IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2000 MT WCC 51

WCC No. 2000-0057

LINDA YOUNG, a/k/a LINDA PLUM YOUNG

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer for

WENDY'S OF MONTANA

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary of Case: Claimant, an employee of Wendy's, was injured at work when a case of french fries fell on the back of her leg. Two days after the incident she reported leg pain to a physician's assistant. Two weeks after the incident she told a physician she also had low-back pain, which she traced to the accident. She claims her back pain increased and is disabling. She has not returned to work and seeks additional and ongoing temporary total disability benefits, medical benefits relating to her alleged back condition, coverage of an examination by an orthopedic surgeon, and designation of the surgeon as her treating physician.

Held: Claimant did not injure her back at work and has not persuaded the Court she suffers from disabling back pain. Three physicians and one physician's assistant found claimant's symptoms exaggerated and inconsistent with any objective medical condition. Based on claimant's testimony at trial and her videotaped deposition, an evaluation of her statements to various medical providers, and video surveillance, the Court finds claimant's reports of back pain are grossly exaggerated. She is not temporary totally disabled and is not entitled to further medical treatment for her back condition. Under section 39-71-1101, MCA, et seq., claimant is not entitled to demand treatment by an orthopedic surgeon who is not a member of the insurer's designated preferred provider organization (PPO).

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code: 39-71-1101. Under section 39-71-1101, MCA (1997), claimant is not entitled to demand treatment by an orthopedic surgeon who is not a member of the insurer's designated preferred provider organization (PPO).

Evidence: Credibility. Where three physicians and one physician's assistant found claimant's symptoms exaggerated and inconsistent with any objective medical condition, video surveillance suggested claimant was capable of more than she claimed, and Court found claimant not credible in testimony at trial and during videotaped deposition, claimant was not entitled to further medical treatment or temporary total disability benefits.

Medical Evidence: Kummel's Test. Claimant's response during Kummel's test suggested non-organic origin of her pain reports, which contributed to Court's conclusion she did not injure her low back, was not disabled, and was not entitled to further medical or temporary total disability benefits.

Medical Evidence: Non-organic Findings. Three physicians and one physician's assistant found claimant's symptoms exaggerated and inconsistent with any objective medical condition, which contributed to Court's conclusion she did not injure her low back, was not disabled, and was not entitled to further medical or temporary total disability benefits.

Medical Evidence: Functional Capacity Evaluation. Where physical therapist conducting FCE conceded she took claimant's pain reports at face value, and claimant's statements about her limitations were contradicted by video surveillance, FCE's conclusion that claimant was limited to sedentary-light work for four hours a day were not persuasive.

Physicians: Choice Of. Under section 39-71-1101, MCA (1997), claimant is not entitled to demand treatment by an orthopedic surgeon who is not a member of the insurer's designated preferred provider organization (PPO).

¶1 The trial in this matter was held on July 5, 2000, in Billings, Montana. Petitioner, Linda Young (claimant), was represented by Mr. Paul E. Toennis. Respondent, Liberty Northwest Insurance Corporation (Liberty), was represented by Mr. Larry W. Jones. A trial transcript has not been prepared.

¶2 Exhibits: Exhibits 1 through 11, and 14 through 27, were admitted without objection. Exhibits 12 and 13 were admitted over claimant's relevance objections.

¶3 Witnesses and Depositions: The Court received depositions of Scott K. Ross, M.D., Steven J. Rizzolo, M.D., Richard P. Lewallen, M.D., Jane Kukes-Penney, Ron Maki, Cheryl Maki, Rhonda Wakai, and two videotaped depositions of claimant (May 4, 2000 and June

14, 2000.) Claimant, Dr. Scott K. Ross, Jane Kukes-Penney, and Glen Wheeler were sworn and testified at trial.

¶4 Outstanding motions: At the time of trial, claimant's Motion for Partial Summary Judgment Pursuant to A.r.m. 24.5.316 or in the Alternative Declaratory Ruling Pursuant to A.r.m. 24.5.351 was pending. The motions are considered in the present decision.

¶5 Issues presented: The issues as restated by the Court are as follows:

- Whether claimant is entitled to additional and/or ongoing temporary total disability benefits based on her alleged low-back injury.
- Whether claimant is entitled to further medical treatment or benefits for her low-back complaints.
- Whether the insurer is liable for the expense of claimant's examination by Dr. Richard P. Lewallen, an orthopedic surgeon.[(1)]
- Whether the insurer must recognize Richard P. Lewallen, M.D., as claimant's treating physician pursuant to section 39-71-1101, MCA (1999), or under a theory of estoppel.

¶6 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

¶7 Claimant is 47 years old. She is a high school graduate.

¶8 For many years prior to her husband's death in July 1998, claimant worked at "a little bit of everything" in the Mexican Star Café, a restaurant owned by her husband. She also worked over five years for the Montana Nugget Casino.

¶9 Claimant began working for Wendy's in Billings on April 1, 1999. During her employment at Wendy's, she worked at two Wendy's restaurant locations, the first located on Grand Avenue, the second on Central Avenue.

¶10 On July 16, 1999, while working at the Central Avenue Wendy's, a case of french fries fell and hit claimant on the back of her left leg behind her knee cap. (Young Dep. I at 9.) The accident occurred at 8:40 a.m. Claimant's work shift ended at 2:00 p.m. At that time, she was experiencing burning and sharp pain in the calf of her leg. (*Id*. at 13-14, Dep. Ex. 3, *and* Trial Test.) She did not work the next day. (*Id*. at 12-13.)

Medical Treatment

¶11 On July 20, 1999, claimant was evaluated by physician assistant Dave Johnson (Johnson) at the Deaconess Billings Clinic. (Ex. 2 at 80.) He took the following history from claimant:

> Was in the restaurant, turned away from a stack of cases of french fries when they inadvertently fell over. One case falling a couple of feet striking her on the proximal calf. This kind of pushed her forward and she bumped the anterior aspect of her knee against the wall. She developed bruising and a little swelling in the proximal calf. She comes in for evaluation of leg pain and concern of possible blood clot.

(*Id*.)

¶12 The July 20th record does not mention back pain. On examination, Johnson noted "a small area of hematoma in the posterior left leg, proximal calf." (*Id*.) His impression was "[c]ontusion, left leg." (*Id*.) Johnson recommended claimant take the analgesic Aleve as needed and restricted her from frequent sitting, extensive walking, and kneeling or squatting. (*Id*. at 82.)

¶13 Claimant returned to work thereafter but only for a short period of time.

¶14 On July 23rd, she returned to Johnson, who recorded:

> She came back earlier than her previously scheduled appointment upset because she doesn't believe her management is adhering to the work accommodations requested.
>
> She states she has been on her feet too much, walking too much, and bending and having to pick things up too much. It is just too difficult and too painful for her. She is thinking she may need to go off work for a few days "under Worker Comp." Because of the continuing symptoms, I obtained x-rays of the left knee today -- other than a little medial narrowing of the joint space, there are no acute problems such as fracture, dislocation, or other bone injury noted.

(*Id*. at 83.) Johnson found tenderness in the area of the bruise and noted his impression of "[c]ontusion left knee and proximal posterior calf." (*Id*.) He restricted claimant's work duties to sitting and limiting walking. He wrote that "she can certainly sit at a cash register utilizing a stool if they will accommodate that. If not, she will have to be off work for a few days." (*Id*. at 83-84.)

¶15 As on July 20th, Johnson's office note for July 23rd does not record any complaints of back pain. (*Id*.)

¶16 On July 28, 1999, a Wendy's manager talked to claimant about "coming in and working while sitting on a stool." (Ex. 5 at 3.) He told her that Wendy's would try to accommodate

her restrictions. (*Id*.) On July 29th, claimant called the manager and told him her leg was swollen and she would not be going into work. (*Id*.)

¶17 Claimant returned to Johnson on July 30, 1999. In his office note, he wrote:

> Since last visit Mrs. Plum-Young has not yet recovered from her injuries. She is concerned about the ongoing symptoms and plans to go see Dr. Dorr for orthopedic consultation. She evidently had received his name from one of two attorneys. She gave me the name of Mr. Tovis [sic] and then she also mentioned that she had seen a personal attorney regarding her knee problem. She is a bit discouraged because early on evidently the restaurant didn't have the capability of accommodating the restrictions we requested, but she tells me later in the week they did offer her a stool to be able to sit at the register and rest her leg. At this point, it doesn't seem that she has any intention of working, because she doesn't believe she can sit comfortably for any length of time, nor can she comfortably ambulate.

(Ex. 2 at 87.) He recorded her complaints as "numbness through the entire lower extremity, and some pain in her gluteal region on the left" (*id.*), commenting that the complaints were "a bit difficult to evaluate . . . because of recurrent pain about the knee." (*Id*.) His office note does not record any complaints of back pain.

¶18 Given claimant's continued pain, Johnson sent claimant to his supervising doctor, Dr. Scott Ross, Director of Occupational Health Services. (*Id*.) For the first time, fourteen days after the accident, claimant complained of back pain. Dr. Ross recorded: "In addition, she describes an aching discomfort in the central low back region. This is relatively new but is attributed by the patient to her work injury." (*Id*.)

¶19 At deposition, Dr. Ross testified he would expect claimant to have reported back pain within a day or two of the July 16th incident if claimant had injured her back. (Ross Dep. at 14.) He questioned "whether the complaints of back pain could be associated with the reported work injury." (*Id*. at 13.)

¶20 Dr. Ross found no objective evidence of significant back injury. He found no blanching of the skin, spasm, swelling, or bruising. (*Id*. at 24.) He did find several reasons to question claimant's pain complaints. He wrote:

> Waddell's nonorganic signs are equivocal with negative axial load, positive pseudo rotation, and positive exaggerated pain response. Throughout the examination, the patient exhibits exaggerated pain response in my opinion. Kummel's nonorganic sign is positive with low back pain reported upon abduction of the left upper extremity (4/10 intensity pain in the low back). Range of motion at the waist is limited to 45 degrees in forward bend, 10 degrees extension, 20 degrees right lateral flexion, and 10 degrees left lateral flexion. Pain reported during this maneuver is between 8-10/10 intensity. There are no palpable or visible bony or soft tissue abnormalities in

> the lumbosacral region. There is no lumbar paraspinous muscle spasm. There are no trigger points palpable. The patient does, however, report 9-10/10 intensity pain with very gentle palpation over the posterior spinous processes in the lumbar region, particularly at the L4/5/S1 level. There are no palpable or visible bony or soft tissue abnormalities in this region. The patient is able to dress and undress without assistance or apparent difficulty. She seems comfortable seated in the examination chair during the interview and following the examination. She does not demonstrate any antalgic gait.

(Ex. 27 at 2-3.)

¶21 Dr. Ross used various tests to help evaluate "whether someone's being forthright with you during the evaluation and to reproduce findings by testing with different methods the same anatomic structure." (Ross Dep. at 22.) He explained the tests as follows:

- Pseudo rotation "is a twisting in a very gentle way [of] the spine, making sure that the hips and the shoulders remain in the same plane." (*Id*. at 23.) "In other words, you are doing a test which does not actually rotate the spine; you rotate the body, the objective being to determine if a patient complains of pain, which again, is a nonanatomic finding." (*Id*.) During pseudo rotation claimant reported pain. (Ex. 27 at 2.)
- Kummel's test was performed with claimant standing. Dr. Ross asked her to move one shoulder, while ensuring that her spine remained straight, a maneuver that should not cause pain. (Ross Dep. at 25.) Claimant reported low-back pain, which Dr. Ross interpreted as a nonorganic finding. (*Id*. at 26.)
- Straight leg raising test was performed with claimant seated, then supine. Claimant complained of pain when supine but not when seated; the test should have elicited similar responses. *(*Ross Dep. at 20-21
- Dr. Ross testified claimant also displayed an exaggerated pain response to light palpation. (*Id*. at 24.)

¶22 Based upon his July 30th examination, Dr. Ross concluded claimant would reach maximum medical improvement within 7-10 days with no permanent impairment. (Ex. 27 at 3.) He released her to modified work duties with restrictions on lifting, twisting, bending, climbing, crouching, and recommendation of frequent changes of position. The restrictions were effective until claimant returned for follow-up on August 5th. (*Id*.)

¶23 Claimant did not return to work. Dennis Stern, an assistant manager at Wendy's, made the following notes of conversations with claimant:

> 7-31 Evening.

> Linda called to say her leg really hurt & she didn't think she would be able to work on Sunday.
>
> 8-1 Around 8 a.m.
>
> Linda called in saying she had a hard time walking because of the pain in her leg. She would [not] be able to work. I could hear that she was crying.
>
> 8-2 8:23 a.m.
>
> Linda called saying she was trying to get an appt. with her doctor. She said that she could barely walk. She said that she had doubts about her doctor because he isn't an orthopedic surgeon.

(Ex. 5 at 4.)

¶24 Claimant returned to Dr. Ross on August 3, 1999. Dr. Ross reported she was "in distress, complaining of low back and left leg pain. . . not[ing] 10/10 intensity pain with minimal palpation in the left popliteal space." (Ex. 27 at 4.) At trial, claimant testified she did not understand her statement of 10/10 pain to mean she had the most pain humanly possible, but only that she was having *her* maximal pain. She testified Dr. Ross did not explain the 0-10 properly. Dr. Ross, however, testified that he explained to claimant, as he explains to all patients asked to rate their pain, that 10 equals "pass out pain" or "call 911 pain." I credit Dr. Ross on this point.

¶25 Dr. Ross characterized claimant's pain responses during his August 3rd examination of her as "exaggerated." He contrasted her responses during examination to what he observed before and after the actual examination:

> Throughout the evaluation, the patient exhibits exaggerated pain response and withdrawal behavior. During the interview and following the evaluation, the patient is able to sit comfortably without apparent difficulty. She is sitting with her left leg flexed at approximately 115 degrees without apparent difficulty, pain, or discomfort.

(Ex. 27. at 5.)

¶26 At the conclusion of his August 3rd examination, Dr. Ross referred claimant to Dr. Gregg L. Singer "for consultation regarding continued musculoskeletal low back pain complaints and pain complaints in the left leg." (*Id*.) Although claimant was initially pleased with the referral, Dr. Ross noted she later became "quite indignant and angry and stated that I was referring her to Dr. Singer who was in the same specialty as me." (Ex. 2 at 92.)

¶27 Claimant decided she needed treatment by an orthopedic surgeon. Sometime *before* the evening of August 3rd, she called Orthopedic Associates for an appointment but was told she needed a referral. (Trial Test.)

¶28 On the evening of August 3rd, claimant went to the emergency room at St. Vincent's Hospital, looking for a referral to an orthopedic surgeon. She was seen by Dr. Kathi Theade. (Ex. 2 at 110.) Dr. Theade recorded that claimant came "in complaining of three weeks worth of back pain," which she reported as unchanged "virtually since the day it started." (*Id.*) The history of back pain claimant gave Dr. Theade is inconsistent with the medical history disclosed in Dave Johnson's and Dr. Ross' records.

¶29 Dr. Theade examined claimant. She found it difficult to test claimant's range of motion, "but flexion was approximately 45 to 50 degrees, extension 10 degrees, abduction normal." (*Id.*) She found no tenderness in the sciatic notch and noted that reflexes and motor strength were all well preserved. She looked for Waddell's signs, but noted they "were negative for me." (*Id.*)

¶30 Regarding a referral to an orthopedic surgeon, Dr. Theade wrote,

> She apparently asked for a referral to an orthopedic surgeon today while at the clinic, but This [sic] was not felt to be necessary at This [sic] point in her treatment. The patient expresses frustration, states she is tired of her back hurting and would like a referral.
>
> . . . .
>
> I discussed with the patient her options. We will certainly treat her with a small amount of Bancap to use at night time only as well as the Soma that she was prescribed today. I have also placed her on a short course of some ketoprofen during the day, 75 mg. p.o. t.i.d. with food. I have recommended that she return to Dr. Ross and discuss her concerns. I also asked her to check with her case manager at Liberty Northwest to discuss the issues that she has with him. The patient states she will do both of these. I also stated I would be glad to provide her with a referral *if* that becomes appropriate with her treating physician.

(*Id.,* emphasis added.)

¶31 Claimant testified Dr. Theade actually referred her to Orthopedic Associates during the emergency room visit. I am unpersuaded.

¶32 On the morning of August 4th, Dr. Ross spoke with claimant and "recommended she continue as planned with her appointment with Dr. Singer, and should she have any other requests or requirements, she could contact the insurance company directly (Liberty Northwest - Jim Belknap, claims adjuster)." (Ex. 2 at 92.)

¶33 On August 4th, claimant spoke with Glen Wheeler (Wheeler), the insurer's claims manager in Montana. Claimant asked Wheeler for authorization to treat with either Dr. Greg McDowell or Dr. Rizzolo, who are orthopedic surgeons. Wheeler then talked with Dr. Ross, who agreed to refer claimant for an orthopedic physician though continuing to question the

objective basis of claimant's reports of back pain. Wheeler authorized claimant to see Dr. Greg McDowell. (Trial Test. and Ex. A to Motion for Partial Summary Judgment and Ex. B., Affidavit of O. Glen Wheeler, to Brief in Opposition to Motion for Partial Summary Judgment And/or Declaratory Ruling.)

¶34 On August 11, 1999, claimant was examined by Dr. Singer, who specializes in physical and rehabilitation medicine, not, as claimant believed, occupational medicine. Dr. Singer found claimant's history "a bit difficult to sort through" and noted "inconsistencies in examination." (Ex. 27 at 8-9.) He explained:

> When asked to ambulate, she has a significantly antalgic gait. When she leaves her exam room on her way out of the clinic, her gait essentially normalizes. There are discrepancies with her initial complaint of anterior knee pain, and then with her complaint of posterior thigh pain.
>
> Her exam for the left lower extremity muscle strength testing was marked by give-way muscle testing diffusely.
>
> Straight leg raising on the left side, in both the sitting and supine positions, caused overreacting and pain behaviors as did internal rotation and Fabere maneuver on the left side.
>
> . . . .
>
> The right side shows excellent strength.

(*Id*. at 9.)

¶35 Dr. Singer diagnosed "leg contusion and lumbar strain with some numbness in the foot." He doubted the presence of "true radiculopathy." (*Id*.) He commented: "I suspect that there are some other issues that area [sic] impacting Ms. Young's behavior, and I suspect that these will impact upon her recovery." (*Id*.) He referred claimant back to Dr. Ross, recommending physical therapy which "should be short, exercise-directed, and [should] not involve any modalities as there are no findings on exam, and in fact her examination predicts a poor outcome." (*Id*. at 9-10.)

¶36 On August 18, 1999, claimant saw Dr. Richard P. Lewallen, an orthopedic surgeon. (Ex. 2 at 1.) One-third of his practice is devoted to children and, although he diagnoses spine problems in his patients, he does not perform back surgery. (*Id*. at 7.)

¶37 At the time of Dr. Lewallen's examination, claimant reported that since the accident she suffered low-back pain radiating down into her leg. X-rays of her spine were normal but based on claimant's pain reports Dr. Lewallen suspected a disk herniation. (*Id*. at 10.) He ordered an MRI.

¶38 On August 23, 1999, claimant returned to Dr. Ross, who had a copy of Dr. Lewallen's initial report. Claimant described low-back pain, ranging in intensity from 8/10 to 9/10, which was "deep, burning, and aching which is constant." (Ex. 2 at 95.) Dr. Ross again found no organic signs. He opined claimant had reached MMI with respect to her leg injury with no permanent impairment. With regard to her back, he stated:

> Low back pain complaints (subjective) without objective correlation. As noted previously, it is my opinion that her current low back pain complaints are not related to the work injury sustained on 7/16/99 at Wendy's restaurant.

(*Id*. at 96, emphasis in original.)

¶39 An MRI was conducted August 24, 1999. (Ex. 2 at 9.) Slight bulging of the annulus was noted at L3-4. At the L4-5 level, the MRI showed "mild central protrusion of the disk with slight indentation of the subarachnoid space and mild prominence of the dorsal ligaments and facet joints creating mild central stenosis." (*Id*.) The radiologist's conclusion stated:

> 1. Mild central stenosis at L4-5.
>
> 2. Bilateral facet arthropathic changes somewhat greater on the left at L4-5.

(*Id*.)

¶40 Dr. Lewallen believed there was correlation between claimant's pain reports and the MRI findings. He testified: "she had facet arthritis changes which were greater on the left at L4-5, which correlated with her left leg - left back pain and left leg pain." (Lewallen Dep. at 12.) He ordered epidural steroid injections. (Ex. 2 at 2; Lewallen Dep. at 12.)

¶41 On August 30th, claimant returned to Dr. Ross, who found "*[t]he patient continues to be noncompliant*." (Ex. 2 at 100; emphasis in original.) He noted claimant had not filled recommended prescriptions and had not reported for physical therapy. With regard to the MRI, he noted:

> The MRI was performed on 8/24/99 and revealed mild central protrusion at the L4-5 and L5-S1 levels without evidence of a mass effect or nerve root compression. A mild central stenosis was noted at L4-5 as well as some bilateral facet arthropathic changes, somewhat greater on the left at L4-5. The patient has already obtained a copy of her MRI report and is focused on the disk protrusion aspect of her report, despite my explanation that a protruding disk needs to have a clinical correlation to be relevant.
>
> She is scheduled for an epidural injection on 9/1/99. When I explained the results of the MRI report, she asked me why she was getting the epidural steroid injection. I asked her to post the question to Dr. Lewallen, the physician who ordered the epidural injection.

(Ex. 2 at 100.)

¶42 At deposition, Dr. Ross opined that the "MRI findings are within normal limits for a woman her age and do not correlate with her examinations that I had or Dave Johnson or Rick Singer." (Ross Dep. at 90.) He emphasized the mild nature of the disk protrusion noted in the MRI, and described studies indicating that a significant percentage of the population have bulges, protrusions, or frank herniations without symptoms. (*Id*. at 44-46.) Lacking correlation of the MRI to specific symptoms consistently presented by claimant, Dr. Ross believed the MRI did not corroborate claimant's pain reports. (*Id*.)

¶43 Dr. Ross's assessment on August 30th was as follows:

> 1. Low back pain - subjective complaints without objective correlation.
>
> 2. Left knee pain - subjective complaints without objective correlation.

(Ex. 2 at 102.) He concluded claimant was not yet at MMI, but released her to modified work duties. (*Id*.)

¶44 Claimant's final visit to Dr. Ross was on September 7, 1999. He noted she was complaining of some leg and knee pain, and sharp low-back pain with radiation. (*Id*. at 105.) She reported the sharp pain as "8/10 intensity" and a constant ache of "7/10 intensity." (*Id*.) He found her at MMI with no permanent impairment and released her to regular work duties without restriction.

¶45 On September 21, 1999, claimant returned to Dr. Lewallen. She reported that her pain limited her to walking only "approximately ¼ mile" and that steroid injections prescribed by the doctor had provided only 30 to 40 percent relief. (Ex. 2 at 4.) Dr. Lewallen testified that the treatment for claimant "wasn't terribly effective." (Lewallen Dep. at 12.) He testified it was "difficult to tell whether she's got - whether that's more from the arthritis in the facet joints, you know, versus nerve root irritation. Usually if it's a nerve root that's swollen and inflamed, then the epidural steroid injection may work better." (*Id*. at 12-13.)

¶46 Believing claimant had an element of spinal stenosis on the left at L-4, 5, he referred her for evaluation by Dr. Rizzolo. (*Id*.) Dr. Rizzolo examined claimant on October 18, 1999. (Ex. 2 at 16.) In his office note he recorded her chief complaint as "[l]ow back pain that radiates down her left leg." (*Id*.) Claimant told the doctor her back pain was "always present" and that she had intermittent leg pain, worse if she stood more than ten minutes. (*Id*.) Based on his physical examination of claimant, Dr. Rizzolo recorded:

> I felt that there was marked symptom amplification. I also felt that there was abnormal illness behavior and that her pain was constant with no symptom-free intervals. She had positive distraction signs, symptom amplification and nonphysiologic response to stigma [sic]. Specifically, she had knee buckling and breakaway weakness and buckling when she attempted to walk on her heels and

> toes. Her exam was limited by self-limiting behavior. Her shoulders and pelvis were level. Her spine was straight and well balanced. She had a very guarded restricted range of motion which was self-limited. There was no muscle spasm. She was tender at both iliolumbar ligaments. (*Id.* at 17.)

¶47 Dr. Rizzolo read the x-rays as showing "minimal degenerative changes" with no instability or bony lesions. (*Id.*) The MRI "showed mild widespread degenerative changes with desiccation of the bottom three discs with no nerve root compression." (*Id.*, bold in original.) The x-rays and MRI did not explain her symptoms or behavior. Dr. Rizzolo observed:

> I think her case is affected by significant functional overlay. She is very angry with Dr. Ross who she feels told her she was faking. I tend to believe that she had a relatively minor lumbar sprain and now has secondary issues, including anger at her previous physicians and the work comp system in general which is limiting her recovery.

(*Id.* at 18.) He suggested "rapid aggressive work-up and non-confrontational approach [would be] most likely to return this patient to gainful employment without litigation and prolonged loss of function." (*Id.*) He also recommended certain tests to rule out other problems, along with four to six weeks of aggressive physical therapy. (*Id.*) Then, "[i]f, in fact, she claims she cannot return to work I would recommend a Functional Capacity Evaluation." (*Id.*)

¶48 At deposition, Dr. Rizzolo was asked whether he found any objective medical evidence supporting claimant's reports of back pain. He testified that

> reading through the results of the tests that Dr. Lewallen performed in terms of an MRI and a bone scan, there are some abnormalities. Those abnormalities may have nothing to do with her injury. On the other hand, they may have something to do with her injury. And if you presume that they have something to do with her injury, then that's some firm objective evidence of an injury, but that's debatable. So other than that, I don't have any other evidence.

(Rizzolo Dep. at 6, emphasis added.)

¶49 Dr. Rizzolo testified he could not state whether imaging studies reflected pathology or normal aging. (*Id.* at 7.) He also testified that drawing the connection between claimant's symptoms and the alleged accident depended on her credibility. (*Id.* at 6.)

¶50 Claimant's workers' compensation benefits were terminated on October 28, 1999. (Young Dep. II at 69.)

¶51 Claimant returned to Dr. Lewallen in November. He ordered a bone scan, which he read as showing "some slight increased uptake at the left L4, 5 region," along with "some sclerosis and arthritic changes at the L4, 5 facet level." (Ex. 2 at 22.) Dr. Lewallen believed

activity shown on the bone scan "was correlated with the plain films, which suggested sclerosis at L4-5." (Lewallen Dep. at 15.) He prescribed physical therapy. (*Id*.)

¶52 At deposition, Dr. Ross reviewed the bone scan report and testified it did not change his opinion regarding claimant's condition. (Ross Dep. at 124.) He disagreed with Dr. Lewallen's correlation of the bone scan with results of claimant's injury. (*Id*. at 143.)

¶53 Dr. Rizzolo testified that "uptake" indicated by the bone scan *could* be consistent with claimant's pain reports (Rizzolo Dep. at 10), but he did not believe he could "make the clinical correlation well enough between her complaints and presentation and physical examination and the bone scan result." (*Id*. at 11.)

¶54 On November 17, 1999, claimant was evaluated by physical therapist Kim Larson (Larson). She reported pain of 7 on a scale of 10, primarily located in the left low back, buttock, and hip. She reported the pain as "constant and it increases and decreases with different activities and throughout the day." (Ex. 2 at 47.) Larson assessed "decreased functional mobility secondary to pain, decreased in ROM and decreased strength in the left lower extremity and lumbar region." (*Id*. at 49.) He believed claimant's symptoms would benefit from therapy, as well as education in posture and body mechanics. (*Id*.) Larson planned four weeks of biweekly therapy (i*d*. at 50) but claimant attended only two sessions. (*Id*. at 51).

¶55 On February 16, 2000, Dr. Lewallen wrote to claimant's counsel, opining that claimant's injury "did aggravate the condition of facet arthrosis." (*Id*. at 32.) He stated:

> The bone scan did show some increased uptake at the facets at L4-5 on the left, which demonstrates that she has some inflammation in the facet joint at L4-5. She does have soreness on the left side of her low back and down the left leg, and it is my opinion that this correlates with the arthritis at the L4-5 facet on the left. I do think on a more probable than not basis, that she did have an aggravation of a pre-existing asymptomatic condition.

(*Id*.)

¶56 At deposition, Dr. Lewallen testified that claimant's main difficulty is facet arthritis, which contributed to her spinal stenosis. (Lewallen Dep. at 20.) These are long term degenerative changes but he opined that the accident at Wendy's aggravated her preexisting condition. (*Id*. at 20.)

¶57 Dr. Lewallen conceded that the MRI and bone scan do not in themselves indicate conditions causing pain. (*Id*. at 21-22, 25.) He agreed that claimant's reports of pain, hence her credibility, were "absolutely central" to his diagnosis. (*Id*. at 25.) He believed claimant's pain reports. His philosophy is, "You know, when you practice medicine, if you don't put any

weight to what the patient tells you, you - you know, you really shouldn't be practicing medicine." (*Id.* at 25-26.)

¶58 Dr. Lewallen did not perform Waddell's or Kummel's tests on claimant, nor did he perform straight leg raising in more than one position or use any distraction techniques. (*Id.* at 26-27, 30.) When asked whether he formed any opinion whether claimant was exaggerating her reports of pain, Dr. Lewallen responded, "Well, I think I tried to take that [her reports of pain] at face value." (*Id.* at 29.)

¶59 On February 21, 2000, physical therapist Scott Welles (Welles) prepared another "initial" evaluation of claimant. (Ex. 2 at 53.) Claimant described her leg pain as a dull aching and her back pain as sharp. She rated her current pain level "as a 10/10 and at best in the last 30 days as a 9/10." (*Id.*, emphasis added.) Welles commented:

> The patient seems to demonstrate possible decrease in symptoms in centralization with extension. Some nonorganic behavior was noted with exaggeration of pain behavior.

(*Id.* at 54.)

¶60 A Functional Capacity Evaluation (FCE) was performed on May 30, 2000, by physical therapist Rhonda Wakai (Wakai). (*Id.* at 56-70.) Wakai concluded claimant was only able to work four hours a day at the sedentary-light level. (*Id.* at 56.) Her conclusion was grounded in claimant's subjective report. Wakai wrote in her report:

> This tester used information provided by the patient in her activity profile to determing [sic] the 4 hours. She [claimant] states she spends 14 hours of a typical day in the sleeping or lying position and is limited to 30 minutes of sitting at a time. It is the judgement of this tester that she would be more successful in re-intering [sic] the workforce as a part time worker and given the opportunity to increase hours gradually rather than expect full time hours after almost one year post-injury.

(*Id.*, emphasis added.)

¶61 Wakai did not find evidence of claimant exaggerating her pain or limitations. However, a review of Wakai's report suggests she ignored signs of exaggeration. For instance, the report shows that the validity criteria she used indicated claimant used only "fair effort." In addition Wakai did not use all validity criteria in considering claimant's effort (Wakai Dep. at 15-16) and acknowledged errors in testing procedures (*Id.* at 42-43, 48).

¶62 In her deposition, Wakai testified she took claimant's reports at face value. She based some of her findings regarding claimant's limitations upon claimant's statements that "it

hurts" or "that's as far as I can go." (*Id*. at 10.) Wakai acknowledged she did not use distraction techniques to assess symptom amplification. (*Id*. at 42-43, 48). Before writing her report, Wakai did not view a videotape of claimant's activities on September 7, 1999. (The video will be discussed later in these findings.) (*Id*. at 8.)

¶63 Claimant was deposed on May 4, 2000, and again on June 14, 2000. Her depositions were videotaped.

¶64 During her first deposition, she testified her leg pain has not gone away since the time of the accident, stating, "I constantly have a burning pain every day." (Young Dep. I at 15.) She testified the pain in her low back and buttocks *increased* with time. (*Id*. at 15-16.) With regard to her ability to engage in daily activities:

> She testified she is able to shop for groceries only by leaning over her grocery cart and using it as support, "[l]ike a little walker." (*Id*. at 20.) She testified she could not carry groceries to her car, but had a friend carry them for her. (*Id*. at 20-21.) She testified: "I cannot stand for any more than ten or 15 minutes, so when I do my dishes, and the back starts to cramp up and spasm, it hurts my back and my leg, and then I sit down." (*Id*.) She testified she can sit in a chair for only 20 or 25 minutes before feeling the need to change positions. (*Id*. at 22.) At the 20 minute mark into her deposition she indicated she was already uncomfortable sitting and "that's why I'm swiveling in my chair. I'm about ready to get up." (Id., Videotape of Dep. at 2:26 p.m.) She testified that walking on cement has been a problem for her. (*Id*. at 23.)

¶65 She further testified that her limitations, as described by her, have persisted since two days after the accident:

> Q. Okay. I'm going to talk about a little bit different subject, but it is related to Exhibits 3 and 4. These are the symptoms; in other words, "I feel pain or discomfort or burning." Now, I want to talk about the limitations they impose on you. Follow me on that?
>
> A. I follow you.
>
> Q. Okay. And we can cut the time line up any way we want, from two days after the accident, to a month later, or all the way to today. And I'm going to talk about that. But I want to get an idea of what kind of limitations these problems have imposed on you. Okay?
>
> A. Okay.
>
> Q. And let's take, to see if it will work, from the day the back symptoms began, though today. Have you had the same type of limitations the entire time?
>
> A. Yes, I have.

Q. So we don't have to go month by month. We can just go all the way from two days after the accident through today, right?

A. Yes, sir.

(*Id*. at 16.)

¶66 Claimant's testimony was contradicted by her activities on September 7, 1999, which were surreptitiously videotaped by private investigators Cheryl and Ron Maki. The Court viewed the video prior to trial in connection with pretrial motions, and also viewed parts of it at trial and after trial. I also reviewed the surveillance log prepared by the Makis (Ex. 13) in correlation with the videotape itself. Both investigators testified the log accurately reflects their activities in taping claimant. (Cheryl Maki Dep. at 3-4; Ron Maki Dep. at 4-5.)

¶67 The video shows claimant shopping in Dillard's department store from 1:07 p.m. to approximately 1:30 p.m., which is approximately 20 minutes. She and a friend then drove to ShopKo, where she shopped for approximately another 40 minutes. The videotape shows claimant standing and walking in both stores. In ShopKo, it shows her friend, but not her, pushing a grocery cart. The total time of her walking and standing, without the aid of a cart and without apparent difficulty, is an hour. After shopping at ShopKo, claimant drove back to her friend's residence, where she removed bags of items from the trunk of the car, bending slightly at times at her waist, and carried them into the residence. She then returned home and is shown at 4:08 p.m. returning from a walk to her mailbox, a walk which she testified took her approximately 10 minutes (Young Dep. I at 24). At 4:20 p.m. she drove to Albertson's grocery store, entering the store at 4:22 p.m. and returning to her car at 4:51 p.m., a period of 29 minutes. She then drove to the Prairie Star Casino on 4th Avenue in Billings, which she entered just after 5:00 p.m. She remained at the casino until 10:10 p.m., a period of 5 hours. While her activities in the casino were not continuously filmed, the video which was taken shows her sitting, nearly immobile, at a video gambling machine, visiting at times with a friend, sometimes playing the machines.

¶68 On the video claimant walked slowly, but she is significantly overweight. Dr. Ross testified at trial that her gait appeared appropriate for a woman of her age and weight. I did not observe any obvious expressions of pain.

¶69 Based on his examinations and treatment of claimant, and his viewing of the video surveillance of claimant, Dr. Ross testified that claimant has no physical impairment or restrictions resulting from her industrial accident.

Resolution

¶70 I am unpersuaded that claimant injured her back on July 16, 1999, as she claims or that she is unable to work. I further find that she reached maximum medical improvement at least by September 7, 1999.

¶71 In reaching my decision, I find that clamant's reports of pain and physical limitations are grossly exaggerated. She was not a credible witness. The medical evidence she tendered in support of her case depended on her veracity, and is therefore unreliable. I have considered not only my own evaluation of claimant's credibility when testifying at trial, but the following facts:

> Claimant's activities on September 27th, as shown on the video, are incompatible with her testimony as to her limitations. She was on her feet, standing and walking for approximately one hour over a 3½ hour period. Video of her shopping shows that she shopped without hanging onto a shopping cart for support even where a shopping cart was available to her. While claiming she can sit for only 20 minutes before becoming uncomfortable, she spent 5 hours that evening at a casino, and is shown sitting, almost immobile, in the segments which were videotaped. It is safe to infer that she was either sitting or standing during those 5 hours, more probably than not sitting for most of that time. Overall, her activities fly in the face of her report to Waki that "she spends 14 hours of a typical day in the sleeping position and is limited to 30 minutes of sitting at a time." (Ex. 2 at 56.)
>
> •Claimant did not report a back injury until two weeks after the incident. Dr. Ross testified that he would expect her to have reported pain within a day or two of the incident if the claimed condition resulted from the incident.
>
> •Claimant testified that she felt severe back pain and was severely limited in her activities within two days following the accident. That testimony is inconsistent with her lack of report of any back pain during initial medical visits.
>
> •Three physicians and one physician's assistant (Ross, Singer, Rizzolo, and Johnson) have found claimant's symptoms exaggerated and inconsistent with an objective medical condition. Of particular note, Dr. Rizzolo, who saw claimant on referral from Dr. Lewallen and had no connection to the insurer's Preferred Provider Organization, found exaggerated behavior. Specific tests elicited non-anatomical pain reports.
>
> •Dr. Lewallen, the only physician linking claimant's reported back condition to the incident at Wendy's on a more probable than not basis, conceded the link depends on claimant's veracity regarding her pain. Dr. Lewallen testified he accepted claimant's subjective report and did not conduct the tests conducted by other physicians that reveal the lack of objective consistency in claimant's pain reports.
>
> •No physician, not even Dr. Lewallen, has given an explanation for the extent of pain claimant reports. There is no medical evidence supporting her claim of *disability* between July 1999 and the present *resulting from* the July 16th incident.

•I found Dr. Ross' testimony concerning his examination of claimant, her non-anatomical responses to tests, and his opinions regarding her back condition credible and persuasive.

¶72 Liberty has utilizes a Preferred Provider Organization to treat injured workers. While Glen Wheeler authorized an orthopedic examination by Dr. Gregory McDowell, a PPO physician, he did not authorize claimant to see Dr. Lewallen or any other non PPO physician.

¶73 Claimant has produced no evidence to support her contention that she is entitled to designation of Dr. Lewallen as her treating physician. She began treatment with the Occupational Health Services Unit of the Deaconess Billings Clinic. Dr. Ross thus became her treating physician, as recognized by the insurer. Claimant has presented no circumstances requiring the insurer to change that recognition to Dr. Lewallen.

CONCLUSIONS OF LAW

¶74 Since claimant alleges an injury on July 16, 1999, the statutes in effect on that date apply in this case. *Buckman v. Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶75 Claimant bears the burden of persuading the Court that she is entitled to benefits. *See 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).

¶76 Claims for temporary total disability benefits are governed by section 39-71-701, MCA (1999), which has stated as follows since 1995:

> 39-71-701. Compensation for temporary total disability -- exception. (1) Subject to the limitation in 39-71-736 [regarding commencement of benefits and relationship to other benefits] and subsection (4) of this section, a worker is eligible for temporary total disability benefits:
>
> (a) when the worker suffers a total loss of wages as a result of an injury and until the worker reaches maximum healing; or
>
> (b) until the worker has been released to return to the employment in which the worker was engaged at the time of the injury or to employment with similar physical requirements.
>
> (2) The determination of temporary total disability must be supported by a preponderance of objective medical findings.
>
> (3) Weekly compensation benefits for injury producing temporary total disability are 66 2/3% of the wages received at the time of the injury. The maximum weekly compensation benefits may not exceed the state's average weekly wage at the time

of injury. Temporary total disability benefits must be paid for the duration of the worker's temporary disability. The weekly benefit amount may not be adjusted for cost of living as provided in 39-71-702(5).

(4) If the treating physician releases a worker to return to the same, a modified, or an alternative position that the individual is able and qualified to perform with the same employer at an equivalent or higher wage than the individual received at the time of injury, the worker is no longer eligible for temporary total disability benefits even though the worker has not reached maximum healing. A worker requalifies for temporary total disability benefits if the modified or alternative position is no longer available for any reason to the worker and the worker continues to be temporarily totally disabled, as defined in 39-71-116.

. . . .

¶77 Claimant testified she received benefits through October 28, 1999. (Young Dep. II at 69.) She was not entitled to benefits after that date because her back condition was not caused by her work-related accident and in any event was exaggerated. By October 28th she had reached maximum medical improvement.

¶78 Medical benefits are governed by section 39-71-704, MCA (1999),[(2)] which provides in relevant part:

39-71-704. Payment of medical, hospital, and related services -- fee schedules and hospital rates -- fee limitation. (1) In addition to the compensation provided under this chapter and as an additional benefit separate and apart from compensation benefits actually provided, the following must be furnished:

(a) After the happening of a compensable injury and subject to other provisions of this chapter, the insurer shall furnish reasonable primary medical services for conditions resulting from the injury for those periods as the nature of the injury or the process of recovery requires.

. . . .

Given my findings that claimant did not suffer a back injury at work and is not suffering from disabling back pain as she claims, she is not entitled to further medical care for her back.

¶79 Claimant's choice of physicians is governed by managed care provisions of the Workers' Compensation Act. Section 39-71-1101, MCA (1997)[(3)], provides in pertinent part as follows:

> **39-71-1101. Choice of physician by worker -- change of physician -- receipt of care from managed care organization.** (1) Subject to subsection (3), a worker may choose the initial treating physician within the state of Montana.
>
> (2) Authorization by the insurer is required to change treating physicians. If authorization is not granted, the insurer shall direct the worker to a managed care organization, if any, or to a medical service provider who qualifies as a treating physician, who shall then serve as the worker's treating physician.
>
> (3) A medical service provider who otherwise qualifies as a treating physician but who is not a member of a managed care organization may not provide treatment unless authorized by the insurer, if:
>
> (a) the injury results in a total loss of wages for any duration;
>
> (b) the injury will result in permanent impairment;
>
> (c) the injury results in the need for a referral to another medical provider for specialized evaluation or treatment; or
>
> (d) specialized diagnostic tests, including but not limited to magnetic resonance imaging, computerized axial tomography, or electromyography, are required.
>
> (4) A worker whose injury is subject to the provisions of subsection (3) shall, unless otherwise authorized by the insurer, receive medical services from the managed care organization designated by the insurer, in accordance with 39-71-1104. The designated treating physician in the managed care organization then becomes the worker's treating physician. The insurer is not liable for medical services obtained otherwise, except that a worker may receive immediate emergency medical treatment for a compensable injury from a medical service provider who is not a member of a managed care organization.

Section 39-71-1104, MCA (1999), provides, and has provided since 1993:

> **39-71-1104. Managed care organizations -- notification.** Workers who are subject to managed care must receive medical services in the manner prescribed in the contract. Each contract must comply with the certification requirements provided in 39-71-1105. Insurers who contract with a managed care organization for medical services shall give written notice to workers of eligible service providers and shall give notice of the manner of receiving medical services.

¶80 Claimant was notified by the insurer that it contracted with a PPO. (Ex. 10.) She does not contend Dr. Lewallen was a member of a PPO, or that he otherwise meets requirements of the managed care statutes. Since claimant suffered a total wage loss for some period, under section 39-71-1101(3), MCA, the insurer was liable for treatment by Dr.

Lewallen only if it specifically authorized the treatment. After claimant commenced treatment with Dr. Ross at the Billings Clinic, authorization for a change in treating physician was required. § 39-71-1101(2), MCA (1999). The insurer did not authorize claimant to change to Dr. Lewallen as her treating physician. The circumstances of claimant's injuries and medical care did not render the insurer's denial of care from a non-PPO physician unreasonable.

¶81 Claimant's argument that the insurer is estopped from denying that it authorized Dr. Lewallen as claimant's treating physician is unsupported by the evidence. No such authorization was given. Claimant was not credible. Even under her version of her conversation with Wheeler, at most she was authorized to treat with Dr. Lewallen for one visit.

JUDGMENT

¶82 1. Claimant did not injure her back at work on July 16, 1999, and is not entitled to additional compensation or medical benefits with respect to her back complaints.

¶83 2. Claimant is not entitled to additional temporary total disability benefits.

¶84 3. The insurer was not obligated to recognize Dr. Lewallen as claimant's treating physician and is not liable for charges by Dr. Lewallen.

¶85 4. Pursuant to ARM 24.5.348, this JUDGMENT is certified as final for purposes of appeal.

¶86 5. 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 25th day of August, 2000.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Paul E. Toennis
Mr. Larry W. Jones
Submitted: July 5, 2000

1. This issue was initially presented through claimant's Motion for Partial Summary Judgment. Because the matter involved a disputed factual issue, decision was deferred to trial.

2. The statute was amended effective April 23, 1999, but not in any fashion relevant to this proceeding. See Ch. 442, L. 1999.

3. The 1999 legislature amended this section effective October 1, 1999, making the 1997 version applicable in this case. See Ch. 468, L. 1999.