

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1997 MTWCC 7

WCC No. 9608-7591

LINDA KLEIN

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE

CORPORATION

Respondent/Insurer for

ST. JOSEPH CONVALESCENT

& RETIREMENT CENTER

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Certified nursing assistant who slipped and fell at work challenged date on which TTD benefits were terminated, asked for coverage of additional medical services, and sought PPD benefits . A panel of medical providers, including an orthopedic surgeon, a pain specialist, and an occupational specialist, opined that claimant did not suffer any structural or neurological impairment as the result of the accident, was not recovering as expected due to preexisting psychological problems, and had reached maximum medical improvement. A rheumatologist diagnosed claimant with fibromyalgia and opined that her condition preexisted, but was aggravated by, the industrial injury. He opined that claimant, like other fibromyalgia patients, had become deconditioned following the flare-up of pain, which suggested she was not at MMI as early as claimed by the panel.

Held: The medical evidence, as well as claimant's testimony and the insurer's acceptance of the claim, establishes that claimant did in fact suffer an industrial injury. She aggravated her preexisting and underlying condition of fibromyalgia. This led to deconditioning, a condition which was not remedied at the time the panel placed her at MMI. Since the deconditioning was a result of the occupational injury and since it was treatable with an exercise program, claimant did not reach MMI until she had the benefit of that program. The medical evidence, however, fails to establish that the effects of the industrial injury are

permanent in any way. At most, she suffered a setback in a long-term condition. She is now at MMI and has no permanent impairment. The insurer is liable for treatment to return claimant to her baseline status, even if some of that treatment flowed from the underlying condition that flared up with the industrial accident. An employer and insurer take a claimant as they find her, with regard to both preexisting physical and emotional conditions. See *Houts v. Kare-Mor*, 257 Mont. 65, 68, 847 P.2d 701, 703 (1992).

Topics:

Benefits: Temporary Total Benefits. Injured CNA was not at maximum medical improvement where her deconditioning prevented her from returning to her normal CNA duties. Where a sustained exercise program promised to increase claimant's conditioning sufficiently for her to resume her job, there was a reasonable potential for "material improvement" in her condition within section 39-71-116(17), MCA, (1993). She was entitled to TTD benefits during the period she still required conditioning. This does not mean, however, that insurers must pay to train claimants as athletes or that additional conditioning will result in "material improvement" in every case.

Maximum Medical Improvement. Injured CNA was not at maximum medical improvement where her deconditioning prevented her from returning to her normal CNA duties. Where a sustained exercise program promised to increase claimant's conditioning sufficiently for her to resume her job, there was a reasonable potential for "material improvement" in her condition within section 39-71-116(17), MCA, (1993). She was entitled to TTD benefits during the period she still required conditioning. This does not mean, however, that insurers must pay to train claimants as athletes or that additional conditioning will result in "material improvement" in every case.

Maximum Medical Improvement. Where exercise, physical therapy, or other therapy is prescribed by a claimant's treating physician, the claimant has an obligation to follow through with the treatment or risks suspension of benefits. See *Meidinger v. Western Energy Co.*, 254 Mont. 18, 23, 834 P.2d 1382, 1385 (1992).

Medical Conditions: Conversion Disorder. An employer and insurer take a claimant as they find her, with regard to both preexisting physical and emotional conditions. See *Houts v. Kare-Mor*, 257 Mont. 65, 68, 847 P.2d 701, 703 (1992).

Medical Conditions: Fibromyalgia. WCC declines insurer's invitation to determine whether fibromyalgia is a medically correct diagnosis. Compensability does not turn on the validity of the diagnosis. It requires only that the claimant suffer an injury of some sort and, for purposes of compensation benefits, be disabled as the result of the injury.

Medical Conditions: Fibromyalgia. The medical evidence, as well as claimant's testimony and the insurer's acceptance of the claim, establishes that claimant did in fact suffer an industrial injury. She aggravated her preexisting and underlying condition, which was diagnosed as fibromyalgia. This led to deconditioning, a condition which was not remedied at the time the panel placed her at MMI. Since the deconditioning was a result of the occupational injury and since it was treatable with an exercise program, claimant did not reach MMI until she had the benefit of that program. The medical evidence, however, fails to establish that the effects of the industrial injury are permanent in any way. At most, she suffered a setback in a long-term condition. She is now at MMI and has no permanent impairment.

Medical Conditions: Fibromyalgia. The insurer is liable for treatment to return claimant to her baseline status, even if some of that treatment flowed from the underlying condition (diagnosed as fibromyalgia) that flared up with the industrial accident. An employer and insurer take a claimant as they find her, with regard to both preexisting physical and emotional conditions. See *Houts v. Kare-Mor*, 257 Mont. 65, 68, 847 P.2d 701, 703 (1992).

Medical Conditions: Somatoform Disorder. An employer and insurer take a claimant as they find her, with regard to both preexisting physical and emotional conditions. See *Houts v. Kare-Mor*, 257 Mont. 65, 68, 847 P.2d 701, 703 (1992).

Pain. An employer and insurer take a claimant as they find her, with regard to both preexisting physical and emotional conditions. See *Houts v. Kare-Mor*, 257 Mont. 65, 68, 847 P.2d 701, 703 (1992).

Witnesses: Credibility. While a determination that a claimant is not at MMI must be supported by a preponderance of medical evidence, see section 39-71-701(2), MCA (1993), a preponderance is not determined by the number of medical witnesses who testify on one side of the issue or another. The court must look to the persuasiveness of the testimony, considering all that the witnesses state, not just their ultimate opinions. See *McQuay v. McQuay*, 81 Mont. 311, 320, 263 P.2d 683 (1928) (holding that a fact may be established by the testimony of one witness even where the remaining witnesses testify to the contrary).

The trial in this matter was held on December 5, 1996, in Kalispell, Montana. Petitioner, Linda Klein (claimant), was present and represented by Ms. Laurie Wallace. Respondent, Liberty Northwest Insurance Corporation (Liberty), was represented by Mr. Larry W. Jones. No transcript of the trial has been prepared.

Exhibits: Exhibits 1, 3 through 6, and 8 and 9 were admitted without objection. Exhibit 2 was withdrawn. Exhibit 7 is contained within the records deposition of Sean Welton and was

admitted. Exhibit 10 was admitted without objection for demonstrative purposes. Exhibit 11 was admitted after trial by stipulation of the parties.

Witnesses and Depositions: Claimant, Diana DesJarlais, and Cynthia Bean were sworn and testified. In addition, the parties submitted the depositions of claimant, Sean Welton, Dr. Ethan B. Russo, Dr. Henry W. Busey, Dr. Martin D. Cheatle, Dr. Michael Lahey, Dr. Pamela Sandall, and Dr. Dana Headapohl for the Court's consideration.

Issues Presented: As rephrased by the Court, the petition in this matter presents the following issues:

- (1) Whether claimant is entitled to additional temporary total disability benefits for the period of October 21, 1995 to August 16, 1996;
- (2) whether claimant is entitled to permanent partial disability benefits;
- (3) if claimant is entitled to permanent partial disability benefits, whether such benefits should be paid in a lump sum;
- (4) whether Liberty Northwest is liable for unpaid pharmacy bills, for Dr. Busey's bill, and for further treatment of fibromyalgia; and
- (5) whether claimant is entitled to attorney fees, costs and a penalty.

* * * * *

Having considered the Pretrial Order, the testimony presented at trial, the demeanor and credibility of the witnesses, the depositions and exhibits, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

1. Claimant is 48 years old and resides in Ronan, Montana.
2. Claimant is a high school graduate and has one year of college. She has worked as a maid at a motel, a cashier at a grocery store, a front desk clerk and cashier at a department store, and a nurses aide. (Klein Dep. at 36.)
3. Claimant was certified as a nurse assistant (CNA) in 1990. (Ex. 3 at 36.) Following her certification she worked as a nurses aide. From October 1989 to March 1990, a period overlapping her certification, she worked as an aide, caring for elderly persons. She was then unemployed until February 1991 when she returned to work, but was again off work commencing in March 1992 due to cataract surgery. In August 1993 she returned to work for St. Joseph Convalescent & Retirement Center (St. Joseph).
4. On March 6, 1995, while employed as a CNA at St. Joseph, claimant slipped on a wet floor and fell on her buttocks. She immediately felt pain in her lower back, buttocks, and

the backs of her thighs. (Klein Dep. at 12.) However, she continued to work for another two weeks without reporting the accident. When her pain did not abate, claimant reported the accident to Bill McDonald, an administrator with St. Joseph.

5. At the time of injury, Liberty insured St. Joseph. Liberty accepted liability for claimant's injury and paid temporary total disability benefits until October 20, 1995. It also paid medical bills with the exception of a bill from Dr. Henry Busey and pharmacy bills for medication prescribed by Dr. Busey

6. Prior to her injury, the claimant had a history of chronic low-back pain. (Ex. 1 at 44, 36.) She described her history of back problems as follows:

I've always had some kind of back pain, especially when I do exertion, but nothing -- and I will state this, nothing like it was after that fall. Achiness, yes. I call it pain, but it wasn't -- it was more achiness, tired achiness all the time, you know, when you over stress your body, which I have a tendency to do. But after that fall, the pain was 20 times more severe.

(Klein Dep. at 40.) Dr. Michael Lahey recorded that claimant "can't remember not having back discomfort." (Ex. 1 at 44.)

7. Claimant's history of back problems included two automobile accidents. In 1972 she injured her neck in a car accident. (Klein Dep. at 31-32). In 1978 she was involved in a head-on collision, after which she reported low-back symptoms. (*Id.*; Ex. 1 at 44.)

8. However, up until the time of her industrial injury she had been able to perform all of her job duties as a CNA and had needed no significant medical attention. Her CNA duties were physically demanding. She assisted in bathing, dressing, and feeding nursing home residents. She assisted in lifting and transferring residents from their beds to wheelchairs. Her job entailed constant lifting, bending, and stooping. She lost no significant time from her CNA work on account of her backaches. (Ex. 1 at 44.) Other than occasional chiropractic treatments and treatment following her automobile accidents, she had no significant medical care or hospitalization relating to her back. Her chronic back-ache also did not limit her recreation or housework.

9. Dr. R. Stephen Irwin, a physician at the Polson office of the Western Montana Clinic, did an employment physical of claimant in February of 1990 and "found no condition that appears to prevent him/her from performing the duties of the position applied for." (Ex. 3 at 102.) Dr. Irwin performed another employment health examination in January of 1992 and again approved claimant's employment (Ex. 3 at 71.)

10. A coworker of claimant, Diana DesJarlais, testified that prior to claimant's industrial accident she had observed claimant "lift anybody" and often work overtime. She acknowledged that claimant "occasionally" complained of pain but said that chronic aches

and pains "come with the job [CNA]." Ms. DesJarlais has worked with claimant since her return to work at St. Joseph in September 1996, and testified that claimant appears to have difficulty performing her job.

Post-Injury Medical

11. Steven VanDonselaar, a physician's assistant at Western Montana Clinic in Polson, examined claimant on March 20, 1995. (Ex. 1 at 61.) He ordered x-rays and noted that they were "totally unremarkable." (*Id.*)

12. Bill McDonald, a supervisor at St. Joseph, referred claimant to a physical therapist who treated claimant with heat and ultrasound. (Klein Dep. at 13-14.) Following physical therapy, claimant complained of increased pain in the lower back, buttocks, and down the back of the thighs. In addition, she said she experienced new symptoms of pain, tingling, and numbness down both calves and into her feet and swelling in her knees and ankles. (Klein Dep. at 16-17.) She further testified that the physical therapy "pushed" the pain up her spine into her neck and across her shoulders and that for four months following physical therapy she suffered continuous, severe headaches. (*Id.* at 18, 25.) Neither Dr. Headapohl nor Dr. Busey, both of whom addressed claimant's complaints regarding the therapy, could explain claimant's reaction to the therapy. (Headapohl Dep. at 37; Busey Dep. at 19.)

13. Dr. Irwin examined claimant on March 31, 1995. (Ex. 1 at 59.) Claimant told him she had pain in the lower back radiating into the posterior aspect of her legs, headaches, and some left arm pain. (*Id.*) He described her as "tearful today and also intermittently agitated and angry. She seems quite dysfunctional in her response to pain." (*Id.*) Other than tenderness over the lower sacral area, her physical exam was normal. (*Id.*) Dr. Irwin diagnosed claimant with a lumbar strain and prescribed rest and Oruvail, an NSAID (non-steroidal anti-inflammatory drug). (*Id.*)

14. Claimant returned to Dr. Irwin on April 5, 1995. (*Id.* at 57.) He noted on that date:

This pt [patient] is back today just 5 days after her most recent visit. She is very angry considerably at P.T. Dept. at St. Joseph Convalescent Center because she thinks they were too aggressive and made it worse. Today she appears agitated, anxious and tearful. She is very impatient for improvement. She has a lot of financial burdens and stresses. Doesn't know how she is going to make ends meet w/o being able to work. . . .

Back remains normal to inspection and palpitation. She still seems somewhat dysfunctional in her pain response. Neurologically she is still intact.

(*Id.*) He reduced the dosage of the Oruvail and told her to discontinue the physical therapy.
(*Id.*)

15. Dr. Irwin examined claimant again on April 21, 1995. (*Id.* at 56.) He noted that claimant remained tearful and that she stated "emphatically" that she was "absolutely no better whatsoever." (*Id.*) His examination of her was normal and his diagnosis remained "[l]umbar strain." (*Id.*) Nonetheless, he ordered an MRI scan of claimant's spine. (*Id.*)

16. An MRI was done on April 27, 1995, and disclosed Schmorl's nodes⁽⁴⁾ and "some annulus bulge at L4-L5 and L5-S1," but "[n]o spinal stenosis or focal nerve root compression" (*Id.* at 55.) Dr. Irwin characterized the MRI as "borderline" and referred her to Dr. Michael Lahey, an orthopedic surgeon practicing in Missoula. (*Id.* at 51.)

17. Dr. Irwin also ordered an ANA test for lupus. (Ex. 1 at 54.) Although the test results were outside normal limits, Dr. Busey testified that the results were "very nonspecific, very low tier nonspecific pattern" and that he would "call that a negative." (Busey Dep. at 37.) He also stated that the test "shouldn't have been ordered in this patient because there's nothing clinically to suggest lupus." (*Id.*) Dr. Headapohl said the test results were "positive" but agreed with Dr. Busey that the results were "quite nonspecific." (Headapohl Dep. at 22.)

18. In a letter dated July 14, 1995, Dr. Irwin wrote to Cynthia Bean, the adjuster for Liberty, saying in part:

Linda Klein has no hard, objective findings to explain her discomfort. I agree with Dr. Lahey that she is emotionally and mentally impaired with a dysfunctional response to her pain. I feel that for her to be successfully employed, her anger and hostility must be dealt with, and I recommend psychological intervention for her. Most duties of a certified nurse attendant can be carried out by Mrs. Klein, and I have indicated that on the job analysis form enclosed. I have, throughout the job analysis form, indicated restrictions which I feel would be appropriate for Mrs. Klein.

I think it is safe to assume that Mrs. Klein had reached maximum medical improvement on 5/31/95 when she was evaluated by Dr. Lahey.

Again, in spite of lack of objective physical findings and physical, orthopedic or neurologic impairment, Mrs. Klein may be impaired for gainful employment because of her current dysfunctional mental status.

(Ex. 1 at 50.)

19. Dr. Irwin examined claimant again on July 24, 1995. (*Id.* at 47.) Dr. Irwin wrote to Ms. Bean in regard to this visit.

Physical examination of the patient remains totally unremarkable and I still am unable to produce any objective findings. Specifically, inspection and palpitation of her back are unremarkable. Neurologically she is intact. There is no motor or sensory loss. Likewise, inspection of her knees is completely normal and I cannot

detect any swelling in her knees. There is no instability demonstrated in the knees, and I do not feel that a joint effusion is present either. . . .

On my examination, I can document no findings which would substantiate this degree of disability. It is my impression that Linda remains quite dysfunctional in her pain response. I do not note any improvement on my exam today in her mental condition.

(*Id.* at 47-48.)

20. Dr. Michael D. Lahey, who is board certified in orthopedic surgery, examined claimant on May 31, 1995. (Lahey Dep. at 5; Ex. 1 at 44.) He diagnosed claimant with a lumbosacral sprain but also noted "[p]ositive non organic physical findings with elements of probable hysteria, anger and emotional overlay." (Ex. 1 at 42.) Dr. Lahey reviewed claimant's MRI and noted degenerative facet arthrosis, moderate at L4-L5 and mild to moderate at L5-S1. (*Id.*) He testified that trauma can cause a condition such as facet arthrosis to become symptomatic but he did not have an opinion whether that occurred in this case. (Lahey Dep. at 49.) He recommended as follows:

At this point, it will be necessary, I believe, to address the patient's emotional reaction. This is clearly impairing her ability to respond to appropriate medical treatment. There is no structural abnormality that is likely to cause further deterioration. There is no neurologic abnormality that is likely to cause deterioration. From a physical standpoint, there is no restriction against her working but clearly from a pain management standpoint and an emotional standpoint, she is not capable of working at this point. The patient and her husband are very hostile towards me and the whole process as well as a number of physician's [sic].

(Ex. 1 at 42.)

21. Dr. Lahey testified that claimant's symptoms are consistent with a diagnosis of fibromyalgia (Lahey Dep. at 50-51) and that he generally refers fibromyalgia patients to a rheumatologist or a physiatrist (*id.* at 47-48). He described fibromyalgia as a "catch all of different pain patterns that may correspond to subjective complaints." (*Id.* at 51.) He indicated skepticism regarding the diagnosis, stating: "There's a paucity of objective medical evidence according to that diagnosis as there is on myofascial pain. And a majority of subjective pain complaints." (*Id.*)

22. Dr. Lahey testified that he believed claimant's complaints of pain. (Lahey Dep. at 39, 43.) He explained that claimant's complaints fit a hysteria pattern which may cause symptom magnification or exaggeration, but that did not necessarily mean she was falsifying her reports of pain. (Lahey Dep. at 31.)

23. At the request of Liberty, claimant was examined on September 5, 1995, by a medical panel consisting of Dr. Timothy D. Browne, an orthopedic surgeon; Dr. Ethan B. Russo, a

board certified neurologist; Dr. Dana Headapohl, who specializes and is board certified in occupational and environmental medicine; and Dr. Martin D. Cheatle, a Ph.D. clinical psychologist who founded and now directs the pain clinic at St. Patrick Hospital. (Cheatle Dep. at 5.)

24. Dr. Browne diagnosed claimant with "[c]hronic mechanical low back pain." (Ex. 1 at 25.) Although claimant exhibited abnormal pain behaviors, he nonetheless believed that her back pain was real. (*Id.*)

25. Dr. Russo's assessment of claimant was: "She has a history of chronic back pain and in this instance, the most we could say that happened was a temporary exacerbation of a preexisting problem." (*Id.* 1 at 34.) He stated that claimant "might qualify for a course of P.T. with work hardening. . . ." (*Id.*)

26. Like Dr. Lahey, Dr. Russo is no fan of fibromyalgia as a diagnosis. He characterized fibromyalgia as a "semimythical" or "pseudo" disease stating:

There is no established pathologic basis for quote, "fibromyalgia", there is no established etiology. There is no provable positive type of finding on exam. There is this concept of trigger points, which are totally un-reproducible [sic] even by so-called experts in the field. It should be mentioned I do not have any impression that people with this syndrome are imagining their problem or creating their problem.

However, the vast majority show clinical, provable signs of depression as well as other concomitant psychiatric diseases and most often have other chronic pain complaints that may include idiopathic bowel syndrome, functional chronic headaches, or any number of similar problems. . . .

Once more I'll go on to say that there's no evidence that fibromyalgia occurs due to an injury.

(Russo Dep. at 23-24.) Dr. Russo, however, did not question claimant's sincerity or truthfulness in reporting pain, sleep disruption, and difficulty in performing household chores. (*Id.* at 35, 37.)

27. In her examination notes, Dr. Headapohl noted that claimant reported living in pain all of her life and specifically a long history of back pain. (Ex. 1 at 27.) She also noted that claimant suffers from degenerative facet arthrosis at L4-L5 and L5-S1 but said the condition developed over time and was not induced by trauma. (Headapohl Dep. at 30-31.) She concluded that work as a CNA was not medically appropriate for claimant, not because of any injury but because of claimant's preexisting facet arthritis and her long history of low- back pain. (Ex. 8 at 8; Headapohl Dep. at 35-36.)

28. Dr. Headapohl also is not overly fond of fibromyalgia as a diagnosis. She described fibromyalgia as a "diagnosis of last resort" or a "garbage can diagnosis." (Headapohl Dep. at

42-43.) Moreover, it was her opinion that claimant does not meet the classic diagnostic criterion for fibromyalgia. (*Id.* at 46.)

29. Dr. Headapohl wondered about the accuracy of claimant's pain complaints, observing: "When one reviews the entire medical record and the concerns and comments made previously alluding to possible psychological complicating factors, there is some reason to not be certain that what she is saying is in fact accurate." (*Id.* at 56.) However, like Dr. Lahey and the other panel members, she did not disbelieve claimant and found no "compelling evidence of malingering." (*Id.* at 58.) On the other hand, she was unconvinced that claimant's pain at the time of the evaluation was attributable to her industrial injury. (*Id.* at 78.) She concluded that claimant's pain was a continuation of the pain that claimant described as having experienced for years. (*Id.*) Dr. Headapohl explained:

I believe this is a woman who has had lifelong pain, whose primary disabling condition at this point is psychological, and that's not to say that she doesn't have back pain. I'm sure she does. That's not to say that she doesn't have anatomical or mechanical reasonings [sic] for the back pain, she does. But in my opinion, the primary disabling factor is the psychological.

(*Id.* at 79-80.)

30. Dr. Cheatle recorded his impressions of claimant's conditions as follows:

Impression:

1. Lumbosacral strain secondary to 3/6/95 injury, probably resolved;
2. Chronic, diffuse musculoskeletal pain secondary to myofascial pain syndrome pre-existing to 3/6/95 injury;
3. Panic disorder without agoraphobia - pre-existing;
4. Dysthymia [chronic depression];
5. Somatoform pain disorder.

(Ex. 1 at 38-39.) He observed:

The patient has a long, pre-existing history of pain symptoms, panic disorder, and dysthymia, which are not related to her 3/6/95 injury. Most likely this injury aggravated her pre-existing physical and psychological problems, but I would be of the opinion that at this point any exacerbation of pre-existing problems have most likely resolved. . . .

(*Id.* at 39.) At the time of his examination, he felt that claimant was back to "baseline."
(Cheatle Dep. at 26.)

31. The three panel members issued a joint panel report on September 13, 1995. (Ex. 1 at 22.) They concluded that claimant did not suffer any structural or neurological impairment

as a result of her industrial accident. (*Id.*) They further concluded that claimant was not recovering as expected because of preexisting psychological problems but that she had reached maximum medical improvement. (*Id.*) They found no physical restrictions resulting from the injury which would preclude claimant from performing her normal duties as a CNA with St. Joseph. (*Id.*)

32. Based upon the panel evaluation, Liberty terminated claimant's temporary total disability benefits effective October 4, 1995. (Ex. 5 at 224.)

33. Claimant was also treated by Dr. Pamela S. Sandall, a chiropractor, for a period of five months beginning on April 10, 1995. (Ex. 1 at 13-17.) Dr. Sandall diagnosed muscular and ligamentous injury in the sacral-iliac area and low back. (Sandall Dep. at 21.)

34. Given the more extensive education, training and expertise of the medical doctors who have rendered opinions in this case, I have given little weight to Dr. Sandall's opinions. I therefore do not review them here.

35. Dr. Sandall suspected that claimant suffered from fibromyalgia and provided claimant with a pamphlet about fibromyalgia. Claimant responded by saying, "At least I know I'm not crazy. Because intermittently through my life, I have had different pains and didn't know what it was." (Klein Dep. at 30.)

36. Dr. Sandall referred claimant to Dr. Henry W. Busey, a rheumatologist who believes in and freely uses fibromyalgia as a diagnosis. Dr. Busey is board certified in internal medicine and board eligible in rheumatology. (Busey Dep. at 5.)

37. Dr. Sandall contacted Cynthia Bean, who was adjusting the claim on behalf of Liberty, and sought approval for the referral. Ms. Bean, relying on the panel opinions,⁽²⁾ refused the request.

38. Nonetheless, Dr. Busey examined claimant on October 20, 1995, and diagnosed claimant with fibromyalgia. (Ex. 1 at 21.) In a letter to claimant's attorney dated November 28, 1995, he wrote:

The current injury appears to have been a low back strain occasioned by her fall at work on March 6th. That strain appears to have resolved, but she has ongoing problems with fibromyalgia.

The history would indicate that the fibromyalgia apparently preceded her March 6th injury, but apparently was aggravated by that problem. I would feel that she would be capable of returning to work at this point, but should avoid employment which requires significant or repeated lifting, bending or twisting. I would agree with Dr. Russo's assessment of 09/05/95 that she would potentially benefit from work hardening and sleep patterns clearly need to be improved to help with the fibromyalgia aspects.

(Ex. 1 at 18.) Dr. Busey testified by deposition that he did not place any physical restrictions on claimant at the time. (Busey Dep. at 21-22.) However, he testified that claimant was unable to work as a CNA in October 1995. (*Id.* at 38.) His testimony was not inconsistent with his November 28, 1995 letter approving her return to work. In that letter he indicated that while claimant was capable of "returning to work" at that time she should avoid "significant or repeated lifting, bending or twisting."

39. Dr. Busey described fibromyalgia as a diagnosis of exclusion (*id.* at 30-31), meaning other causes have to first be eliminated (*id.*). He said the condition is characterized by multiple areas of tender or painful muscles or joints and deficient stage-four sleep. (Busey Dep. at 8, 11, 17, 29-31.) He agreed that a majority of physicians who do not specialize in rheumatology "don't appreciate the diagnosis of fibromyalgia." (*Id.* at 35-36.)

40. According to Dr. Busey, the principal treatment for fibromyalgia is exercise. (*Id.* at 39-40.) Because of pain, however, fibromyalgia patients may reduce their activity and become deconditioned. (*Id.* at 31, 43.) Thus, their instinctual attempts to reduce pain may be counterproductive.

41. Dr. Busey observed that following her injury, and at the time he saw her in October 1995, claimant was deconditioned. (*Id.* at 21-22, 38.) His observation finds some support in Dr. Russo's suggestion that claimant might benefit from a work-hardening program. (*Id.* at 24.)

42. In November 1995, the claimant indicated to Dr. Sandall that she wished to return to work. Dr. Sandall gave her a "Restriction from Work" form in which she released claimant to light-duty work (Ex. 1 at 3). St. Joseph, however, would not return claimant to duty without a full release so claimant then obtained a full release from Dr. Irwin on November 15, 1995. (*Id.* at 45.) However, St. Joseph still refused to hire her back because of the conflict between the two releases.

43. Claimant thereafter began her own rehabilitation program, exercising at home. As a result, her condition has improved significantly. When Dr. Busey examined claimant in August 1996, he was impressed by her improvement. (*Id.* at 20.) He released claimant to work on August 16, 1996. (Ex. 7.) He said that his previous limitations on repetitive lifting, bending and twisting were "just appropriate at that time", i.e., at the time of his November 1995 letter. (Busey Dep. at 32.) He did not place any restrictions on her in August 1996, although he expressed some reservations on her lifting more than 100 pounds.

44. Claimant returned to work as a CNA at Westside Care Center (Westside) shortly after Dr. Busey's release. She worked on call at Westside for two weeks. Then in September of 1996, she returned to St. Joseph, initially working part time on the night shift. Claimant testified that the night shift involves less lifting, stooping, bending and walking than the day

shift. She went to full time on the night shift in November 1996. However, she testified that full-time work is "too much" and that she is going to have to cut her hours.

45. Dr. Busey anticipates that claimant will continue to improve. (*Id.* at 22.) He did not identify any permanent effects from claimant's industrial injury and did not place any restrictions on her as a result of her injury.

46. Dr. Busey did *not* testify that claimant's fibromyalgia was caused by her industrial accident; at best he indicated that claimant's industrial accident aggravated a preexisting condition. (*Id.* at 18, 23-24, 41-43.) He indicated that fibromyalgia is a "condition that does not occur overnight." (*Id.* at 22.)

47. After considering all the evidence, I am persuaded that claimant suffers from a preexisting condition which, *for lack of a better term*, is diagnosed by some members of the medical profession as fibromyalgia. While none of the doctors examining claimant could find any specific physiological basis for the condition, and even though the diagnosis of fibromyalgia is one of exclusion and may be merely descriptive of a patient who complains of multiple areas of muscle and joint pain and sleep disturbance, there is no credible evidence that the claimant fabricated her reports of pain or that her pain was imaginary, although there is evidence that claimant's perception of her pain may have been enhanced by psychological factors. I decline Liberty's invitation that I get involved in a semantical debate over the diagnosis.

48. The medical evidence presented in this case, as well as the claimant's testimony and the insurer's acceptance of liability for the claim, establishes that the claimant did in fact suffer an industrial injury. She aggravated her preexisting and underlying fibromyalgia. In her attempts to reduce her pain, the claimant thereafter avoided physical activity and exercise. As a result, she became deconditioned. That deconditioning in turn rendered her incapable of performing her CNA job duties until August 1996.

49. The deconditioning which claimant suffered subsequent to her industrial accident was attributable to her accident, which aggravated her underlying fibromyalgia. Deconditioning prevented claimant from engaging in normal activity and from returning to her time-of-injury job. Since the deconditioning was a result of the accident and since it was treatable through an exercise program, I find that claimant did not reach maximum healing until August 1996.

50. The evidence fails to establish that the effects of claimant's industrial injury are permanent in any way. At best it establishes that claimant suffered a temporary set back in her long-term condition. I find that claimant has now returned to her preinjury condition. Her future success in remaining active and employed will depend on her motivation to maintain her physical conditioning.

51. Referral of claimant to Dr. Busey was reasonable and appropriate. As found herein, claimant had not reached maximum healing at the time of the panel examination. The referral was supported not only by Dr. Sandall but also by Dr. Lahey, who indicated that claimant's complaints were consistent with a diagnosis of fibromyalgia and that he generally refers fibromyalgia patients to a rheumatologist or physiatrist. Ultimately, Dr. Busey provided additional insight into the role of exercise and activity in the treatment of her condition.

52. Claimant does not have any physical restrictions as a result of her industrial accident. While Dr. Busey expressed concern over claimant lifting more than 100 pounds, he did not restrict her from doing so. Moreover, he did not indicate that his concern was the result of her industrial accident as distinguished from her preexisting, underlying condition. The remainder of the medical doctors affirmatively opined that claimant does not have any physical restrictions as a result of the accident, and their opinions on this point are persuasive.

53. Liberty's termination of claimant's temporary total disability benefits and denial of permanent partial disability benefits were not unreasonable. It's conduct was supported by medical opinions indicating that claimant had reached maximum healing and had returned to her preinjury status.

CONCLUSIONS OF LAW

1. The law in effect at the time of claimant's injury governs her entitlement to benefits. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986). Claimant's accident occurred on March 6, 1995, therefore the 1993 version of the Workers' Compensation Act applies.
2. Claimant has the burden of proving by a preponderance of the evidence that she is entitled to compensation. *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).
3. The claim in this case was accepted by Liberty. Thus, it is uncontested that claimant suffered an industrial injury on March 6, 1995, when she fell at work.
4. The employer and insurer took the claimant as they found her, both with regard to her preexisting physical and emotional conditions. *Houts v. Kare-Mor*, 257 Mont. 65, 68, 847 P.2d 701, 703 (1992). Thus, the insurer is liable not only for new medical conditions resulting from an industrial accident but also for aggravations of preexisting medical conditions. *Hash v. Montana Silversmith*, 248 Mont. 155, 158, 810 P.2d 1174, 1175 (1991).
5. Temporary total disability benefits are governed by section 39-71-701, MCA (1993), 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 when the worker suffers a total loss of wages as a result of an injury and until the worker reaches maximum healing; or

(2) The determination of temporary total disability must be supported by a preponderance of medical evidence.

Section 39-71-116(28), MCA, also defines temporary total disability, as follows:

(28) "Temporary total disability" means a condition resulting from an injury as defined in this chapter that results in total loss of wages and exists until the injured worker reaches maximum medical healing.

Maximum healing or maximum medical improvement is defined as follows:

(14) "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.

§ 39-71-116(14), MCA (1993.) "Primary medical treatment," referred to in the medical stability definition, means "treatment prescribed by a treating physician, for conditions resulting from the injury, necessary for achieving medical stability."⁽³⁾ As should be evident to the reader, the definitions of primary medical treatment and maximum healing are somewhat circular.

Liberty argues that claimant reached maximum healing in September 1995, and that her benefits were properly terminated at that time. However, I am persuaded that the medical evidence in this case preponderates in favor of a determination that claimant did not in fact reach maximum healing until August 1996. Even though the members of the medical panel expressed the opinion that claimant had reached maximum healing in 1995, both Dr. Busey and Dr. Russo pointed out that she was deconditioned in September 1995. In his deposition Dr. Busey opined that claimant had not achieved maximum improvement in September 1995, and indicated that at that time the claimant's deconditioning precluded her from returning to her normal CNA duties. Claimant's testimony supported his opinion. Both Dr. Busey and claimant also confirmed that claimant's subsequent exercise program improved her condition sufficiently to enable her to return to work. Claimant's improvement dovetailed with Dr. Busey's opinion that fibromyalgia patients benefit from exercise, thereby lending credence to his opinions.

Dr. Busey unequivocally released claimant to return to work on August 16, 1996. That release marks the date of claimant's maximum healing. Therefore, she is entitled to additional temporary total disability benefits for the period of October 4, 1995, until August 16, 1996.

Lest what I have determined in this case be misconstrued, several points merit further discussion.

First, I have declined Liberty's invitation that I determine whether fibromyalgia is a medically correct diagnosis. Compensability does not turn on the validity of the diagnosis. It requires only that the claimant suffer an injury of some sort and, for purposes of compensation benefits, be disabled as a result of the injury.

Second, as required by section 39-71-701(2), MCA (1993), the determination that claimant is not at maximum healing must be supported by a "preponderance of medical evidence."⁽⁴⁾ However, a preponderance of evidence is not determined by the number of medical witnesses who testify on one side of the issue or the other. See *McQuay v. McQuay*, 81 Mont. 311, 320, 263 P. 683 (1928) (holding that a fact may be established by the testimony of one witness even where the remaining witnesses testify to the contrary). The Court must look to the persuasiveness of the testimony. It must also look at *all* that a medical witness says, not just his or her ultimate opinion, and must consider other facts which may undermine or bolster the ultimate opinion. In this case, I found Dr. Busey's assessment most persuasive in large part because his analysis of the role of exercise in patients diagnosed with fibromyalgia fit what in fact occurred in this case.

Third, my decision in this case should not be read as indicating that maximum healing means that a claimant must be restored to the best possible physical condition. My comments in this case rest on specific facts showing that deconditioning resulted from the accident and was disabling, i.e., claimant was deconditioned to a point which rendered her unable to return to her time-of-injury job. As of August 1995, further treatment, by way of a sustained exercise program, promised to increase the claimant's conditioning sufficiently for her to resume her job, thus there was a reasonable potential for "material improvement" in her condition, § 39-71-116(17), MCA (1993). *This does not mean that insurers must pay to train claimants as athletes or that additional conditioning will result in "material improvement" in every case.*

Fourth, I noted in the medical records and in my observation of claimant at trial that claimant is somewhat resistive to engaging in full activity and exercise. In this regard I want to make it clear that where exercise, physical therapy, or any other therapy is prescribed by a claimant's treating physician, the claimant has an obligation to carry through with the treatment. In *Meidinger* the Court stated the obligation as follows:

The claimant must cooperate and participate in both the physical therapy program prescribed as well as treatment for his psychological disorder. Any failure to do so may result in suspension of benefits per section 39-71-605, MCA.

254 Mont. at 23, 834 P.2d at 1385. A claimant will be held accountable for complying with medical advice despite pain and any psychological condition unless it can be shown that

the treatment prescribed was unreasonable or that the claimant's psychological condition was so severe as to deprive her or him of volition.

6. Claimant is not entitled to permanent partial disability benefits. Such benefits are payable only if the claimant first satisfies the definition of permanent partial disability. § 39-71-703, MCA (1993). Permanent partial disability is defined in section 39-71-116(18), MCA (1993), which states:

(18) "Permanent partial disability" means a condition, after a worker has reached maximum medical healing, in which a worker:

(a) has a medically determined physical restriction as a result of an injury as defined in 39-71-119; **and**

(b) is able to return to work in some capacity but the physical restriction impairs the worker's ability to work. [Emphasis added.]

The criteria set forth in the section are in the conjunctive, thus both must be met. *Williams v. Plum Creek Timber*, WCC No. 9403-7017 (1994) at 6, aff'd, 270 Mont. 209, 891 P.2d 502 (1994).⁽⁵⁾ In this case, claimant failed to establish that she "has a medically determined physical restriction as a result" of her injury.

7. Since claimant is not entitled to permanent partial disability benefits, the Court need not consider her request that such benefits be paid in a lump sum.

8. Claimant is entitled to payment of Dr. Busey's bill and for the medication he prescribed.

9. Claimant has failed to establish that she suffers any residual effects from her industrial accident. The insurer is not liable for any further treatment of claimant.

10. As found in Finding of Fact 53, Liberty's denial of benefits was not unreasonable. Since a finding of unreasonableness is a prerequisite to an award of both a penalty and attorney fees, sections 39-71-611 and -2907, MCA, claimant is entitled to neither.

11. Since claimant is the prevailing party she is entitled to costs in an amount to be determined at a later time.

JUDGMENT

1. Claimant is entitled to, and Liberty shall pay, temporary total disability benefits from October 5, 1995 until August 16, 1996.

2. Liberty shall pay Dr. Busey's bill and reimburse claimant for the medications prescribed by Dr. Busey.

3. Claimant is not entitled to permanent partial disability benefits.

4. Claimant is not entitled to attorney fees or a penalty.

5. Claimant is entitled to costs in an amount to be determined by the Court. **Claimant shall have ten days from the date of this judgment in which to submit her affidavit of costs. Liberty shall then have ten days in which to file its objections, if any, to claimant's request.**

6. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.

7. 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 4th day of March, 1997.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Ms. Laurie Wallace

Mr. Larry W. Jones

Submitted December 5, 1996

1. A portion of the nucleus pulposus that has protruded into an adjoining vertebra. Dorland's Illustrated Medical Dictionary. (27th ed. 1988.)

2. Bean received an oral report of the panel findings on the same day she talked to Dr. Sandall.

3. The definition is actually for "primary medical services" but services and treatment are one and the same.

4. Section 39-71-710(2), MCA, was amended in 1995 and now provides that a finding of temporary total disability must be supported by a "preponderance of medical findings," an apparently tougher standard.

5. The only issue considered on appeal was the denial of attorney fees and a penalty.