penalty in cases where the insurer unreasonably denies benefits even if a claim is settled prior to trial. *Mintyala v. State Compensation Insurance Fund*, 276 Mont. 521, 527, 917 P.2d 442, 445-446 (1996); *Handlos v. Cyprus Industrial Minerals*, 243 Mont. 314, 317 794 P.2d 702, 703-704 (1990).

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-611 and -612, MCA (1989). Despite the finding of unreasonable conduct, claimant was not entitled to attorneys fees or costs under sections 39-71-611 or -612, MCA (1989) where the claim for benefits was settled without an order of the workers' compensation court. See, *Lasar v. E.H. Oftedal & Sons*, 222 Mont. 251, 252, 721 P.2d 352 (1986); *Yearout v. Rainbow Painting*, 222 Mont. 65, 68, 719 P.2d 1258 (1986).

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-2907, MCA (1989). Insurer's persistent denial of medical benefits was unreasonable. Three doctors consistently opined her condition was related to the injury. While the claims adjuster suspected another accident caused the exacerbation, she took no affirmative steps to investigate that possibility. Claimant was entitled to a twenty-percent penalty on medical benefits under section 39-71-2907, MCA (1989), even though the insurer acknowledged liability prior to trial. Although the statute refers to "an order by the workers' compensation judge" granting benefits, the Supreme Court has found the section ambiguous and construed it to allow penalty in cases where the insurer unreasonably denies benefits, even if the claim is settled prior to trial. *Mintyala v. State Compensation Insurance Fund*, 276 Mont. 521, 527, 917 P.2d 442, 445-446 (1996); *Handlos v. Cyprus Industrial Minerals*, 243 Mont. 314, 317 794 P.2d 702, 703-704 (1990).

Attorney Fees: Cases Denied. Despite the finding of unreasonable conduct, claimant was not entitled to attorneys fees or costs under sections 39-71-611 or -612, MCA (1989) where the claim for benefits was settled without an order of the workers' compensation court. See, *Lasar v. E.H. Oftedal & Sons*, 222 Mont. 251, 252, 721 P.2d 352 (1986); *Yearout v. Rainbow Painting*, 222 Mont. 65, 68, 719 P.2d 1258 (1986).

Penalties: Insurers. Insurer's persistent denial of medical benefits was unreasonable. Three doctors consistently opined her condition was related to the injury. While the claims adjuster suspected another accident caused the exacerbation, she took no affirmative steps to investigate that possibility. Claimant was entitled to a twenty-percent penalty on medical benefits under section 39-71-2907, MCA (1989), even though the insurer acknowledged liability prior to trial. Although the statute refers to "an order by the workers' compensation judge" granting benefits, the Supreme Court has found the section ambiguous and construed it to allow penalty in cases where the insurer unreasonably denies benefits, even if the claim is settled prior to trial. *Mintyala v. State Compensation Insurance Fund*, 276 Mont. 521, 527, 917 P.2d 442, 445-446 (1996); *Handlos v. Cyprus Industrial Minerals*, 243 Mont. 314, 317 794 P.2d 702, 703-704 (1990).

The trial in this matter was held in Great Falls, Montana, on June 16, 1997. Petitioner, Penny Stevens (claimant), was present and represented by Mr. Richard J. Martin. Respondent, National Union Fire Insurance Company of Pittsburgh (National Union), was represented by Mr. Oliver H. Goe. No transcript of this trial has been prepared.

Disposition of Motion for Partial Summary Judgment: At the commencement of trial, the Court granted respondent's Motion for Partial Summary Judgment as to the issue of attorney fees and costs. The Court ruled that claimant is not entitled to an award of attorney fees or costs, as a matter of law, pursuant to sections 39-71-611 and -612, MCA (1989). The ruling is reflected in the conclusions of law.

Exhibits: Exhibits 1, 3 through 12, 16, 17, 19, 22 through 26 and 28 through 35 were admitted without objection. Exhibits 2, 13 through 15, 18, and 27 were admitted over objections. Exhibits 20 and 21 were refused.

Witnesses and Depositions: Claimant and Paula Vidrine were sworn and testified. In addition, the parties submitted the depositions of claimant and Paula Vidrine for the Court's consideration.

Issues Presented: The sole issue before the Court is whether National Union unreasonably delayed the payment of medical benefits for claimant thereby entitling her to a penalty pursuant to section 39-71-2907, MCA (1989).

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

FINDINGS OF FACT

1. Claimant is 36 years old and resides in Great Falls, Montana. She is a high school graduate and has one year of technical college.
2. Claimant worked in the restaurant sector from age sixteen until her industrial injury in 1991. She is currently employed as a medical secretary at the Gateway Recovery Center.
3. Claimant suffered a compensable injury in the course and scope of her employment as a cook at King's Table restaurant on February 16, 1991. (Pretrial Order at 1.) Claimant slipped and fell, hitting her arm on a grill and twisting her neck. (Ex. 15.)
4. At the time of claimant's injury, King's Table was insured by National Union. National Union accepted liability for her claim and paid temporary wage-loss and medical benefits.
5. Dr. Gary Jimmerson, a chiropractor, initially treated claimant following her injury. (Stevens Dep. at 18.)

6. Dr. Terry L. Jackson, a physiatrist, began treating claimant in March or April of 1992. (*Id.* at 18.)

7. On referral from Dr. Jackson, Dr. D.R. Alzheimer performed an MRI of claimant's cervical spine on April 29, 1992, reporting:

FINDINGS: The discs show no evidence of significant desiccation. There is loss of normal cervical lordosis. The axial images show no evidence of encroachment upon the discs, neural foramina and/or central canal. There is no evidence of a laterally herniated disc identified. The cord itself is unremarkable. I see nothing to suggest Chiari's malformation at this time.

IMPRESSION: 1. Loss of the normal cervical lordosis as described.

2. Otherwise unremarkable cervical spine.

(Ex. 34 at 1.)

8. In an office note dated July 2, 1992, Dr. Jackson reported the following:

Plain X-rays and MRI of the cervical spine have not demonstrated any significant abnormal findings. There is no evidence of disc herniation on her cervical images.

(Ex. 35 at 1.)

9. Dr. Jackson determined claimant to be at maximum medical improvement on July 2, 1992. (*Id.* at 2.)

10. The Department of Labor and Industry approved the settlement of claimant's workers' compensation claim on November 16, 1992. (Ex. 1.) Claimant reserved medical and hospital benefits in the settlement. (*Id.*)

11. Claimant continued chiropractic treatment with Dr. Jimmerson until July 20, 1995. (Ex. 24.) However, in November of 1992, National Union advised claimant and Dr. Jimmerson that it would no longer pay for chiropractic treatment. (Vidrine Dep. at 6-7.) Claimant did not protest National Union's termination of chiropractic benefits and, as a consequence, Dr. Jimmerson did not thereafter provide National Union with his treatment reports.

12. In 1994 claimant's condition worsened. She contacted Paula Vidrine (Vidrine), the claims adjuster for National Union, on December 15, 1994. (*Id.* at 9.) Vidrine testified that she told claimant in a telephone conversation that she should provide her with Dr. Jimmerson's records for her review. (*Id.* at 11.) Claimant did not recall having a telephone conversation with Vidrine in December of 1994 (Stevens Dep. at 23-24) and Dr. Jimmerson's records were not provided to Vidrine at that time. (Vidrine Dep. at 12.) Vidrine did not contact Dr. Jimmerson or make any written request for the records.

13. Claimant returned to Dr. Jackson on February 1, 1995, complaining of recent "difficulty with increased neck as well as arm pain and numbness in her upper extremities." (Stevens Dep. Ex. 1.) Dr. Jackson noted claimant "has not had any intervening trauma." (*Id.*) National Union paid for claimant's office visit with Dr. Jackson.

14. Vidrine received Dr. Jackson's office report in May of 1995, and subsequently requested Dr. Jackson's opinion regarding the relationship between claimant's original injury in 1991 and claimant's current condition. On June 15, 1995, Dr. Jackson responded, stating:

I do think the problems that Ms. Stevens is having at the present time are probably more likely than not related to her previous work related injury. During her visit in February, she was not able to relay to me any difficulty with trauma or any new activities that she was doing, either vocationally or recreationally, that would necessarily account for her development of symptoms.

(Stevens Dep. Ex. 2.)

15. Following this letter, National Union authorized a new EMG and MRI. Dr. Russell performed an MRI on July 13, 1995, noting:

1. Straightening of the normal cervical lordosis which is unchanged from the last exam.
2. **Minimal new disc bulge at C5-6** which is central in location. This does not compress the cord or significantly narrow the spinal canal at the present time.

(Ex. 34 at 2; emphasis added.)

16. In an office note dated July 31, 1995, Dr. Jackson noted:

A recent workup including upper extremity EMG did not demonstrate any evidence of radiculopathy. She does have incomplete right as well as left median nerve compression at the wrist. She had no evidence of myopathy. MRI scan of the cervical spine did demonstrate some straightening of the normal cervical lordosis which was unchanged from a previous exam done on 4/29/92. She did have a new minimal disc bulge at C5-6 which was central in its location. This did not compress either the cord or the nerve roots.

....

I am going to be seeing her in the future for any other flare-ups in pain. I did reassure her that, with regard to her neck pain, I felt this was primarily myofascial at this point, and the studies did not reveal any evidence of radiculopathy.

(Stevens Dep. Ex. 3.) Dr. Jackson referred claimant to physical therapy for a trial period of cervical traction. (*Id.*)

17. Dr. Jackson continued to treat claimant from January to July of 1996. (Ex. 17 at 3-6.) National Union continued to pay for her treatment.

18. On August 23, 1996, Dr. Jackson noted, for the first time, radicular symptoms in claimant's condition. (*Id.* at 7.) As a result of the new findings, he ordered an MRI. (*Id.*) Dr. Jackson did not obtain prior authorization for the MRI from National Union.

19. Dr. Russell performed an MRI on August 26, 1996, noting:

FINDINGS: Comparison is made to a prior study of 7/13/95. . . .

At the C5-6 level, the small disc herniation has become much larger in the interval since the last examination. The disc extrusion now extends cephalad behind the C5 vertebral body and caudad behind the C6 vertebral body. The canal is borderline stenotic at this level as a result of this moderate sized disc herniation. Both neural and foramina are patent. The cord is not significantly compressed, but very little CSF surrounds it. At the C6-7 and C7-T1 levels no abnormalities are demonstrated.

(Ex. 34 at 3.)

20. Vidrine received the August 26, 1996 MRI report on September 12, 1996. (Ex. 34 at 3.) Despite the presence of a small herniation on the prior MRI, Vidrine initially denied payment for the August 1996 MRI because she viewed the report as containing new findings.

21. Dr. Jackson's office called Vidrine on September 25, 1996, requesting authorization to refer claimant to Dr. Dale Schaefer for a neurosurgical consultation. (Vidrine Dep. at 23.) Vidrine responded that she was "questioning the relationship of the current problems to the injury in light of the previous MRI's" and that she needed to discuss this with Dr. Jackson. (*Id.*) "Connie" from Dr. Jackson's office called Vidrine back and informed her that Dr. Jackson did not have the time to call her. However, Connie told Vidrine that Dr. Jackson would write a letter and that he believed claimant's current condition was related to her original injury. Vidrine informed Connie that she would await the letter but that she was probably going to look at a second opinion based upon the change in the August MRI.

22. Dr. Schaefer's office called Vidrine in late September to obtain authorization for a neurosurgical consultation. Vidrine did not approve the consultation with Dr. Schaefer at that time because she was waiting for information from Dr. Jackson.

23. Dr. Schaefer's office contacted Vidrine again on October 1, 1996, stating that claimant was there for an evaluation. (*Id.* at 26.) Vidrine informed Dr. Schaefer's office again that she had not received the information she needed from Dr. Jackson and that she could not authorize the consultation. (*Id.*) Dr. Schaefer nonetheless proceeded to examine claimant on October 1, 1996.

24. Dr. Schaefer wrote to Dr. Jackson on October 1, 1996, stating:

She [claimant] reports that the etiology of this depression as her long standing pain and seeming inability to achieve long term pain relief. **She has also sustained a recent injury to her right wrist in a fall. . . .**

A series of MRI's [sic] are reviewed. The first of which occurred in 1992, a subsequent on[e] in 1995 and a third in 1996. There is a clear progression on each of these three MRI's [sic] of disruption of the disc at C5/6 with enlargement of a midline disc protrusion at C5/6 over this four year period of time.

I think it is possible that at least some of her pain is coming from this disc herniation. She has certainly undergone an extensive course of conservative treatment and, because of this and because of the fact that the home cervical traction seems to give her the best pain relief, **I think it is reasonable to offer her anterior cervical discectomy and fusion in an effort to improve her pain syndrome.** I have told her that I would not expect her to gain complete and total pain relief or at least her chances of complete and total pain relief are not great but we could realistically expect considerable improvement.

I do think that this disc herniation and her current pain syndrome are all related to her original injury. We will have to try and get this approved through her worker's [sic] compensation carrier. I am concerned about that since Paula Vadrine [sic] who is her case manager initially gave this office approval to see Penny as a second opinion but when it came down to the actual office visit she denied that approval. We will try to work this out through Alexis here in the near future.

(Ex. 16 at 1-2; emphasis added.)

25. Vidrine took no action on claimant's file between September 25 and October 16, 1996.

26. On October 16, 1996, Dr. Schaefer faxed a copy of his October 1st letter to Vidrine and requested authorization for surgery. (Vidrine Dep. at 26-27.)

27. Vidrine testified that Dr. Schaefer's letter dated October 1, 1996, was "lacking in explanation" in regard to the change in the MRIs from 1992 to 1996. (Trial Test.) She contacted Dr. Schaefer's office on October 18, 1996, and spoke to "Mary," whom Vidrine believed was a nurse. Vidrine and Mary discussed the relationship between the disk herniation and the original injury and the right wrist injury. Vidrine did not follow up with a written request from either Dr. Schaefer or Dr. Jackson regarding the right wrist injury and its relation to the disk herniation, nor did Vidrine contact claimant regarding the wrist injury. There is no evidence indicating that the right wrist injury caused the disk herniation or that it caused a material aggravation of claimant's underlying condition, and Vidrine's failure at

that time to seek further information concerning the injury indicates it was not of significant concern to her.

28. On October 21, 1996, Vidrine wrote to Dr. Jackson and Dr. Schaefer requesting that each address specific questions in regard to causation as follows:

Can you relate within a reasonable degree of medical certainty Ms. Stevens' current problems and need for surgery to the industrial injury she sustained in February, 1991? In other words, is it more probable than not that the current problems and disc extrusion are directly related to the industrial injury as opposed to other factors? Please be very specific and detailed in your answer.

If you are of the opinion the current problems are directly related to the 1991 industrial injury, how do you explain the increase of symptoms now being noted on the most recent MRI since the MRI in 1992 was essentially normal and Ms. Stevens was noted to be at maximum healing by you in July, 1992?

(Ex. 3 at 1; Ex. 4 at 2.)

29. On October 23, 1996, Vidrine received Dr. Jackson's medical reports dated August 23, 1996, (ex. 17 at 7), and September 24, 1996, (*id.* at 8), and a letter dated October 15, 1996, (*id.* at 9). (Vidrine Dep. at 28.) In the letter, Dr. Jackson states:

Penny does now have evidence of a major disc herniation. **I think, with a reasonable degree of medical certainty, that this is related to her work-related injury.** I think that she is symptomatic from this disc herniation and feel that it is appropriate for her to be seen in neurosurgical consultation.

(Ex. 17 at 9; emphasis added.) Because Dr. Jackson's letter was dated October 15, 1996, before Vidrine's October 21, 1996 letter, Vidrine anticipated a more specific response from Dr. Jackson. (Vidrine Dep. at 29.) However, Dr. Jackson clearly relates the disk herniation to claimant's original injury. Vidrine did not contact Dr. Jackson's office requesting that he specifically reply to her October 21 letter.

30. Although Dr. Jackson notes on September 24, 1996, that claimant "is having more problems with dizziness and has had several falls" (ex. 17 at 8), Vidrine did not request any further information from Dr. Jackson regarding the falls or any role they might have played in claimant's condition.

31. Dr. Jackson indicated the urgency of the surgery in his note of September 24, 1996:

In my opinion, I do not think that all of her symptoms are necessary [sic] related to her disc herniation. I think some of her symptoms certainly are and this is not a condition that has necessarily improved with time and, in fact, her MRI scan does show a significant change with regard to her disc herniation. I anticipate at some

point in time she is going to need to have surgery and I think all things considered, **probably the sooner that can be done, the better off I think she may be.**

(*Id.*; emphasis added.)

32. Dr. Schaefer responded to Vidrine's October 21, 1996 letter on October 24, 1996, as follows:

In the first instance, it is clear that Ms. Stevens did seek, at least, some form of treatment for her neck pains between 1992 and 1996, since she reported to me that she continued going to a chiropractor 2-3 times per week for 3 or 4 years. When she finally decided that these treatments were going no where [sic] she was subsequently referred to Dr. Jackson and subsequently referred to my office for further evaluation and treatment.

I do think that her current complaints relate back to her original injury in 1991. I would take issue with the fact that an opinion has been rendered that the MRI of the cervical spine, in 1992, was "normal". It is my opinion that this cervical spine MRI, in 1992, is not normal, but as mentioned in my note of October 1, 1996, shows disruption of the disc at C5/6 with progressive enlargement of a midline disc protrusion over a 4 year period of time.

For these reasons I think it can be clearly stated that her current condition relates back to her original injury in October of 1991.

(Ex. 16 at 3.)

33. Vidrine testified that Dr. Schaefer's comment that the 1992 MRI was "not normal" conflicted with the reports of both Dr. Jackson and Dr. Alzheimer, the radiologist, who found the MRI to be normal (see Findings of Fact 7 and 8).

34. On October 24, 1996, claimant's attorney wrote to Vidrine urging approval of the surgery. (Ex. 5.) Vidrine replied on November 5, 1996, as follows:

As you are undoubtedly aware and as I stated in my letters dated October 21, 1996 to Dr. Jackson and Dr. Schaefer, there is some question regarding the relationship of Ms. Stevens' current problems and the need for surgery to her industrial injury. Neither Dr. Jackson nor Dr. Schaefer has explained how Ms. Stevens' current problems and need for surgery are directly related to her 2/91 industrial injury given the fact that she had an essentially normal cervical MRI in April, 1992 and now has an MRI revealing a significant disc extrusion requiring surgery.

....

Prior to acceptance of liability for Ms. Stevens' current problems and surgery, I will need specific information directly relating her current problems to her industrial

injury. Dr. Schaefer states in his letter of October 1, 1996, "I think it is possible that at least some of her pain is coming from this disc herniation." He states in the next paragraph that the disc herniation and her current pain syndrome are all related to her original injury. This is contradictory. Dr. Jackson makes similar statements in his report of September 24, 1996. Dr. Jackson also states that in his report of September 24, 1996 that Ms. Stevens is having problems with dizziness and has had several falls. No explanation has been provided regarding the etiology of the dizziness. If Ms. Stevens has had several falls, it seems possible that one of the falls could have caused the disc herniation.

(Ex. 7 at 1-2.) Despite Vidrine's statement that she had concerns regarding claimant's "falls," she did not attempt to interview the claimant nor did she request further information from Dr. Jackson, Dr. Schaefer, or the claimant.

35. On November 4, 1996, Vidrine referred claimant's case to Louise Belt (Belt) of Crawford and Company (Crawford), for medical case management. (Vidrine Dep. at 30.) Belt retained Dr. John Lane, a radiologist, to review the MRIs and to render an opinion as to the relationship between the MRIs and claimant's original injury.

36. Claimant's counsel questioned Vidrine as to why she made the referral to Crawford instead of accepting the opinions of Drs. Schaefer and Jackson, to which she replied:

Primarily because despite my request to Dr. Schaefer to explain the relationship, I was just getting information that he felt it was related. He didn't give me any reason why he felt it was related, there was no clear information from him forthcoming in terms of why there was such a drastic change in the MRI's [sic]. There was [sic] indications that Miss Stevens had had several falls, that was [sic] referenced in Dr. Schaefer's notes, as well as Dr. Jackson's notes, there were a lot of problems that -- issues that seemed to be going on that were not really explained.

(*Id.* at 30-31.)

37. On November 12, 1996, Vidrine received copies of a handwritten diary kept by claimant. Specifically, she received diary entries dated August 31 and September 17, 1996. (Ex. 28.) On August 31st, Claimant noted problems with her balance and catching herself on several occasions to "keep from falling." (*Id.* at 2.) On September 17th, she indicated that her head was hurting from where she "hit the bookcase." (*Id.* at 2-3.) The Court notes, however, that there is no indication of any fall on August 31st and that claimant's increased symptoms and MRI findings antedated August 31st and September 17th.

38. On November 18, 1996, Dr. Lane wrote to Belt as follows:

There is no question that there has been considerable progression of disease when compared to the initial examination from April 1992. The relationship of this

progression to the initial traumatic episode is one that is more difficult to define. The natural history of degenerative disease of the cervical spine is quite variable in the general population. Progression of the disease as is seen in this patient is common and the change seen between the serial examinations does not necessarily implicate subsequent traumatic events. The exact relationship of the initial disc protrusion to the initial traumatic episode is one that is always difficult to establish. The causal relationship between a traumatic event and resulting disc disease is always difficult to establish because of the high incidence of underlying disease in the general population. **There is, however, no evidence on these examinations which can be used to refute the claim that the traumatic episode was related to the subsequent disc protrusion and progression to disc extrusion in this case.**

(Ex. 27; emphasis added.)

39. Vidrine testified that Dr. Lane's report did not provide a sufficient answer in order to accept the claim. She stated that at that point there were **still** some unanswered questions and that Dr. Lane did not say definitively whether or not the current condition was or was not related to the initial injury. Be that as it may, on the date Vidrine received his report, the only medical opinions in her possession verified a relationship between claimant's condition and her industrial injury. Vidrine did not have a single medical opinion disputing the relationship. Nonetheless, and despite Dr. Jackson's indication of urgency for surgery, Vidrine continued to refuse authorization for the surgery.

40. Mediation before the Department of Labor and Industry was held on November 21, 1996. The outcome of the mediation has no bearing on this decision. However, as a result of the mediation, claimant agreed to provide the insurer with the chiropractor's records as well as those from claimant's family doctor, Dr. Margaris. No previous written request for the records had ever been made.

41. National Union received the records on November 25, 1996. (Vidrine Dep. at 35.)

42. Dr. Jimmerson's records noted falls by claimant. On January 21, 1993, he noted a slip and fall on the ice, stating: "Landed on back and hit head. Arms & neck are very sore. . . ." (Ex. 24 at 1.) On June 19, 1993, he reported: "Slipped & fell up stairs Friday morning going to work." (*Id.* at 4.) On June 4, 1994, he reported: "Tripped & fell over 2nd base at softball. Sore all over. . . ." (*Id.* at 9.)

43. Dr. Schaefer scheduled claimant for surgery during the week of December 9, 1996. (Stevens Dep. at 11.)

44. On November 25, 1996, Dr. Jackson wrote the following to Vidrine:

Enclosed you will find a copy of my most recent clinic note on Penny Stevens on 11/11/96. It is my opinion that Penny Stevens' current difficulty with neck and arm

pain and cervical disc herniation is related to her previous injury. It is well known in the medical literature that people with cervical injuries are predisposed to going on to develop cervical spondylosis as well as cervical disc herniations. Penny, at the present time, is suffering from a great deal of pain and is effectively unable to apply for work or proceed with any vocational pursuits until her cervical problem is resolved.

I would agree with Dr. Schaefer that she could be benefited and would be appropriate for cervical decompression laminectomy and probable fusion. **I do not feel that it is appropriate and in the best interest if Ms. Stevens for her to have any further delay in definitive treatment.**

(Ex. 17 at 10; emphasis added.)

45. National Union's attorney sent Dr. Schaefer a letter on December 3, 1996, requesting that he respond to the following questions:

1. Can you state to a reasonable degree of medical probability the disruption of the disk at C5-6 which you apparently believe is present on the MRI of 1992 was caused by the accident of February 16, 1991?
2. To a reasonable degree of medical probability is the C5-6 central disk extrusion noted on the August 26, 1996, MRI the direct and natural result of the abnormality noted in 1992?
3. To a reasonable degree of medical probability did the accidents referenced in Dr. Jimerson's [sic] records play a role in causing the progressive enlargement in the midline disk protrusion which is referenced in your correspondence of October 24, 1996?
4. To a reasonable degree of medical probability did the accidents referenced in Dr. Jimerson's [sic] records play no role in the progressive enlargement of the midline disk protrusion as referenced in your correspondence of October 24, 1996?

(Ex. 23 at 2.)

46. Dr. Schaefer responded on December 9, 1996, stating:

- 1.) To a reasonable degree of medical probability I believe that the disc disruption at C5/6, present on the MRI of 1992, was caused by the accident of February 16, 1991.
- 2.) I do believe to a reasonable degree of medical probability that the C5/6 central disc extrusion, noted on the August 26, 1996 MRI, is the direct and natural result of the abnormality noted in 1992.

3.) It is possible that the accidents referenced in Dr. Jimmerson's records did play a role in exacerbating the disc herniation. I would consider this to be an exacerbation of her work related injury and not a new injury.

4.) Should be, therefore, self explanatory.

(Ex. 22.)

47. Finally on December 12, 1996, National Union authorized the surgery and indicated it would pay related medical expenses. It also agreed to pay for the August 26, 1996 MRI.

48. National Union's persistent denial of medical benefits in this case was unreasonable. All of the evidence presented supports a finding that the insurer should have accepted liability for this medical claim prior to December 12, 1996. Dr. Jackson, the treating physician, and Dr. Schaefer consistently opined that claimant's condition related to her original injury. By the time she received Dr. Lane's report, if not before, Vidrine's refusal to authorize surgery became unreasonable. Dr. Lane's report only reinforced Dr. Jackson's and Dr. Schaefer's opinions. At that point, Vidrine had no evidence indicating that claimant's condition was a result of anything other than her original injury. She did not actively attempt to obtain information which might indicate that another incident caused an aggravation of claimant's condition. While expressing concern in that regard, Vidrine did not make any written request for other medical records or information. Specific inquiry only occurred at or after mediation.

CONCLUSIONS OF LAW

1. Claimant's entitlement to attorney fees, costs, and a penalty is governed by the 1989 version of the Montana Workers' Compensation Act. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 730 P.2d 380 (1986).

2. Claimant has requested attorney's fees and costs pursuant to either section 39-71-611 or section 39-71-612, MCA (1989). At the commencement of trial, the Court granted National Union's Motion for Partial Summary Judgment, ruling that claimant is not entitled to an award of attorney's fees or costs, as a matter of law, pursuant to sections 39-71-611 and -612, MCA (1989). That ruling is based on section 39-71-611, MCA (1989), which provides in pertinent part:

(1) The insurer shall pay reasonable costs and attorney fees as established by the workers' compensation court if:

(a) the insurer denies liability for a claim for compensation or terminates compensation benefits;

(b) the claim is later adjudged compensable by the workers' compensation court; and

(c) in the case of attorneys' fees, the workers' compensation court determines that the insurer's actions in denying liability or terminating benefits were unreasonable. [Emphasis added.]

Interpreting similar language of earlier attorney fee statutes, the Supreme Court has held that the requirement that the claim be "later adjudged compensable by the workers' compensation judge" precludes an award of attorney fees unless the insurer persists in its denial of liability and the Court actually awards benefits. Thus, attorney's fees cannot be awarded where the insurer belatedly accepts liability prior to an actual adjudication. *Lasar v. E.H. Oftedal & Sons*, 222 Mont. 251, 252, 721 P.2d 352 (1986); *Yearout v. Rainbow Painting*, 222 Mont. 65, 68, 719 P.2d 1258 (1986).

In this case, the claim was never adjudged compensable by this Court. Claimant argues that she "was required to invoke the statutory adjudicative process, commencing with mediation. . ." (Petitioner's Brief Opposing Motion for Partial Summary Judgment at 3.) However, the plain language of the statute requires an adjudication by the Workers' Compensation Court. Pursuant to section 39-71-611, MCA, claimant is not entitled to attorney's fees and costs.

Section 39-71-612, MCA (1989), states, in pertinent part:

(1) If an insurer pays or submits a written offer of payment of compensation under chapter 71 or 72 of this title but controversy relates to the amount of compensation due, the case is brought before the workers' compensation judge for adjudication of the controversy, and the award granted by the judge is greater than the amount paid or offered by the insurer, a reasonable attorney's fee and costs as established by the workers' compensation judge if the case has gone to hearing may be awarded by the judge in addition to the amount of compensation

Prior to the 1987 amendments, section 39-71-612, MCA, allowed attorney's fees and costs where a case resulted in "settlement." See *Madill v. State Compensation Insurance Fund*, 930 P.2d 665 (1997). The legislature deleted the language referring to settlements, thereby allowing an award of attorney's fees and costs only when the "case is brought before the workers' compensation court for adjudication. . ." The dispute concerning payment of medical benefits was never brought before this Court and was therefore never adjudicated. Based upon the foregoing, claimant is not entitled to attorney's fees or costs pursuant to section 39-71-612, MCA (1989.)

3. The claimant is entitled to a 20% increase in benefits since the insurer unreasonably refused to pay benefits. § 39-71-2907, MCA (1989). Section 39-71-2907(1), MCA (1989), provides:

39-71-2907. Increase in award for unreasonable delay or refusal to pay. (1) When payment of compensation has been unreasonably delayed or refused by an insurer,

either prior or subsequent to the issuance of an order by the workers' compensation judge granting a claimant compensation benefits, the full amount of the compensation benefits due a claimant between the time compensation benefits were delayed or refused and the date of the order granting a claimant compensation benefits may be increased by the workers' compensation judge by 20%. The question of unreasonable delay or refusal shall be determined by the workers' compensation judge, and such a finding constitutes good cause to rescind, alter, or amend any order, decision, or award previously made in the cause for the purpose of making the increase provided herein.

While the section appears to require an "order" for benefits as a prerequisite to any penalty, the Supreme Court in *Handlos v. Cyprus Industrial Minerals*, 243 Mont. 314, 317, 794 P.2d 702, 703-704 (1990), found the section to be ambiguous and construed it to allow imposition of the penalty in cases where the insurer delays payment until mid-trial. The Court held:

[T]he penalty under sec. 39-71-2907, MCA, is available where an insurer unreasonably delays paying a claim until the claimant takes the case to **trial**. We hold that sec. 39-71-2907, MCA, allows the Workers' Compensation Court to award a penalty when payment of benefits has been unreasonably delayed until **mid-trial**. [Emphasis added.]

In *Mintyala v. State Compensation Insurance Fund*, 276 Mont. 521, 527, 917 P.2d 442, 445-446 (1996), the Montana Supreme Court stated: "[T]he penalty provision is available to the claimant from the moment the insurer's delay in payment becomes unreasonable."

Since I have found National Union unreasonable in its refusal to pay for the August 26, 1996 MRI and surgery, claimant is entitled to a penalty.

JUDGMENT

1. Claimant is not entitled to attorney's fees and costs pursuant to sections 39-71-611 and 39-71-612, MCA.
2. National Union shall pay a 20% penalty with respect to the August 26, 1996 MRI and the surgery.
3. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.
4. Any party to this dispute may have 20 days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 17th day of July, 1997.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Richard J. Martin

Mr. Oliver H. Goe

Date Submitted: June 16, 1997