**IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA**

**1994 MTWCC 83**

**WCC No. 9308-6873**

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**AETNA CASUALTY & SURETY CO.,**

**Petitioner,**

**vs.**

**STATE COMPENSATION INSURANCE FUND,**

**Defendant,**

**IN RE: MARLA SMITH,**

**Claimant.**

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FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The trial in this matter was held on March 1, 1994, in Kalispell, Montana. Petitioner, Aetna Casualty & Insurance Co. (Aetna) was represented by Mr. Charles E. McNeil. Respondent, State Compensation Insurance Fund (State Fund), was represented by Mr. Charles G. Adams. Claimant, Marla Smith, was present and represented by Mr. Darrell S. Worm.

Claimant testified. Exhibits 1 through 6 were admitted into evidence by stipulation of the parties. The parties also stipulated that the depositions of claimant, Dr. Steven M. Martini, Dr. James H. Mahnke and Dr. John Hilleboe may be considered part of the record.

Having considered the pretrial order, the testimony presented at trial, the demeanor and credibility of the witness, the depositions and exhibits, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

1. Claimant is 40 years old, married, and lives in Columbia Falls.

2. Claimant began working for Crop Hail Management in Kalispell, Montana, in 1987. While at Crop Hail Management, she worked as an accounts receivable clerk, a data entry clerk, and an executive secretary.

3. Prior to her injury, claimant was intermittently treated for low-back pain. (Ex. 1-1).

4. On February 28, 1989, claimant injured her low-back while attempting to lift a box at work.

5. At the time of claimant's injury, Crop Hail Management was insured by the State Fund, which accepted liability for claimant's injury.

6. Following her February 1989 injury, the claimant initially sought treatment from Dr. Louise Swanberg, who first saw claimant on April 27, 1987. Thereafter, Dr. John Hilleboe, an orthopedic surgeon, treated claimant commencing on May 24, 1989.

7. A May 12, 1989 MRI of claimant's back disclosed a herniated nucleus pulposus at the L4-5 disc and a degenerated disc at L5-S1. The MRI finding was consistent with claimant's complaints of pain in her buttock and down her left leg. Dr. Hilleboe specifically attributed claimant's symptoms to L5 nerve root involvement.

8. On July 14, 1989 Dr. Hilleboe performed a laminectomy and disc excision at the L4-5 level on claimant. He also explored the L5-S1 disc, which appeared normal.

9. Dr. Hilleboe released claimant to return to work in October of 1989. She returned to work at Crop Hail Management in November of 1989.

10. The State Fund paid claimant temporary total disability benefits at the weekly rate of $114.20 from July 22, 1989 to October 2, 1989. The State Fund also paid an impairment award based upon a nine percent (9%) impairment rating assigned by Dr. Hilleboe.

11. Between November 1989 and April 1992, claimant's back condition deteriorated. A May 1991 MRI disclosed further degeneration and a small midline protrusion of the disc. The report noted "some posterior displacement of the descending left S1 nerve root as compared with earlier exam 12 May 1989."

12. In January 1992, claimant reported increased pain to Dr. Hilleboe. Her pain was in both the buttocks and radiated to both legs.

13. On January 17, 1992, Dr. Hilleboe recommended that claimant see Dr. Steven Martini, who specializes in spine medicine, for further evaluation.

14. On April 22, 1992, claimant again injured her back while carrying a box of computer tapes.

15. At the time of claimant's second injury, Crop Hail Management was insured by Aetna. Aetna accepted liability for the April 22, 1992 injury pursuant to section 39-71-608, MCA, and has paid medical and disability benefits to claimant under a reservation of rights.

16. Claimant saw Dr. Hilleboe on May 6, 1992, complaining of "back pain again only now on the R[ight] rather than the left . . . ." The doctor commented, "She continues to have left sided leg pain which she says is constant and aching. . . . now she is developing this R[ight] leg pain." (Ex. 1-16). There were no new neurologic findings. Dr. Hilleboe referred claimant to Dr. James Mahnke, a neurosurgeon.

17. Dr. Mahnke examined claimant on May 15, 1992. Dr. Mahnke considered her a candidate for bilateral L5-S1 disc excision and testified that claimant would likely have needed surgery at the L5-S1 level irrespective of her April 1992 injury.

18. Dr. Martini began treating claimant on May 18, 1992. Dr. Martini testified that claimant's complaints from 1990 to early 1992 represented a gradual worsening of her lumbar spine condition. He also considered it likely that claimant would have needed surgery at the L5-S1 level irrespective of her April 1992 injury.

19. Claimant continued working until August of 1992, when she quit due to her pain.

20. On August 3, 1993, claimant further aggravated her back condition while drying her hair after a shower at home. Claimant's August 3, 1993 aggravation is not an issue in this proceeding. An August 3, 1993 MRI revealed an extremely large L5-S1 disc herniation that was not present when a discogram had been performed on March 15, 1993. On August 20, 1993, Dr. Michael P. Lahey performed repeat laminectomies at L4 and L5 and excised the L5 disc.

21. In Dr. Hilleboe's opinion, claimant's 1989 injury was to her L4-5 level. "The 5-1 situation, I'm not sure I can base -- or say with any degree of certainty that that was related at all to the problem at that time. And the progression of the 5-1 disc I'm not sure has anything to do with her injury." (Hilleboe Dep. at 17.)

22. However, Dr. Hilleboe also testified that the 1989 surgery he performed at the L4-5 level affected the L5-S1 level by putting greater stress on it.

Q. Doctor, does the surgery at the L4-5 level such as she underwent affect the L5-S1 level immediately below it in some way?

A. Yes.

Q. How?

A. The spine is basically made up of motion segments which are -- The vertebral body does not bend; the bone doesn't bend. So all motions that occur in the spine have to occur at the disc space. And the disc is constructed such that it can bend basically in a hundred and eighty degrees. And -- although it doesn't bend that much, but it can go in all directions. And when you remove the disc at 4-5, you essentially stop most of the motion that occurred at that motion segment. So now the stress and strain of bending forward, to the side, to the back, and all those motions that we do everyday, that stress has to be distributed. And it is distributed to the <u>disc space above and to the disc space below</u>. [Emphasis added.]

(Hilleboe Dep. at 21.)

23. Dr. Mahnke testified that it was likely that claimant's L5-S1 condition was a result of her February, 1989 injury. (Mahnke Dep. at 14.) Dr. Martini also felt "that whatever injury and stress was rendered to the L4-5 level [in her February 1989 injury] probably occurred at L5-S1 at the same time." (Martini Dep. at 21).

24. Based on the medical testimony and claimant's testimony, the Court finds that the claimant's 1989 industrial accident accelerated the degeneration of her spine at the L5-S1 level, including the L5-S1 disc.

25. The testimony of Drs. Hilleboe, Mahnke, and Martini, taken as a whole, shows that claimant had not reached maximum healing prior to her April 1992 injury. While Dr. Hilleboe testified that claimant reached maximum medical healing prior to April 1992, he defined maximum medical healing as meaning that he would not do anything different therapy-wise within a year. However, Dr. Hilleboe referred claimant to Dr. Martini in January of 1992, just prior to her second injury, to determine what else could be done for her. Both Drs. Mahnke and Martini felt that claimant had not reached maximum medical healing with respect to her L5-S1 condition prior to her April 1992 injury. All of the doctors agreed that her low-back condition was a degenerating one, and Drs. Martini and Mahnke both testified that at the time of the second accident claimant needed further medical treatment and was already a candidate for further surgery.

CONCLUSIONS OF LAW

1. The dispute in this case concerns which insurer was at risk when the claimant aggravated her low-back condition in 1992. The rule in Montana regarding successive injuries was originally enunciated in ***Belton v. Hartford Accident & Indemnity Co.,*** *202 Mont. 384, 658 P.2d 405 (1983),* and is summarized in ***EBI/Orion Group v. State Fund****, 249 Mont. 449, 816 P.2d 1070 (1991):*

Simply stated the ***Belton*** rule holds that once a claimant has reached maximum healing or a medically stable condition, the insurer at risk is no longer responsible for any subsequent injuries or conditions. See ***Belton v. Carlson Transport*** (1983), 202 Mont. 384, 389, 658 P.2d 405, 408. As this rule clearly states, in order for EBI [the first insurer] to sustain a claim of indemnification against the State Fund [second insurer] it must establish two elements. First it must show that [claimant] had attained a condition of maximum healing. Second, it must establish that he sustained an injury after he reached maximum healing.

***Id.*** at 452-453; *accord* ***Richter v. Simmons Drilling, Inc.,*** *241 Mont. 518, 788 P.2d 308 (1990) (to receive compensation for a second work-related injury, the claimant must establish that he or she reached a medically stable condition before the occurrence of the second injury).*

The Court has considered all of the evidence in this case, ***Plainbull v. Transamerican Insurance Co.,*** *51 St.Rptr. 181 (Mont 1994),* and finds it more likely than not that

deterioration of claimant's back at the L5-S1 level was accelerated by her 1989 injury. If the preexisting disease or condition is "*lit up, aggravated or accelerated* by an industrial injury" the worker is entitled to the benefits provided by the Workers' Compensation Act. ***Birnie v. U.S. Gypsum Co.,*** *134 Mont. 39, 45, 328 P.2d 133 (1958);* ***Carmody v. Employer's Insurance of Wausau,*** *WCC No. 9302-6686 (May 6, 1994).* Thus, unless claimant reached maximum medical improvement prior to April 22, 1992, the State Fund is liable for claimant's L5-S1 condition.

2. Maximum healing or maximum medical improvement occurs when a claimant has reached the end of the healing period. It does not mean the person is free of symptoms. ***Stangler v. Anderson Meyers****, 229 Mont. 251, 255, 746 P.2d 99 (1987).* However, at the time of her April 22, 1992 injury, claimant had not reached maximum healing and needed further treatment. Surgery at the L5-S1 level appeared to be inevitable even before her April 22, 1992 injury.

3. In ***Belton v. Carlson Transport,*** *202 Mont. 384, 658 P.2d 405 (1983),* the Supreme Court summarized the rules governing indemnification in subsequent injury cases:

We hold that the burden of proof is properly placed on the insurance company which is on risk at the time of the accident in which a compensable injury is claimed. This holding assures that claimant will always know which insurer he can rely on to pay the benefits. . . . If it is later determined that the insurance company on risk at the time of the accident should not pay the benefits, this insurance company, of course, has a right to seek indemnity from the insurance company responsible for the benefits already paid out to the claimant.

***Id.*** at 392. Since the State Fund was at risk at the time of the second accident, Aetna is entitled to indemnification.

4. Aetna is entitled to full indemnification for the medical benefits it has paid to claimant ($34,716.33). However, its entitlement to reimbursement for the benefits it has paid claimant is limited to the amount of the State Fund's liability to claimant at claimant's 1989 benefit rate. The 1989 rate was $114.20. Aetna has paid benefits at a weekly rate of $200.80. The fact that Aetna chose to compensate claimant at a higher rate, based on her 1992 wages, does not obligate the State Fund to indemnify Aetna at that higher rate. The State Fund is responsible only for the amount of its liability to the claimant.
Neither ***Belton*** nor ***EBI/Orion****, 240 Mont. 99, 782 P.2d 1276 (1989)* which are cited by Aetna, support its request for full indemnification. The Court in ***EBI/Orion*** stated, "The right of indemnity is that where one is compelled to pay money which, in justice, **another ought to pay**, the former may receive from the latter the sums so paid ." *240 Mont. at 104 (emphasis added; citations omitted).* The weekly sum the State Fund "ought" to have paid was $114.20. Accordingly, the State Fund is responsible to indemnify Aetna in an amount based on that rate.

5. Aetna is not entitled to costs. See ***North American Van Lines v. Evans Transfer & Storage,*** *234 Mont. 209, 766 p.2d 220 (1988)* and ***Jaenish v. Super 8 Motel****, 248 Mont. 383, 812 P.2d 1241 (1991)*.

JUDGMENT

1. The State Fund is liable for claimant's low-back condition at L5-S1 vertebral level.

2. Aetna is entitled to indemnification from the State Fund for medical expenses paid by it in the amount of $34,716.33. Aetna is also entitled to indemnification for disability benefits it has paid claimant but only at the rate of $114.20 per week.

3. Claimant is not entitled to costs.

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

5. Any party to this dispute may have 20 days in which to request a rehearing from these Findings of Fact and Conclusions of Law and Judgment.

DATED in Helena, Montana, this 16th day of September, 1994.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Charles E. McNeil
Mr. Charles G. Adams
Mr. Darrell S. Worm