

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

**2004 MTWCC 37**

**WCC No. 2003-0864**

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**KATHLEEN ANDERSON**

**Petitioner**

**vs.**

**LIBERTY NORTHWEST INSURANCE COMPANY**

**Respondent/Insurer.**

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**FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT**

**Summary:** On May 8, 2001, the claimant fell from a truck while working for Meyer Company Ranch. Thereafter, she experienced back, hip, neck, and shoulder problems. She underwent multiple low-back surgeries, shoulder surgery, and neck surgery. The insurer accepted liability for all of the surgeries, however, it denied liability for thoracic herniated disks and for a recommended T7-8 diskectomy.

**Held:** The insurer is liable for the claimant's herniated disks at the thoracic level and for the recommended T7-8 diskectomy. The claimant's treating physician determined that her thoracic condition was related to her industrial accident. While the insurer presented an opinion of a medical examiner it hired to review claimant's case, and the examiner opined that her thoracic condition was unrelated to her industrial accident and does not in any event justify surgery, the Court finds the opinions of the claimant's treating physician the more persuasive.

**Topics:**

**Proof:** Conflicting Evidence: Medical. The Court finds an IME physician's opinion that a claimant's thoracic condition is unrelated to her injury and does not require surgery, as well as his suggestion that there are "secondary gain issues" present, not only unpersuasive but incredible where the claimant's industrial injury caused multiple injuries objectively proven by imaging and surgery. She suffered from radiculopathies arising from both lumbar and cervical disk herniations and a torn rotator cuff. MRI imaging shows a herniated disk in the thoracic spine. In light of the serious injuries the claimant suffered, the IME physician's suggestion that the claimant's complaints are motivated by secondary gain borders on outrageous and diminishes his credibility.

**Proof:** Conflicting Evidence: Medical. In weighing the testimony of two neurosurgeons, the Court gives greater weight to the treating neurosurgeon even though he has been in practice for only four years following a six year neurosurgical residency and where, in contrast, the IME neurosurgeon devoted nine of the eleven years prior to his examining the claimant to dog sled racing, doing only IME exams when not racing.

¶1 This matter is submitted upon depositions, exhibits, and parties' briefs.

¶2 Exhibits: There are 29 exhibits. There are no objections to any of them and they are therefore admitted and considered in reaching the decision in this case.

¶3 Witnesses and Depositions: The Court has the depositions of Kathleen Anderson, Dr. K.C. Brewington, II, Dr. F. Clifford Roberson, and Dennis L. McCrea.

¶4 Issues Presented: The sole issue presented for decision is:

Whether the Respondent is liable for Petitioner's thoracic spine condition and related treatment as causally related to Petitioner's May 8, 2001 industrial injury.

(Pretrial Order at 2.)

¶5 Having considered the Pretrial Order, the depositions and exhibits, and the arguments of the parties, the Court makes the following:

#### FINDINGS OF FACT

¶6 On May 8, 2001, the claimant was employed as a cook, housekeeper, and caretaker for the Meyer Company Ranch (Ranch). (Claimant's Dep. at 6.) The Ranch is located near Helmville, Montana. (Ex. 1.)

¶7 On that date, the claimant fell off a pick-up truck while loading garbage. (Id.) As demonstrated by her subsequent medical history, she suffered multiple injuries involving her shoulder, neck, back, and hip. Immediately following her fall, she "hurt all over," a description which includes her entire back, hip, and shoulder. (Claimant's Dep. at 11.)

¶8 The claimant denies any subsequent injuries and there is no evidence of any subsequent injuries. (Id. at 9.)

¶9 The claimant first sought medical treatment at the Missoula Community Medical Center Emergency Room, apparently a week after her fall, however, the Court does not have the medical record of that visit. The first medical record it has is on May 22, 2001, when the claimant was seen by Dr. G.J. Jarrett, an orthopedic surgeon. (Ex. 6.) Dr. Jarrett references the fact of the ER visit.

¶10 On May 22, 2001, Dr. Jarrett noted that the claimant "has some diffuse areas of pain" but noted her primary pain was in her low back and down into her right buttock. (Id.) He also noted she had a "small avulsion of the lesser trochanter, right hip." (1) (Id.)

¶11 By June 21, 2001, the claimant was suffering extreme and intractable radicular pain into her right leg. (Ex. 3 at 4, and Ex. 22 at 76.) She also had a "near complete foot drop", indicating neurological compromise of nerves at the L5 and S1 levels. (Ex. 3 at 5.) On June 26, 2001, Dr. Chriss A. Mack, a neurosurgeon, performed a "Right L5 hemilaminectomy, microsurgical discectomy at 4-5 right, 5-S1right." (Ex. 22 at 76.)

¶12 The June 21st surgery ameliorated the claimant's leg pain. However, by the time of a follow-up visit with Dr. Mack on August 1, 2001, the claimant had significant neck and arm pain consistent with a C7 level injury; she also reported hip pain. (Ex. 2 at 2.) Dr. Mack noted that the claimant had complained of neck pain shortly after her industrial injury but that her neck complaints "were not the focal point of her initial neurosurgical evaluation" since her foot drop and significant nerve root compression problems in her lower back were more pressing. (Id.)

¶13 While the results of her June 21st low-back surgery were initially promising, in mid-September the claimant experienced renewed lower-extremity radiculopathy and foot drop of even greater severity than she had experienced prior to her first surgery. (Ex. 19 at 69.) An MRI disclosed "a large recurrent disk herniation" at the L4-5 level and Dr. Mack performed a repeat microdiscectomy on September 18, 2001. (Id. at 70.) Following that surgery, claimant improved but then on October 17, 2001, she experienced renewed radiculopathy. On November 8, 2001, she underwent a complete L4-5 laminectomy, a complete L4-5 discectomy, bilateral L4-5 and S1 foraminotomies, and a L4-5, L5-S1 fusion. (Ex. 17; Ex. 7 at 44-46.)

¶14 Meanwhile, the claimant continued to have neck, shoulder, arm pain, and tingling. On September 28, 2001, she underwent a cervical MRI which disclosed a small focal disk protrusion at the C5-6 level and a more diffuse disk protrusion at C6-7. (Ex. 18.) Dr. K.C. Brewington, the orthopedic surgeon who performed claimant's November 8, 2001 low-back surgery and thereafter became her primary treating physician, noted in his deposition that he did not focus on the claimant's neck complaints at that time because "it probably paled in comparison, likely paled in comparison to the lower extremity problems she was having." (Brewington Dep. at 8.)

¶15 Sometime late in 2001, Dr. C.G. Sherrill, an orthopedic surgeon, determined that some of the claimant's left shoulder pain was due to a rotator cuff tear. (Exs. 7 at 39 and 4 at 10.) He attributed the tear to her industrial accident and performed rotator cuff surgery on February 18, 2002. (Exs. 4 at 10 and 5.)

¶16 On February 28, 2002, Dr. Brewington again noted that the claimant was suffering from neck pain but commented that "we need to get her shoulder and her lumbar spine healed up." (Ex. 7 at 37.)

¶17 Following her rotator cuff surgery, the claimant underwent physical therapy with Dennis L. McCrea (McCrea). In his March 5, 2002 physical therapy note, McCrea noted that the claimant had "tight tender mid-thoracic paraspinals . . . ." (Ex. 14 at 59.) In his deposition, McCrea testified that the claimant's thoracic pain could have been explained by guarding due to her shoulder surgery or low-back problems, however, he could not rule out the possibility that they were due to some thoracic injury. (McCrea Dep. at 8-10.)

¶18 On April 16, 2002, Dr. Brewington noted that the claimant had mechanical neck pain but that "from mid chest down she says everything is good." (Ex. 7 at 34.) In his deposition, Dr. Brewington testified that this meant

that from there up, things were bothering her. And mid-chest corresponds to middle thoracic spine. And so she was obviously having some type of symptoms back there. Otherwise I would have said from the neck down she was fine. **And also I see that some x-rays were ordered of the thoracic spine, so obviously she was complaining of some symptoms of that as well.**

(Brewington Dep. at 11, emphasis added.) He also testified that he would never have ordered thoracic x-rays unless the claimant was complaining of thoracic pain. (Id. at 12.)

¶19 The claimant's neck pain continued to predominate and on October 14, 2002, Dr. Brewington performed a C6-7 discectomy, bilateral C6-7 foraminotomies, and a C6-7 anterior fusion. (Ex. 7 at 27.)

¶20 Subsequent to her cervical surgery, the claimant again underwent physical therapy with McCrea. In his initial assessment on December 13, 2002, McCrea noted that the claimant had neck pain radiating out to the shoulder and down to the middle of her back between her shoulder blades. (Ex. 11.) In his deposition he testified that he assumed her thoracic pain was related to her neck and shoulder conditions but that it was also possible it was from a thoracic injury. (McCrea Dep. at 14-15.)

¶21 The claimant continued to report thoracic pain in subsequent physical therapy sessions with McCrea. On January 7, 2003, McCrea noted "tenderness and tightness of bilateral thoracic paraspinals . . . ." (Ex. 10; McCrea Dep. at 19.) On January 29, 2003, he found that the claimant was extremely tender in the thoracic paraspinals, especially at the T8 level. (Ex. 9; McCrea Dep. at 20.) He also recalled that the claimant told him that she had complained about mid-back pain since her industrial accident but that her doctors were not listening. (McCrea Dep. at 20.) His PT note on that date records:

PN [pain] IN MID-BACK AREA SINCE ACCIDENT THAT SHE HAS TOLD THE MD'S & NO ONE IS LISTENING.

(Ex. 9.)

¶22 In subsequent physical therapy sessions in February and March of 2003, the claimant continued to complain of thoracic pain. (Ex. 8; McCrea Dep. at 22-27.)

¶23 On March 24, 2003, the claimant was reexamined by Dr. Brewington. He noted that at that time she was complaining of "mid to lower thoracic pain radiating around the costal margin to just below the rib cage on her abdomen. . . . Her symptoms can be very consistent with a thoracic radiculopathy . . . ." (Ex. 7 at 18.) He ordered a thoracic MRI. (Id.)

¶24 A thoracic MRI was done on April 3, 2003. It revealed "a moderate to large herniated nucleus pulposus, T7-T8, with impingement on the thecal sac and the ventral cord," as well as a "small central herniated nucleus pulposus, T8-T9" and a "small right-sided bulge at the T9-T10 level." (Id. at 29.)

¶25 Based on the claimant's thoracic symptoms and her thoracic MRI, on April 23, 2003, Dr. Brewington concluded that the claimant's thoracic symptoms were due to the disk herniation at T7-8. (Brewington Dep. at 19.) He recommended a T7-8 disectomy. (Id. at 20; Ex. 4 at 17.)

¶26 Liberty accepted liability for claimant's low back, neck, shoulder (rotator cuff) and hip conditions, thus agreeing that all of these conditions are related to and were caused by her May 8, 2001 industrial accident. However, it has refused to accept liability for the claimant's thoracic condition.

¶27 As a result of Liberty's denial of liability for her thoracic condition, claimant has not had the surgery recommended by Dr. Brewington. She petitioned this Court requesting that I find that her thoracic condition is related to her May 8, 2001 industrial injury and that I order Liberty to pay for thoracic surgery.

¶28 Dr. Brewington, who has treated claimant for her spinal conditions since May 8, 2001, has opined that claimant's thoracic disk herniations are due to her industrial accident. In a May 9, 2003 letter to Jamie Kern, Liberty's claims adjuster, he wrote:

Dear Ms. Kern:

While it is true that Ms. Anderson and I have not focused on the thoracic radiculopathy until presently, she states, and I have no information to refute this, that this has been going on since the original injury. If you have any information to the contrary, I would be happy to review it.

It is not uncommon when one has an injury that is less troublesome than another that it is ignored or put on the back burner until the more acute and debilitating problem has been addressed, I believe this is likely the case here.

Sincerely,

K.C. Brewington, II, M.D.

(Ex. 7 at 16.)

¶129 Dr. Brewington explained his May 9, 2003 letter during his deposition:

Well, the insurance company was obviously dragging their feet, even though they said it was reasonable that you can have a lumbar and cervical disease and treat those in a staggered fashion, treating the most serious one first or the most painful one first, but for some reason they didn't seem to think that the same thing could happen with the thoracic spine. I didn't see any medical reason why they could come to this conclusion. And so this was just a formal way of notifying them that I believe that they had misguided notions about what was going on and just declare what I thought was the most medically-correct hypothesis regarding this.

(Brewington Dep at 20.)

¶130 Dr. Brewington wrote Liberty again on May 28, 2003, and emphasized the immediate need for surgery because "the longer the nerve remains under compression, the higher her chances of having a more permanent and perhaps complete disability from the neuropathic pain that is being engendered. . . ." (Ex. 7 at 15.)

¶131 Claimant returned to Dr. Brewington on June 3, 2003, at which time Dr. Brewington reported "[w]orkman's comp is still dragging their feet over this and they have an appointment for her set to see Dr. Roberson. Workman's comp does not sound like they are reviewing the records very well. There is a record of Ms. Anderson having had thoracic films done in April 2002 because she was having pain back then." (Id. at 14.)

¶132 Dr. Brewington explained repeatedly that the claimant's thoracic problems were not fully addressed until 2003 because he and her other treating physicians were treating her for more pressing problems:

. . . I think if you look at it in light of her other symptoms, I mean, she had obviously been assumed to be having cervical problems, you know, when she having lumbar problems. However, that wasn't addressed. But this question isn't coming up, you know. The Workman's Comp obviously said, well, even though she was having cervical problems at the time of her lumbar surgery, the lumbar surgery was done first because that was more painful than the cervical symptoms.

And so for some reason, in their infinite wisdom, Workman's Comp has now said, well, that same thing can't happen with the thoracic symptoms, which is rather befuddling to those of us in the medical profession. (Brewington Dep. at 13-14.)

I mean, if you have a bullet wound and blister, which one do you take care of first? (Id. at 14.)

I mean, we're working through the most painful to the least painful problems that she's been having in the thoracic spine; suddenly, they state they want to put a stop on working and treating her. (Id. at 21.)

¶133 Dr. Brewington specifically testified that, based on the nature of claimant's injury, her medical history and his own treatment, it was his opinion, on a more probable than not basis and within a reasonable degree of medical certainty, that claimant's May 8, 2001 fall from the pickup either directly caused or permanently aggravated her thoracic spine condition. (Id. at 22-23.)

¶134 Dr. Brewington is a neurosurgeon. He completed a six-year neurosurgical residency in 2001 and began his surgical practice in Missoula, Montana, in July 2001. (Brewington Dep. at 5.)

¶135 Posed against Dr. Brewington's opinion regarding causation of the claimant's thoracic condition is the opinion of Dr. F. Clifford Roberson, who conducted an independent medical examination (IME) of the claimant at the request of Liberty.

¶136 Dr. Roberson is also a neurosurgeon. He completed his neurosurgeon residency in 1979. However, in weighing his testimony, I must consider his subsequent practice. He actively practiced for ten to twelve years following completion of his neurosurgical residency, then retired from treating patients for a period of approximately nine years so that he could engage in dog-sled racing. (Roberson Dep. at 5-7.) During his nine years of dog-sled racing, Dr. Roberson did IMEs "except during the racing season;" he did not treat patients or do surgery. (Id. at 7.) In 2001 Dr. Roberson ceased racing and went to Los Angeles for a general neurosurgery refresher fellowship and a "shorter intracranial fellowship." (Id. at 5.) In November 2002 he moved to Missoula and resumed an active neurosurgical practice. His IME exam of the claimant was on June 20, 2003, approximately seven months after resuming a patient practice. (Ex. 24.)

¶137 Dr. Roberson examined the claimant and concluded her thoracic condition was unrelated to her industrial injury. (Id. at 83.) He also opined that "there are likely secondary gain issues here" and recommended against thoracic surgery. (Id.)

¶138 While I respect Liberty's reliance on Dr. Roberson's opinion, and find that its reliance was reasonable, I am astounded by his conclusions. Given the history recited in this decision, no one can doubt that the claimant suffered severe injuries as a result of her

industrial accident. Her low-back, shoulder, neck, and hip conditions were verified by objective imaging and her surgeries. Her multiple surgeries ultimately were largely successful in eliminating radiculopathies and a torn rotator cuff. Her thoracic condition has objective support by MRI imaging, and Dr. Brewington's testimony that her more profound problems, including radicular pain, masked her thoracic pain is both reasonable and compelling. I find Dr. Roberson's suggestion that the claimant is faking or exaggerating her thoracic complaints (he said "secondary gain", which amounts to the same thing) borders on the outrageous.

¶139 Moreover, I find no reason to prefer his opinions over those of Dr. Brewington, who is the claimant's treating physician and who has followed her for some time. While Liberty suggests that Dr. Roberson is more qualified than Dr. Brewington, who is a relatively newly minted neurosurgeon, Dr. Brewington's recent patient practice is far more extensive than that of Dr. Roberson's recent patient practice. He has engaged in an actual patient practice and done surgery for three years, and for the six years prior to that was in a neurosurgery residency where he saw patients and performed surgery. Moreover, I must consider and give some weight to the fact that during nine of the eleven years prior to his IME of the claimant, Dr. Roberson's medical practice consisted solely of IME exams.

¶140 I find Dr. Brewington's opinions persuasive and find that the claimant's thoracic condition was caused by her May 8, 2001 industrial accident. She is entitled to the thoracic surgery recommended by Dr. Brewington, if she so chooses.

#### CONCLUSIONS OF LAW

¶141 This case is governed by the 1999 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).

¶142 The 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).

¶143 The sole issue before the Court is whether the claimant's thoracic herniated disks are related to her industrial accident of May 8, 2001. I have found they are. Accordingly, Liberty is liable for medical and indemnity benefits for her thoracic condition, including the surgery recommended by Dr. Brewington.

¶144 Since the claimant has prevailed, she is entitled to costs. She must claim her costs in accordance with Court rules.

¶145 I apologize for the delay in issuing this decision. Dr. Brewington recommended surgery on April 23, 2003. The petition in this case was filed on August 13, 2003. The matter was

submitted for decision on November 21, 2003, based on agreed facts, the exhibits, and depositions. In light of Dr. Brewington's recommendation for surgery, there was some urgency to my rendering a decision and I vaguely recall thinking of the urgency when the case was submitted, but I was thereafter immersed in other decisions and lost sight of this case. I would urge counsel practicing before this Court to contact me to remind me of any pressing need for an early decision. If apprized of the need for an early decision and it is not forthcoming, I encourage counsel to renew their requests for an expedited decision.

#### JUDGMENT

¶46 The claimant's thoracic condition was caused by her May 8, 2001 industrial injury. Liberty is liable for the thoracic surgery proposed by Dr. Brewington and for indemnity benefits attributable to her thoracic condition.

¶47 The claimant is entitled to her costs.

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

¶49 Any party to this dispute may have twenty days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 19th day of April, 2004.

(SEAL)

\s\ Mike McCarter  
JUDGE

c: Mr. Andrew D. Huppert

Mr. Larry W. Jones

Submitted: November 21, 2003

1. The lesser trochanter is a one of two prominences at the head or top of the femur to which muscles attach. (Merriam-Webster Medical Dictionary.) An avulsion is a separation or tearing away (id.), thus indicating a small fracture of the lesser trochanter. (See Ex. 2 at 3).