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

**2001 MTWCC 53**

**WCC No. 2001-0277**

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**JASON KEY**

**Petitioner**

**vs.**

**LIBERTY NORTHWEST INSURANCE**

**Respondent/Insurer for**

**ALPINE LOG HOMES**

**Employer.**

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FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

**Summary:** Claimant fell and strained his low back while at work. Several weeks later he developed right hip pain and his treating physician opined that his fall had made an underlying, preexisting degenerative hip condition symptomatic and painful. An independent medical examination (IME) physician disagreed but felt that physical therapy which was prescribed for the back injury could have triggered his pain. Claimant has continued to suffer back and right hip pain and is taking significant amounts of narcotic drugs. After another IME found claimant to be at maximum medical improvement (MMI) and the hip condition unrelated, the insurer terminated temporary total disability (TTD) benefits and denied claimant's request for pain clinic treatment recommended by his treating physician. The treating physician and primary IME physician both indicated claimant would benefit from further treatment. The treating physician advocated a pain management program but allowed that physical therapy in conjunction with the program might help. The IME physician advocated physical therapy but allowed that doing it in conjunction with a pain program is appropriate.

**Held:** (1) Claimant's hip condition was made symptomatic (painful) by either his industrial injury or the physical therapy he received for the injury and is therefore related to the injury. (2) Claimant is not at MMI since persuasive medical evidence indicates his condition may be materially improved by a pain program evaluation and, if a good candidate, by his participation in a pain program and further physical therapy. (3) The insurer is liable for

retroactive and continuing TTD benefits and for a pain evaluation and, if appropriate, a pain program and further physical therapy.

**Topics:**

> **Maximum Medical Improvement: General.** Where claimant's pain would be materially improved by his participation in a pain clinic or pain program, he has not reached MMI.**Maximum Medical Improvement: General.** Evaluation and testing to determine what treatment is appropriate is part of treatment. Where further evaluation or testing is necessary to determine whether and what further treatment is appropriate, the claimant is not at MMI.
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> **Maximum Medical Improvement: Pain.** Pain has both physiologic and mental components. Pain receptors are physical parts of the body and are necessary to the sensation of pain. Treatment which significantly reduces or controls pain, and thereby increases mobility, endurance, strength, alertness, and overall functioning is treatment which will materially improve a claimant's condition.
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> **Proof: Conflicting Evidence: Medical.** "As a general rule . . . the testimony of a treating physician is entitled to greater evidentiary weight," although it is not conclusive. *Kloepfer v. Lumbermen's Mut. Cas. Co.*, 276 Mont. 495, 498, 916 P.2d 1310, 1312 (1996). At minimum, the treating physician is the tiebreaker where there is evenly balanced, conflicting medical testimony.
>
> **Pain.** Pain has both physiologic and mental components.

¶1 The trial in this matter was held on April 9, 2001, in Missoula, Montana. Petitioner, Jason Key (claimant), was present and represented by Mr. Robert K. Ogg. Respondent, Liberty Northwest Insurance (Liberty), was represented by Mr. Larry W. Jones.

¶2 Exhibits: Exhibits 1 through 3 were admitted without objection.

¶3 Witness and Depositions: Claimant was the only witness at trial. In addition, the parties submitted the depositions of James H. Chandler, M.D., Patrick Robins, M.D., Martin D. Cheatle, Ph.D., and the claimant.

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

- Whether Claimant is entitled to reinstatement of his temporary total disability benefits?
- Whether Claimant is entitled to attend a pain management clinic?

¶5 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

¶6 Claimant is 25 years of age.

¶7 As a child, the claimant suffered *slipped capital femoral epiphysis* in both of his hips. The condition occurs at the junction of the ball of the femur (thigh bone), which fits into the hip joint, with the neck of the femur (femoral neck). The femoral epiphysis, which is the growth plate of the femur, slips on the femoral neck. Randall T. Loder, M.D., *Slipped Capital Femoral Epiphysis,* in American Family Physician, May 1, 1998. Dr. Robins explained the condition and its treatment during his deposition:

> . . . When a person is very young and their hip joint is developing, the ball of their hip joint is separated from the rest of the thigh bone by a layer of cartilage that later in life fuses the two bones together. In some cases before that occurs, the ball part slips off part of the remaining femur bone and that's what's called a slipped epiphysis. And this happens usually in boys and oftentimes requires a surgical operation to keep it from slipping all the way off.

(Robins Dep. at 7-8.)

¶8 Claimant underwent surgery on both hips while a teenager. In 1986, at age 10 or 11, he had four pins placed in his left hip. In 1987 he had a screw placed in his right hip. (Key Dep. at 9-10; Ex. 3 at 7.)

¶9 According to claimant, his surgeries were successful. Prior to January 18, 2000, he had engaged in a full range of activities without difficulty, including football and track during high school. (Key Dep. at 11-12.) He had also worked construction and at a meat packing plant. (Ex. 3 at 17.)

¶10 On January 18, 2000, claimant was working as a construction worker for Alpine Log Homes (Alpine), when he slipped and fell while walking on a floor joist. He landed initially on his leg while still on the joist, then continued to fall until he hit the ground, landing on his back. The distance of the fall was approximately five feet. (Ex. 1 at 1; Trial Test.) In the fall he struck his left lower leg, both elbows and low back. (Key Dep. at 14-16 and Dep. Ex. 1.)

¶11 In the week following the accident, claimant experienced soreness in his low back and bruising of the calf of his left leg just below the knee and to the lateral side. (*Id*. at 17 and Dep. Ex. 2.) In early February he began experiencing pain and a burning sensation in his right hip. (*Id*. at 18-19 and Dep. Ex. 3.)

¶12 At the time of his fall, Alpine was insured by Liberty Northwest Insurance (Liberty). A claim for compensation was submitted to Liberty (ex. 1), which accepted liability for the accident.

¶13 Claimant's first medical treatment following his injury was on February 2, 2000, when he visited the emergency room of the Marcus Daly Hospital in Hamilton, Montana. At that time he complained of "persistent and diffuse low back pain for the past several days." (Ex. 3 at 2.)

¶14 Thereafter, claimant continued to experience low-back pain and was treated with physical therapy during the month of February 2000. (Ex. 2 at 8.) Not only did the physical therapy fail to cure his back pain, at least by February 28, 2000, he was also experiencing significant "pain over the right greater trochanteric bursa," meaning hip pain[(1)]. (*Id*.; Ex. 3 at 3.) He was referred to Dr. James H. Chandler, an orthopedic surgeon. Dr. Chandler first saw claimant on March 6, 2000, and has treated him since that time for both his back and hip pain.

¶15 At the time of claimant's first visit, claimant was taking Lortab, a narcotic drug, without relief. (Ex. 2 at 8.) On March 6, 2000, Dr. Chandler injected the trochanteric bursa of the right hip. (*Id*.) The nature of the drug which was injected is not identified in the doctor's office note. He then undertook a more significant injection directly into the claimant's right hip joint. (*Id*. at 6-7.) That injection was done on April 5 and included cortisone. (*Id*.) Both injections failed to provide relief and claimant continued to need narcotic medication. (*Id*. at 4-5.)

¶16 Plain x-rays and a CT scan taken on March 6 and 23, 2000, respectively, disclosed osteophytes and cyst-like lesions in the right hip, along with rotational deformity. (*Id*. at 8; Chandler Dep. at 6; Ex. 3 at 6.) Dr. Chandler opined that claimant's hip pain was triggered by the industrial accident. (Chandler Dep. at 10-11, 15; Ex. 2 at 3-4.)

¶17 Dr. Chandler considered hip replacement surgery and requested a second opinion from Dr. David C. King, who is also an orthopedic surgeon. Dr. King acknowledged that claimant will ultimately need hip replacement but recommended against it currently because it is not clear how much of his hip symptoms is related to his low-back condition. (Robins Dep. Ex. 8 at 3.) In his deposition, Dr. Chandler agreed that hip replacement is not presently appropriate, however, he also opined that claimant will benefit from a pain management program and is therefore not at MMI.

¶18 At the request of Liberty, claimant has undergone several IMEs. The first was done on March 8, 2000, which was two days after claimant first saw Dr. Chandler. That IME was done by Dr. Patrick R. Robins, an orthopedic surgeon who is no longer in active practice.[(2)] (Robins Dep. at 5.) Dr. Robins did a followup examination on May 16, 2000, and was also part of a three member medical panel which performed another IME on September 19, 2000. (Robins Dep. Exs. 2 and 4.)

¶19 At the March 8th examination, Dr. Robins diagnosed unresolved low-back strain and recommended physical therapy (PT). (Robins Dep. Ex. 1.) On May 16th he found

"[c]ontinuing low back subjective pain and stiffness" and again recommended physical therapy. (Robins Dep. Ex. 2.) He also recommended an MRI to rule out other abnormalities. (*Id*.) He opined at that time that claimant's hip complaints were unrelated to his work-related injury and that "he very likely has two separate situations going on." (*Id*.)

¶20 Pursuant to Dr. Robins' recommendation, a lumbar MRI was done on June 1, 2000. Dr. Robins read the MRI as showing "mild focal disc protrusion on the lateral side of L4-5, which does not appear to impinge on the nerve root. Otherwise, the MRI did not reveal any significant abnormalities." (Robins Dep. at 11.)

¶21 On both March 8 and May 16, 2000, Dr. Robins had found that claimant was not at MMI and could benefit from PT. Following the MRI, he repeated his PT recommendation. "I feel that the treatment regimen at this time would be an intensive physical therapy and conditioning program of the lower back." (Robins Dep. Ex. 3.) However, PT had not been provided as of the time of the trial.

¶22 On September 19, 2000, again at the request of Liberty, another IME was done, this time by a panel consisting of Dr. Dana Headapohl, who specializes in Occupational and Environmental Medicine, Dr. Henry Gary, a neurosurgeon, Martin Cheatle, Ph.D., a psychologist specializing in pain management, and Dr. Robins. Dr. Headapohl authored the panel report and determined that claimant had reached MMI with respect to his back and that even though "[b]y patient report, the right hip condition was aggravated by the fall . . . . there is no objective evidence of permanent worsening and the patient has reached pre-aggravation with regard to the right hip condition." (Ex. 3 at 12.) Dr. Robins signed the panel report; Dr. Cheatle and Dr. Gary did not. (*Id*. at 13.)

¶23 Dr. Gary diagnosed chronic low-back strain and right hip discomfort but his report did not offer opinions concerning MMI or causation. (Ex. 3 at 15-18.)

¶24 Despite signing the panel report during his deposition, Dr. Robins testified that he still believed PT would improve claimant's condition. (Robins Dep. at 12.) Indeed in a prior note of his discussion of the case with Dr. Headapohl, he wrote:

> I have discussed the case with Dr. Headapohl. I would estimate that he [claimant] would require physical therapy on an outpatient basis three times weekly for four weeks for an intensive PT program to include ultrasound, ionophoresis, stretching and exercises. I feel **at that time** the patient would be at MMI. . . . [Emphasis added.]

(Robins Dep. Ex. 5.) Dr. Robins pointed out that even though the initial trial of PT in February had been unsuccessful there are other modes of PT which could benefit claimant without increasing his hip pain. (Robins Dep. at 14.) He did not satisfactorily explain why he had concurred in Dr. Headapohl's report that claimant had reached MMI. (*Id*. at 24.) He also did not agree that the industrial accident aggravated claimant's hip condition since claimant did not report hip pain until several weeks after the accident; however, he conceded that

the PT claimant underwent shortly after the injury could have triggered his hip pain. (*Id*. at 27.) Finally, he agreed that claimant may benefit from pain management treatment. (*Id*. at 16.)

¶25 Dr. Cheatle focused on claimant's pain and psychological status. His impressions included an "[e]volving somatoform disorder". . . "with mixed anxiety and depression," which he characterized as "most likely an adjustment reaction to his current status and therefore . . . to his IA [industrial accident]," as well as persistent low-back and right hip pain. (Ex. 3 at 25.) Dr. Cheatle concluded:

> If his medical evaluations are unrevealing, possibly he might benefit from a more comprehensive approach to his pain disorder and maybe the addition of an SSRI [Selective Serotonergic Reuptake Inhibitor, e.g., Prozac], would help modulate his mood and therefore his pain perception. I believe the patient has multiple risks for developing a more entrenched pain disorder given his developmental history of abuse which is a primary risk factor identified in the evolution of somatoform pain disorders. . . .

(*Id*. at 26.)

¶26 During his deposition, Dr. Cheatle testified that claimant warrants evaluation to determine if he is a good candidate for a pain program. (Cheatle Dep. at 12, 17.) If so, claimant may benefit from a program. (*Id*. at 12.) He pointed out that claimant is "depressed, he's deconditioned, he has significant pain behavior." (*Id*. at 13.) He also reiterated his recommendation of an SSRI medication, a recommendation that as of the time of trial had apparently not been implemented.

¶27 At the time of trial on April 9, 2001, claimant was still experiencing back and hip pain. He was still taking significant narcotic medication to control his pain. He had not been released to return to work to his time-of-injury job or any similar employment and was not working. His activities are limited by his pain.

¶28 Dr. Chandler, his treating physician, testified by deposition shortly before trial. He noted that claimant was currently taking hydrocodone for pain. (Chandler Dep. at 14.) Hydrocodone is an opiad analgesic. Dr. Chandler strongly recommended claimant be evaluated for and enrolled in a pain management program. (*Id*. at 12, 17.) He considers it possible that a pain management program may reduce claimant's hip pain and obviate the need for hip replacement surgery and that it is essential in any event before any surgeon will operate on the hip. (*Id*. at 12, 15, 17-18, 25.) While he considers claimant at MMI with respect to his low-back injury, he does not consider him at MMI with respect to his hip aggravation. (*Id*. at 11.) Dr. Chandler also indicated that PT in conjunction with a pain program may help claimant.

¶29 Claimant is not presently receiving TTD benefits. Those benefits were apparently cut-off after Liberty received the medical panel report finding him to be at MMI. Liberty also has refused to authorize treatment at a pain clinic or program.

Resolution

¶30 I am persuaded, first, that claimant's hip condition was lit up and made symptomatic by his January 18, 2000 industrial accident, or at least by the PT which he underwent following that injury. In reaching this conclusion I follow the rule that all things being equal, deference should be given to the opinions of the treating physician. "As a general rule . . . . the testimony of a treating physician is entitled to greater evidentiary weight," although it is not conclusive. *Kloepfer v. Lumbermen's Mut. Cas. Co.*, 276 Mont. 495, 498, 916 P.2d 1310, 1312 (1996). At minimum, the treating physician is the tiebreaker where there is evenly balanced, conflicting medical testimony.

¶31 In this case, the doctors did not personally testify before the Court, thus I must rely on the written record, including their depositions. There is nothing in the medical testimony or records which would cause me to discount Dr. Chandler's opinion. Dr. Robins, who conducted several IMEs at the insurer's request, indicated that the PT could have triggered the pain. Lacking better evidence to the contrary, those opinions, which were by orthopedic specialists, together with the fact that claimant's hip condition was asymptomatic prior to the accident, are persuasive. The insurer does not dispute the relationship between the back and the accident. Thus, it makes no difference to my ultimate decision in this case whether further treatment would materially benefit the back or the hip, or both.

¶32 I am further persuaded that claimant has not reached MMI and is entitled to a further workup to determine if a pain clinic or program is appropriate. Irrespective of whether it is ultimately determined that claimant is in fact a good candidate for a pain clinic or program, *evaluation* and testing is a part of any treatment since it is a prerequisite for determining specific treatment recommendations. To insist, as the insurer does here, that claimant must prove that he would benefit from the treatment program while at the same time denying him the opportunity to be evaluated is disingenuous. It is analogous to refusing to authorize an MRI to determine whether there is a surgical lesion and then insist that the claimant has failed to prove he needs surgery. There are ample and persuasive opinions in this case that claimant should be evaluated for a pain program, then enrolled in a program if determined to be a good candidate for the program. Drs. Chandler, Robins, and Cheatle all support that approach. Moreover, there is persuasive evidence that PT will benefit claimant if done properly and in conjunction with a pain program.

¶33 Finally, I note that pain has both physiologic and mental components. Pain receptors are physical parts of the body and are necessary to the sensation of pain. Treatment which significantly reduces or controls pain, and thereby increases mobility, endurance, strength,

alertness, and overall functioning is treatment which will materially improve a claimant's condition.

CONCLUSIONS OF LAW

¶34 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).

¶35 Claimant bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he 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).

¶36 Temporary total disability benefits are governed by section 39-71-701, MCA (1999), which provides in relevant part:

> 39-71-701. **Compensation for temporary total disability -- exception.**
>
> (1) Subject to the limitation in 39-71-736 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.

Maximum medical healing (MMI) is defined in section 39-71-116(18), MCA (1999), as follows:

> (18) "Medical stability", "maximum healing", or "maximum medical healing" means a point in the healing process when further material improvement would not be reasonably expected from primary medical treatment.

"Primary medical treatment", which is referenced in the MMI definition, is in turn defined in section 39-71-117(26), MCA (1999):

> (26) "Primary medical services" means treatment prescribed by a treating physician, for conditions resulting from the injury, necessary for achieving medical stability.

As pointed out in my recent decision, the medical stability definition is circular and simply means that point where "'any further medical treatment' would not materially improve a claimant's condition." *Hiett v. Montana Schools Group Insurance Authority,* 2001 MTWCC 52, ¶ 40.

¶37 Thus, the question in this case is whether, on a more likely than not basis, further treatment will materially improve claimant's condition. After sifting through the medical evidence, I have found by a preponderance that claimant will benefit from further evaluation to determine if he is a candidate for a pain clinic or program, and if he is found to be a candidate that he will materially benefit from going through a pain program and obtaining further, appropriate PT. While it may be argued that "evaluation" for a pain clinic is not treatment that will materially improve claimant's condition, I have already pointed out that *evaluation* and testing is a part of treatment since it is prerequisite for determining specific treatment recommendations. I therefore find and conclude that claimant has not reached MMI.

¶38 Section 39-71-704(1)(a), MCA (1999), requires the insurer to "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." Primary medical services, as defined earlier, are services which are necessary for medical stability. I have found as fact that claimant's condition will be materially aided by a pain program evaluation and, if he is a good candidate, by a pain program and appropriate physical therapy as recommended by Drs. Robins and Chandler.

¶39 Since claimant has prevailed, he is entitled to his costs. § 39-71-611, MCA (1999).

JUDGMENT

¶40 Liberty shall reinstate claimant's TTD benefits retroactive to the date they were terminated and shall continue paying such benefits while claimant undergoes evaluation for a pain program and, if he is a good candidate for a pain program, while he completes the program and receives PT as recommended by Drs. Robins and Chandler, or until claimant otherwise achieves MMI.

¶41 Liberty shall furnish a pain program evaluation to claimant and if he is found to be a good candidate for the program shall pay for the program and for PT recommended by Drs. Robins and Chandler in conjunction with the program. Claimant shall fully cooperate in any evaluation and program and shall follow medical recommendations.

¶42 Claimant is entitled to his costs. He shall submit his memorandum of costs in accordance with Court rules.

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

¶44 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 13th day of September, 2001.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Robert K. Ogg
Mr. Larry W. Jones
Date Submitted: April 9, 2001

1. The "trochanter" is a " prominence or process at the upper part of the femur [thigh bone]" and "bursa" is the sac between tendon and bone. 1997 Merriam-Webster Medical Dictionary.

2. He testified that he was "in practice in Missoula, Montana until 1998." (Robins Dep. at 5.)