IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2002 MTWCC 32

WCC No. 2001-0337

KATHY D. WILSON

Petitioner

vs.

ACE AMERICAN INSURANCE GROUP

Respondent/Insurer for

TOWN PUMP, INCORPORATED

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Claimant tripped at work in March 1999. While she recovered before falling, she twisted her body, resulting in an injury to her shoulder. The shoulder injury required surgery but she then developed reciprocal sympathetic dystrophy (RSD), a painful condition affecting her arm. She was treated for the condition, which improved, and approved to return to work, however, later on her primary physician found that she was unable to work on account of pain. Meanwhile, she had intermittent back pain and eleven months after the accident developed radicular symptoms affecting her knee. She was diagnosed with a herniated disk and surgery was recommended. However, the insurer denied liability for the back condition.

Held: Claimant's shoulder condition is not permanently totally disabling. Her primary physician's opinion to the contrary is unpersuasive in light of an FCE showing otherwise, the opinions of other physicians with more expertise, and my evaluation of claimant's credibility. On the other hand, the evidence for a causal relationship between the herniated disk and the accident has been proven by a very bare preponderance of the evidence. Thus, claimant is entitled to back surgery and to temporary total disability benefits until she recovers from the surgery.

Topics:

> **Disability: Permanent Total.** Where there are conflicting medical opinions as to claimant's ability to return to work after reaching maximum medical improvement,

the Court adopts the opinions of the physicians with the greater expertise where those opinions are supported by information showing that claimant failed to seek further treatment for the alleged disabling condition and an FCE showed that she could work despite her pain behaviors. Claimant's credibility was also a factor.

Medical Conditions: Reciprocal Sympathetic Dystrophy. Where claimant was treated for reciprocal sympathetic dystrophy (RSD), the treatment improved her condition, and she was approved for return to work, her assertion that she cannot return to work on account of RSD pain is unpersuasive where she did not seek additional treatment for the condition and her FCE indicated that despite self-limiting pain behaviors she could perform the physical tasks of the jobs.

Proof: Conflicting Evidence: Medical. The opinions of a primary physician who is a general practitioner are not entitled to deference where other more expert physicians treated or evaluated the claimant's specific conditions and had more expertise with regard to the medical matters at issue.

¶1 The trial in this matter was held on January 22, 2002, in Helena, Montana. Petitioner, Kathy D. Wilson (claimant), was present and represented by Mr. Norman H. Grosfield. Ace American Insurance Group (Ace) was represented by Mr. Leo S. Ward.

¶2 Exhibits: Exhibits 1 through 38 were admitted without objection.

¶3 Witnesses and Depositions: The claimant, claimant's mother (Diane Wilson), and Mamie Nyswonger testified at trial. In addition, the parties submitted depositions of claimant, Diane Wilson, Dr. John Vallin, Dr. John Campbell, Dr. Bruce T. Hayward, and Dr. Peter M. Sorini for the Court's consideration.

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

1. Whether Petitioner is temporarily totally or permanently totally disabled as a result of her industrial injury and entitled to retroactive total disability benefits.

2. Whether Petitioner's low back and knee conditions are related to Petitioner's industrial injury of March 9, 1999, and whether Respondent has to assume liability for the back surgery as recommended by Dr. Peter Sorini.

¶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 presently 44 years of age and a native of the Ennis, Montana area. She is a high school graduate and attended college for two years, concentrating in accounting. (K. Wilson Dep. at 6.)

¶7 Over the years, claimant has worked as data entry clerk for a state agency, helped out on the family ranch, assisted her ex-husband in an outfitting business, worked entering data for her mother's bookkeeping business, and worked for Town Pump in various capacities. Her work in the outfitting business ended in approximately 1994. She worked for her mother's accounting business from 1984 to 1999. She is half-owner of the family ranch but presently does little if any work for the ranch.

¶8 Claimant worked for Town Pump from April 12, 1995 through August 2000, with interruptions due to injuries and health problems. During that time she worked as a deli manager, a day shift clerk, bookkeeper, and manager.

¶9 Claimant has multiple health problems antedating the industrial accident at issue in this case. As pertains to her back, neck, and shoulder conditions:

> ¶9A Claimant tripped and fell when she was 18 and hurt her back. The exact nature of her injury is not elucidated, although there is a suggestion she broke something in her back.
>
> ¶9B In 1990 claimant had pain in her upper and lower back. (Ex. 11-1.) She saw a doctor on a single occasion - October 8, 1990 -- for her complaints. (*Id.*) The pain resolved without significant treatment; the next mention of back problems is two years later.
>
> ¶9C In September 1992 claimant experienced cervical and low-back pain and spasm and had a positive straight leg raising test. (Ex. 11-4, 11-5.) X-rays taken at that time indicated that she had degenerative changes of the spine from the L3 to L5 levels with disk space narrowing at the L4-5 level.[(1)] (Ex. 11-5; Ex. 24.) She was examined by Dr. Lashman Soriya, a neurologist, on October 15, 1992, and he noted low-back pain radiating into claimant's right leg, however, claimant's neurological exam was normal. (Ex. 30.)
>
> ¶9D In 1993 the exact date which is not discernable from the medical record supplied to the Court, claimant was experiencing low-back pain and spasm, however, straight leg raising tests were negative, thus indicating that the pain was not radicular. (Ex. 11-8.)

¶10 Then, on July 16, 1994, she suffered an industrial injury when she fell on her face at work.[(2)] (Ex. 32.) She experienced neck and right shoulder pain, as well as tenderness and pain along her entire spine down to her tailbone. (Ex. 11-10.) X-rays taken at the time disclosed degenerative changes in the lumbar area with narrowing of the disk spaces at L3 through L5, with degenerative spondilolysthesis and virtually no disk space at L3-L4. (Exs. 11-10, 24, and 25.)

¶11 Claimant did not recall the 1994 injury but the explanation for her lack of memory is more probably than not due to the extreme depression she suffered at that time. (Ex. 11-9 to 11-14.) She was being actively treated for the depression and in March 1995 her depression had progressed to point that she required hospitalization. (Exs. 11-14, 11-15, 36.)

¶12 In any event, by October 1994 her low-back pain and radiating symptoms had resolved. (Exs. 11-12 to 11-26.) On February 28, 1995, she was certified as having reached maximum medical improvement (MMI) and as having returned to her pre-July 1994 injury status. (Ex. 5). For several years thereafter, there is no mention of low-back complaints.[(3)] As late as June 5, 1998, an annual physical examination indicated that claimant did not have back tenderness. (Ex. 11-26.)

¶13 Petitioner worked at Town Pump from April 1995 to March 10, 1999, without physical limitations. Her work included stocking shelves and lifting cases of oil and boxes of beer weighing 25 to 30 pounds, as well as acting as a cashier.

¶14 On March 9, 1999, claimant tripped. She caught herself and did not fall, but she was thrown backwards and twisted her torso. (Hayward Dep. at 6.) The episode triggered "pain in her neck and right shoulder as well as some lower back pain radiating into the upper part of her right leg." (Ex. 1-1.)

¶15 At the time of the accident, Town Pump was insured by Ace. Ace accepted liability for the injury.

¶16 Claimant saw Bruce Hayward, a D.O. in general practice, on March 10, 1999. (*Id*.) He examined claimant, finding muscle spasm in the cervical area, right upper trapezius and right lumbar area. (*Id*.) He diagnosed, "Cervical and lumbar strain and right shoulder strain." (*Id*.)

¶17 Claimant's predominant problem for some time thereafter was her right shoulder. Dr. Hayward initially prescribed physical therapy for the shoulder (Ex. 37), then referred claimant to Dr. John Campbell, an orthopedic surgeon concentrating in shoulder and knee injuries. Dr. Campbell saw her on May 20, 1999, and found that she had "some [shoulder] impingement symptoms." (Ex. 14-2.) He operated on the shoulder on September 14, 1999.[(4)]

¶18 Following claimant's shoulder surgery, she developed symptoms of Reciprocal Sympathetic Dystrophy (RSD), which Dr. Campbell described as including "changes in temperature of the skin, discoloration of the extremities, hypersensitivity of the skin, pain with stimulation such as even with bright light, a loud noise." (Campbell Dep. at 12.) He referred claimant to Dr. Duane V. Mohr.

¶19 Dr. Mohr first examined claimant on November 2, 1999. Her symptoms at that time were

> burning pain around her shoulder . . . [which] radiated down her right arm on the lateral surface and even into the forearm and hand, at times. Also, there is extreme sensitivity to light touch, which developed in the same area.

(Ex. 3-1.) Dr. Mohr performed a diagnostic stellate block and concluded, "[T]here is no question that she has reflex sympathetic dystrophy." (*Id.*) Dr. Mohr treated claimant until January 13, 2000, with further stellate blocks, an interscalene block, and medication. (Ex. 3-1 to 3-8.) He noted improvement in her condition over that time.

¶20 Claimant returned to Dr. James C. Simmons on August 4, 2000, for followup of her RSD. She noted at that time that her condition was 50% improved; he recommended but she rejected resumption of the blocks. (Ex. 3-9.)

¶21 At Dr. Campbell's request, on May 25-26, 2000, Gary Lusin (Lusin), a physical therapist, did a functional capacities evaluation (FCE) of claimant. (Ex. 13.) The FCE showed that claimant could perform work "in the lower portion of the medium physical demand level" despite her pain complaints and self-limiting behavior. (Ex. 13-2, underlining in original.) Regarding claimant's cooperation during the examination, Lusin wrote:

Ms. Wilson was cooperative from the standpoint of participating in all tasks asked of her. She does demonstrate broad self-limiting pain behavior for nearly every task. The limitations identified through this testing represent her self-limitations rather than a safe maximum physical limit.

(Ex. 13-2.) Regarding claimant's performance during the FCE, he commented as follows:

- There was a poor link between the physical problems identified in the musculoskeletal assessment and her actual functional performance. During musculoskeletal assessment she would allow no more than 85-90 of right shoulder flexion whether active or passive. During the FCE she easily took the right shoulder to 120-125 flexion without difficulty.
- There was poor correlation between her floor-to-waist lift and her repetitive squat.
- There was poor correlation between overhead lifting and overhead work testing.
- Horizontal lift did not correlate with two-handed carry.
- Her pull force was not greater than her push force which is inconsistent with her current right shoulder problem.
- Low level activities of crawling, kneeling, crouching, squatting, etc. were not consistent with limitations in the lower extremity and trunk.

- Her handgrip testing scores were not reflective of a bell curve indicating submaximal performance.
- Her responses on the Spinal Function Sort did not correlate with her FCE results. I had her complete two Spinal Function Sort questionnaires. One was for the right hand only and one was for the left hand only. The right hand score was 43 and the left hand scored was 79. On neither questionnaire did she indicate that she could do any of the 50 tasks without restriction and that was with both the left and the right. This strongly suggests that she has a poor perception of her pain and disability, and extends that perception to the left upper extremity.

(Ex. 13-2, 13-3.) Lusin concluded that claimant's "pain behavior" limited her performance in the evaluation. (*Id*.) Even with her limited performance, he approved job descriptions for Clerk/Cashier at Town Pump, Assistant Manager at Town Pump, and Manager at Town Pump. (Ex. 13-4.) His overall impression was:

> This is an accurate description of Ms. Wilson's current level of function. The test results strongly suggest that Ms. Wilson does perceive herself to be much more limited and disabled by pain than her performance would indicate. This is not to say that Ms. Wilson is not experiencing pain in the right shoulder, low back, or right lower extremity, however, the test does not support that these pain complaints are significantly limiting her function.

(*Id*.)

¶22 Dr. Campbell agreed with the FCE evaluation and found claimant at MMI on June 5, 2000. (Ex. 14-1; Campbell Dep. at 13.) He set her up for an impairment rating by Dr. John Vallin. (Campbell Dep. at 13.)

¶23 Dr. Vallin is a physiatrist.[(5)] He examined claimant on June 28, 2000. (Ex. 17.) He rated her impairment for cervical spine and shoulder at 15% of the whole person. (Ex. 17-3.) He agreed with Lusin's FCE. He agreed that claimant could return to work in a light to medium job and specifically approved the three Town Pump positions as manager, assistant manager, and cashier/bookkeeper. (Ex. 17-4.) He did not rate or evaluate her low back. (Ex. 17.)

¶24 On September 6, 2000, based on the MMI and impairment findings, Ace terminated claimant's temporary total disability benefits and began paying her a 15% impairment award.

¶25 Meanwhile, claimant had begun experiencing right knee symptoms. On July 14, 2000, Dr. Hayward noted that claimant "has been having trouble with her right knee since Feb" and that her knee had been getting "progressively worse." (Ex. 1-12.) He described claimant's knee symptoms as follows:

> It feels as if her knee is congested and full. She also has a numbness in a stocking fashion from about 4" above the knee to 4" below the knee. She feels as if the knee will give out on her and occasionally it has given out. She also has some hypesthesias [sic] around the knee. **It seems that the pain comes from her back down into her knee**. . . .

(*Id.*, emphasis added.)

¶26 Medical records of back problems from the time of the claimant's March 1999 injury and Dr. Hayward's July 14, 2000 examination, showed that claimant's back complaints during that time were spotty.

¶27 A month after her 1999 industrial injury, in an April 9, 1999 physical therapy evaluation, the therapist reported claimant's major complaint involved her right shoulder but went on to describe her low-back complaints as follows:

> Kathy's low back, she reports as a stiff constant/occasional ache with what she calls leg pain which comes and spirals in the front of her leg. She does report subjectively that she has a tipped vertebrae forward, which was diagnosed by a physician in Billings. Her leg pain is what she reports as a spiraling which goes from her back across the front of her thigh down the inside of her leg. She calls it a hot or cold like water going down her leg. The right hip joint which she was complaining about caused discomfort with lifting her right leg. She says this is like an ache-like discomfort with activity.

(Ex. 37.)

¶28 On May 10, 1999, Dr. Hayward reported that although claimant was having continuing right shoulder and neck complaints, "[t]he rest of her back feels quite well." (Ex. 26.)

¶29 Subsequent physical therapy notes indicate that claimant continued to experience low-back complaints. Sometime between May 10 and June14, 1999,[(6)] the therapist noted "chronic body ache" and questioned whether there might be some "systemic component." (Ex. 38-2.) On June 14, 1999, the therapist noted possible fibromyalgia. (Ex. 38-10.)

¶30 On October 12, 1999, Dr. Bischoff, one of the Madison County Valley Clinic physicians treating claimant over the years, noted that claimant denied low-back pain but was complaining that the "toes on her left foot have been turning blue and feeling numb." (Ex. 1-7.)

¶31 On October 14, 1999, the therapist noted that claimant was complaining of low-back soreness. (Ex. 38-14.)

¶32 During the FCE on May 25 and 26, 2000, claimant gave a history of "back pain" and "right leg pain fairly consistently. She reports her knee swells and gets sore and gives out and will become stiff. Reports of cramping in her feet consistently." (Ex. 13-1.)

¶33 On July 14, 2000, Dr. Hayward ordered an EMG to determine if claimant's knee complaints were back related. (Ex. 1-12.) An EMG and nerve conduction study was subsequently performed. The study showed "lumbar radiculopathy." (Ex. 1-13.) In other words, claimant's knee symptoms were the result of lumbar nerve impingement.

¶34 Dr. Hayward referred claimant to Dr. Peter Sorini, a board certified neurosurgeon. (Ex. 1-13; Sorini Dep. at 4.) Dr. Sorini examined claimant on October 4, 2000. (Ex. 2.) Prior to his examination, claimant underwent an MRI. Dr. Sorini reviewed the MRI and reported:

> MRI of good quality reveals dramatic degenerative disk space changes at L3-L4 with a large disk herniation eccentric to the right in the far lateral aspect at this level. There is also a more central component.

(Ex. 2-2.) He recommended "micro-surgical decompression." (*Id.*)

¶35 Ace has denied liability for the claimant's back and knee conditions on the ground that the conditions are not related to her March 9, 1999 injury.

¶36 The medical history recited above provides no clear path to a finding that claimant's back and knee conditions are related to her March 9, 1999 injury. Claimant had a prior history of degenerative back disease, with significant x-ray findings as long ago as 1992. The knee symptoms developed approximately 11 months after claimant's March 1999 industrial accident. On the other hand, after a several year symptom-free period, she experienced immediate back and leg symptoms following her March 1999 accident.

MEDICAL OPINIONS REGARDING LOW BACK

¶37 Three physicians have weighed in regarding the relatedness of claimant's herniated disk to her March 1999 injury. The physicians, all of whom testified by deposition, are Drs. Hayward, Sorini, and Vallin.

¶38 Dr. Hayward wrote the claims adjuster on September 28, 2000, that "it would be reasonable to suspect that her [claimant's] current lumbar radiculopathy and knee pains do have to do with the initial injury in Mach 1999." (Ex. 1-15.) In deposition he was asked if the March 1999 incident caused or aggravated a preexisting low-back condition. (Hayward Dep. at 9.) He replied, "I believe that it did, in review of previous records, and just interviewing her at our first meeting." (*Id.* at 10.) However, cross-examination disclosed that he was not fully aware of claimant's prior back history. (*Id.* at 15-17.) For example, he was unaware of the 1994 injury. (*Id.* at 16.)

¶39 Dr. Sorini testified that claimant's herniated disk was compressing either or both the third and fourth lumbar nerve roots and reiterated his recommendation for surgery. (Sorini Dep. 7, 9.) He opined that the herniated disk "is related to the incident in [March] 1999." (*Id*. at 9.) He testified that if claimant's prior history of back pain had been "non-specific low back pain," then the March 1999 incident was "causative" of her herniated disk, otherwise it was an aggravation. (*Id*. at 11.) He acknowledged that Dr. Hayward's medical records, which he had, indicated that at times after March 1999 the claimant did not complain of back or leg pain. He testified that even with a herniated disk symptoms may wax and wane. (*Id*.) Dr. Sorini did not have or review records of Drs. Campbell, Mohr, or Vallin. (*Id*. at 15.) He also did not have the claimant's physical therapy records. (*Id*. at 15-16.)

¶40 At the time of his deposition, Dr. Sorini had some but not all of the claimant's pre-March 1999 medical records (*id*. at 15), and even though the records he did have included some of claimant's prior back history, he was unfamiliar with that history (*id*. at 15-22, especially at 22 (see below)). He did not have Dr. Soriya's records or the prior imaging studies. (*Id*. at 19, 22-23.) Indeed, other than claimant's injury when she was 18 he was unaware of claimant's pre-1999 back history and back complaints. (*Id*. at 19-22.) When asked what he knew about the condition of her back prior to March of 1999, he answered:

> Not a lot of information, other than that remote injury when she was a young gal, the fractured back at 18 which was never set; "never reset," I quoted her.

(*Id*. at 22.) In cross-examination, he conceded that claimant's fall in 1994 could have caused her herniated disk. (*Id*. at 20.) In light of the history provided him in cross-examination, he further conceded it was possible that claimant's herniated disk occurred prior to March 1999, that her symptoms waxed and waned over the years, and that the March 1999 incident was merely a temporary aggravation of a preexisting condition. (*Id*. at 23.) Why claimant's counsel did not furnish claimant's complete medical history concerning her back problems and ask him to render his opinions in light of that history is a mystery to me. His failure to consider that history seriously undermines his opinions. On the other hand, either counsel could have asked him whether the additional history changed his opinions. I am left wondering what he would have said.

¶41 Dr. Vallin's examination of claimant was limited to her neck and shoulder for purposes of an impairment rating. He did note that claimant said she had a history of chronic, intermittent back pain. Ace's adjuster, however, later on asked him for his opinion regarding the relatedness of claimant's radiculopathy (from the herniated disk) to her March 1999 injury. He wrote back on May 3, 2001, in pertinent part, as follows:

> . . . Dr. Hayward is diagnosing a new entity with respect to right leg pain which he feels is related to an L3-4 radiculopathy. There are no medical records to reflect injury to the lumbar spine other than a prior medical history of chronic intermittent

> low back pain which more likely than not is unrelated to the previous employment and in my opinion would not be causally related to her injury of 3/9/99.

(Ex. 6.) Dr. Vallin reaffirmed his opinion in his deposition. (Vallin Dep. at 15.) Dr. Vallin's opinion, however, was premised on the brief, incomplete history the claimant provided him at the time of his examination of her, Dr. Hayward's medical notes of March 10, April 7, and May 10, 1999, and Dr. Hayward's letter of February 1, 2001. (*Id.* 16.) When cross-examined about the importance of other records he had not reviewed, he gave them short shrift, testifying that other records would not make a difference to his opinions since the records he had indicated claimant's back pain had resolved. (*Id.* at 18.) As with Dr. Sorini, I am bewildered by the failure of counsel to provide Dr. Vallin with a complete medical history, but in this instance it would appear that the responsible counsel is Ace's attorney who should have done so. Moreover, Dr. Vallin was not asked to comment on the waxing and waning of claimant's symptoms, which was addressed by Dr. Sorini. His testimony also does not lay out his justification for considering a lack of back complaints at a particular time after March 1999 was conclusive.

¶42 Irrespective of my ultimate finding concerning the relatedness of claimant's herniated disk to her March 1999 industrial accident, I find that neither party adequately prepared their medical witnesses and that counsel failed to ask questions that would have aided me in resolving this dispute. Surely, counsel in this case could have supplied Drs. Sorini and Vallin with complete medical records regarding claimant's back problems. And, while I appreciate short depositions, both counsel should have more thoroughly explored the bases for their opinions and at least asked them if additional information would have changed their ultimate opinions.

MEDICAL OPINIONS REGARDING ABILITY TO WORK

¶43 In the alternative, the claimant has asked that I declare her permanently totally disabled. That determination would require that irrespective of any future back surgery she will be unable to return to work.

¶44 The written opinions of the physical therapist, Dr. Campbell, and Dr. Vallin regarding claimant's ability to return to work have previously been set out. (¶ ¶s 21, 22, and 23.) Dr. Hayward also weighed in on the issue. On February 1, 2001, he wrote that "Kathy's pain in both the arm and shoulder as well as the back and leg she would probably not be employable in any capacity at this time." (Ex. 1-19.) He went on to say:

> From the comments of Dr. Sorini I would think that surgery for the ruptured disk would almost entirely relieve the back and leg symptoms that she is having. This would likely greatly enhance her employability. However, she would continue to have the RSD which usually is a problem that remains indefinite. I would have to defer to a specialist in this field to find out if there are any medications or

> procedures that would lessen her pain to the point where she would be able to use her right arm without having incapacitating pain. I also wonder if a functional capacity evaluation would help to clear up some of the questions as to what she is and is not able to do.

(Ex. 1-20.) In deposition, Dr. Hayward reaffirmed his opinions regarding claimant's ability to work without further elaboration. (Hayward Dep. at 10.)

¶45 In their depositions, both Dr. Vallin and Dr. Campbell reaffirmed their prior opinions that the FCE done on May 2, 2000, accurately reflects claimant's physical abilities and ability to return to work.

RESOLUTION

¶46 After considering all the testimony, I find that claimant's neck and shoulder injuries, and her resulting RSD, are not totally disabling. Dr. Hayward is the only physician to opine that she is totally disabled on account of her neck and shoulder injuries, and even he qualifies his opinion. Specifically, he says, "I also wonder if a functional capacity evaluation would help to clear up some of the questions as to what she is and is not able to do." (Ex. 1-20.) Claimant in fact had an FCE and that FCE determined that despite self-limiting pain behavior, she could still perform work at the light to medium level and perform the duties of her prior jobs with Town Pump. Both Drs. Campbell and Vallin agreed with the FCE results and evaluation.

¶47 Dr. Hayward also qualified his opinion by indicating he would defer to a specialist in RSD concerning whether that condition might benefit from further treatment which would improve her ability to work. (*Id*.) Claimant was in fact seen and treated by specialists with experience in RSD. She showed significant improvement with that treatment. The last time she was seen, Dr. Simmons noted that she was 50% improved and recommended additional stellate or interscalene blocks but claimant rejected his recommendation.

¶48 Although Dr. Hayward was claimant's primary physician, he was not the treating physician for RSD. Moreover, Dr. Hayward is a general practitioner. He completed an internship but did not do a residency in family medicine or any other specialty. He is not board certified in any medical specialty. In contrast, Dr. Campbell is a board certified orthopedic surgeon and treated claimant for her shoulder. Dr. Vallin is a board certified physiatrist specializing in non-surgical treatment of musculoskeletal and neurological disorders. (Vallin Dep. at 5.) Dr. Mohr's specialty is unknown, but Dr. Campbell indicated, and the Court finds, that he has expertise in the treatment of RSD. Dr. Simmons provided the followup for Dr. Mohr and, by inference, he also has expertise in RSD. Even if Dr. Hayward is considered the treating physician with respect to claimant's shoulder and RSD conditions, the opinion of a treating physician, while a tie-breaker, *Key v. Liberty Northwestern Insurance,* 2001 MTWCC 53, ¶ 30, is not conclusive, *EBI/Orion Group v.*

Blythe, 288 Mont 356, 359, 957 P.2d 1134, 1136 (1998). I also have to consider claimant's credibility concerning her pain and her failure to seek further treatment for RSD. While I am convinced her complaints are genuine, I am also persuaded they are exaggerated to some extent. After considering all of this, I am **not** persuaded by Dr. Hayward's opinion. I find that the claimant's neck, shoulder, and RSD conditions do **not** preclude her from working and that she is able to return to her prior employment with Town Pump but for her herniated disk.

¶49 The question of the relatedness of claimant's herniated disk to her March 1999 injury is a more difficult one. None of the physicians who expressed an opinion on the matter had a complete medical history of claimant's back problems. Dr. Hayward, who was unequivocal in his opinion, had the least expertise of the three doctors: both Drs. Sorini and Vallin were far more qualified to render opinions on the issue. Dr. Sorini rendered an opinion that claimant's herniated disk was caused or aggravated by the March 1999 incident, but conceded that prior events, as related to him in cross-examination, could have caused her condition. Dr. Vallin disagreed that the herniated disk was causally related to the March 1999 incident, but had even less knowledge of claimant's medical history than did Dr. Sorini, moreover his examination of claimant was focused on her shoulder and neck, not on her low back.

¶50 After considering everything, I am persuaded by a bare preponderance of the evidence that claimant's herniated disk was either caused or aggravated by her March 1999 industrial injury. Dr. Sorini testified that the waxing and waning of claimant's symptoms was not inconsistent with a causal relationship between the condition and the accident. He was never asked if the information concerning her prior history in fact changed his opinion. Dr. Vallin did not address the waxing and waning in a fashion that would allow me to disregard Dr. Sorini's testimony.

¶51 Other facts lend some credence to Dr. Sorini's opinion. First, claimant had been virtually symptom free of back complaints for several years prior to her March 1999 injury. Second, claimant reported back pain immediately after the accident and a month later, on April 9, 1999, reported "leg pain which comes and spirals in the front of her leg." (Ex. 37; ¶ 27.) While neither party brought this report to the attention of either Dr. Sorini or Dr. Vallin, it seems consistent with the later radiculopathy finding. Thirdly, claimant's predominant problem after her March 1999 accident was her shoulder. Her shoulder pain may have masked her low-back and leg pain.

CONCLUSIONS OF LAW

¶52 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).

¶53 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).

¶54 Claimant has failed to prove that she is permanently totally disabled. Section 39-71-116(24), MCA (1997), defines permanent total disability as follows:

> (24) "Permanent total disability" means a physical condition resulting from injury as defined in this chapter, after a worker reaches maximum medical healing, in which a worker does not have a reasonable prospect of physically performing regular employment. Regular employment means work on a recurring basis performed for remuneration in a trade, business, profession, or other occupation in this state. Lack of immediate job openings is not a factor to be considered in determining if a worker is permanently totally disabled.

Claimant has reached MMI with respect to her shoulder and neck condition. She has not reached MMI with respect to her low-back condition, therefore, to receive permanent total disability benefits she must prove that her shoulder and neck condition are permanently totally disabling. She has failed to do so. To the contrary, I am persuaded that but for her herniated disk she can return to her prior jobs with Town Pump. Therefore, she is not permanently totally disabled and is not entitled to permanent total disability benefits.

¶55 The next question presented for decision is whether claimant's herniated disk was caused or permanently aggravated by claimant's March 1999 injury. As a matter of fact, I have found, by a bare preponderance of evidence, that it was. In light of that finding , and the testimony of Drs. Sorini and Hayward (¶¶s 34 and 45) that claimant's condition will be improved by surgery, I conclude that claimant has not reached maximum medical improvement with respect to her March 1999 industrial accident. Ace is therefore liable for the proposed surgery and for temporary total disability benefits until she recovers from the surgery.

JUDGMENT

¶56 Claimant's herniated disk was caused by her March 1999 industrial accident, Since she has not been released to return to work with respect to her herniated disk condition, has not reached MMI with respect to the condition, and is suffering a total wage loss, she is entitled to temporary total disability benefits retroactively to the date they were terminated and until such time as she has surgery and reaches MMI following surgery.

¶57 Since the claimant's herniated disk was caused by her March 1999 industrial accident, she is entitled to medical benefits for the treatment of that condition, including the surgery recommended by Dr. Sorini.

¶58 The Court retains continuing jurisdiction to determine the actual amount owed claimant in the event the parties disagree on the amount.

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

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

¶61 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 7th day of June, 2002.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Norman H. Grosfield
Mr. Leo S. Ward
Submitted: January 22, 2002

1. The Madison County Clinic records indicate that the x-ray showed "disk space is gone" at L3-4. (Ex. 11-5.) However, the actual x-ray report merely states that there is disk space narrowing at L4-L5. (Ex. 24.)

2. The claim form indicates that the accident occurred on July 16, 1994 (Ex. 32), although the initial medical visit indicates it occurred July 25, 1994 (Ex. 11-10).

3. On May 13, 1996, she received a note from a nurse practitioner indicating that she should not use a floor buffer at work or do other activities that might "torque her back." (Ex. 11 at 18.) However, that note was based on a history of back problems. (*Id.*) There is no indication in the note or in contemporaneous medical records of ongoing back problems. (Ex. 11-19.)

4. The operative note has not been furnished to the Court and the particulars of the surgery were not discussed in Dr. Campbell's deposition. Dr. Campbell indicated in his deposition that the surgery included removal of the tip of the clavicle. (Campbell Dep. at 10.) Dr. John Vallin, who later examined claimant for the purpose of an impairment rating, characterized the surgery as "diagnostic arthroscopy with removal of a loose body as well as debridement of the glenoid followed by arthroscopic acromioplasty and distal clavicle resection (Mumford type) on 9/14/99." (Ex. 17-1.) In any event, the specifics of the surgery are unimportant for purposes of the present decision.

5. A physiatrist is a specialist in physical and rehabilitation medicine.

6. The paper holes in the exhibit notebook punched out the actual date.