

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

**1996 MTWCC 27**

**WCC No. 9505-7307**

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**MARIAN MAAS**

**Petitioner**

**vs.**

**LUMBERMENS MUTUAL CASUALTY**

**Respondent/Insurer for**

**INTERSTATE BRANDS**

**Employer.**

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

**Summary:** 41-year old bun wrap operator for large commercial bakery reported tripping and falling at work, striking her left shoulder, hip, jaw and head. Insurer denied occurrence of accident based on evidence claimant had stated, not long before the accident, that she was looking for way to go on disability, that coworkers had not observed accident or dirt on claimant's uniform, that she did not immediately report the incident to her supervisors, and that she did not mention the incident in a physical therapy session on the same day of the alleged accident.

**Held:** WCC credited all witnesses, including claimant, and resolved testimony so as to conclude claimant was injured as claimed.

**Topics:**

**Injury and Accident: Accident.** Although insurer had good reasons for questioning occurrence of fall alleged by bakery worker, WCC credited testimony of claimant that fall occurred and found apparently conflicting evidence reconcilable with claimant's testimony.

The trial in this matter was held in Billings, Montana, on Wednesday, November 15, 1995, and Tuesday, February 6, 1996. Petitioner, Marian Mass (claimant), was present at all times and represented by Mr. Patrick R. Sheehy. Respondent, Lumbermens Mutual Casualty (Lumbermens), was represented by Mr. Michael P. Heringer.

Exhibits: Exhibits 1, 2, and 5 through 19 were admitted. (There is no Exhibit 3.) Exhibit 4 was refused. Exhibit 20, which had been returned to Mr. Heringer at the close of the first trial, was admitted as amended at the second trial.

Witnesses: Marian Maas, Sherry Reinhardt, Michelle Mattfeldt, Ben Auck, Don Nottingham, James Nelson, Scott Miller, Mitch Holmgren, Deborah Weisgarber, Steven Massey and Mark Amendola were all sworn and testified.

Depositions: The depositions of Marian Maas, Dr. John Moseley, Mark Amendola, Sandra Ford, P.A., and Dr. William Bredehoft, Ph.D. were submitted for the Court's consideration.

Issues presented: The claimant seeks a determination that she suffered a work-related injury on March 13, 1995, and that she is entitled to wage loss and medical benefits. She also seeks attorney fees and a penalty. If the Court finds the respondent is not liable for claimant's injury, the insurer seeks reimbursement for benefits paid under a reservation of rights.

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Having considered the Pretrial Order, the Addendum to 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. At the time of trial claimant was 41 years old. She is divorced and resides in Laurel, Montana, with two of her three children. Her third child is an adult.
2. Claimant is a high school and college graduate. She has a bachelor of science degree in Business Administration Management from the University of Montana, which she earned in 1976.

#### Interstate Brands

3. Claimant has worked for Interstate Brands for the last 16 years. Interstate is a large commercial bakery with a production facility in Billings, Montana.
4. During her tenure at Interstate, claimant has held a number of different positions. She worked initially in the company's thrift store. Thereafter, she worked in sanitation. Later she was hired to work in the production process, where she has worked ever since. In production she began as a relief worker but was later promoted to *bun wrap operator*, a position in which she has continued to work.
5. Interstate makes a variety of bread products on a very large scale. The process is an assembly line version of bread making, one hardly recognizable to the home bread maker.

Bread is baked on a massive scale. In the case of buns and bun-related products, the baking process is as follows:

- a. Initially, a dough mixture is prepared from flour, water, yeast and other ingredients. Different breads and other bread products use different mixtures or formulas.
  - b. The resulting "sponge set" (dough with yeast already added) is then placed in a temperature controlled, fermenting room to rise for several hours.
  - c. After rising, the dough is removed from the fermentation room. Additional ingredients, as necessary, are added. It is then re-mixed or kneaded. In the case of dough which is to be made into buns, it is then put through a machine called a "panamat." The panamat cuts the dough into individual buns or bun-type products.
  - d. After leaving the panamat, the buns go through a "proofer" where they rise a second time.
  - e. The buns are then baked in an oven.
  - f. After baking, the buns are cooled and transferred via conveyor belt to the wrapping areas where they are sliced and packaged.
6. The entire process takes several hours. The fermentation process, which begins with the mixing of the dough and involves steps a through d takes approximately three hours. It takes approximately another hour and a half to two hours to complete the process, including packaging.

#### The Bun Wrap Lines

7. *Bun wrap operators* package the buns and put the packages on pallets for transfer to the bakery warehouse for later delivery.
8. Interstate makes numerous types of buns, including "coney" (which are the hot dog buns every baseball fan knows and loves), steak rolls, hamburger buns, and bread sticks. Some are plain, others have sesame seeds, still others use cornmeal. Different types of buns require different ingredients. Thus, different dough "formulas" are used for different varieties of buns.
9. Different buns are packaged differently. Thus, the bun wrap area of the bakery has three different bun wrapping lines: "Pillow Pack," "United," and "Formost." The three lines are used one at a time.
10. Buns are delivered to the bun wrap area via a conveyor belt system. Upon reaching the bun wrap area, the buns are directed to the different lines by mechanical switches which determine the line to which the buns are delivered. When the type of buns change to a type requiring a different line, the bun wrap operators move the switches so that the conveyor

delivers the new buns to the proper line. One product is wrapped at a time. Only one line is in operation at any time.

11. The bun wrapping lines are physically located next to each other in the following order, located from left to right when looking at them from the end of the lines:

Pillow Pack

United

Formost

A diagram of the bun wrap area is attached to this decision as Appendix A.

12. The bun wrap lines are staffed by three bun wrap operators. Bun wrap operators perform three functions.

a. First, they "index" the buns. Indexing involves examining the buns as they proceed down the conveyor, picking out and discarding the irregular buns and righting up-side down buns. The indexer's job is to make sure the buns enter the wrapping machines properly.

b. Second, they manage the actual operation of the bun wrapping machines. This task requires the operator to set up the machine for the various products, stock it with bags, and monitor the output.

c. Third, they "pallet" the buns. "Palleting" involves removing the packaged buns from the conveyor and stacking them on pallets. The palleter then moves full pallets to another conveyor which transports the pallets to the warehouse for shipping.

13. The indexer is positioned at the beginning of the line, the machine operator at the middle, and the palleter at the very end.

14. The three bun wrap operators work as a team and rotate their duties. The work requires the operators to work quickly and synchronously.

#### Claimant's Coworkers

15. For the last eight years the claimant has worked with Sherry Reinhardt and Michelle Mattfeldt. Working together, the three form one of the bun wrapping teams at the bakery. The team worked the night shift commencing after midnight.

#### The Alleged Industrial Accident: In Brief

16. On March 13, 1995, claimant worked from approximately 2:00 a.m. to 12:00 noon. During that shift she worked as the palleter.

17. According to claimant, at approximately 10:30 a.m., she tripped and fell, striking her left shoulder and hip on the cement floor and hitting the left side of her jaw and head on a scale. She later filed a claim for compensation.

#### Denial of Claim

18. At the time of the alleged accident, Interstate was insured by Lumbermens Mutual Casualty. Lumbermens denied the claim and asserts that no accident occurred.

#### Basis for Resisting Claim

19. Several types of evidence draw claimant's allegations into question. Specifically:

- a. Claimant was severely depressed and having difficulty working prior to the alleged accident. A psychological note on February 27, 1995, a few days prior to the alleged accident, indicated that she had "begun to think about whether there is any way she can get on disability." (Ex. 18 at 85.)
- b. Claimant's coworkers did not observe the accident even though they were in the immediate vicinity.
- c. Claimant's coworkers did not observe any unusual dirt on claimant's white uniform as might be expected if she had fallen.
- d. Claimant did not report the incident to her supervisors prior to leaving work on March 13th.
- e. Claimant did not report the incident to her physical therapist during a previously scheduled physical therapy session she had later on the day of the incident.
- f. Claimant, who alleges that her principal injury was to her neck, suffered from a preexisting condition affecting her neck.

#### Resolution of Dispute: Short Version

20. This case presents an interesting dilemma because I did not, and still do not, believe that any of the witnesses who testified in this matter, including claimant, gave testimony which was untruthful or intentionally inaccurate or incomplete. Notwithstanding the difficulty in reconciling claimant's testimony with the testimony provided by her co-employees and supervisors, ultimately I determined that the conflicting testimony is reconcilable. And, after careful consideration and review of all of the evidence, I found claimant credible. Thus, I resolve this case in her favor.

#### Resolution of Dispute: Long Version

a. Claimant's Preexisting Neck Condition

21. Claimant has a long history of headaches dating back approximately 16 years. On May 16, 1994, she sought care from Dr. John Moseley because her headaches had worsened over the previous four months. (Moseley Dep. at 6-7.) Claimant also reported periodic tingling and weakness in her left arm and numbness in her hands but did not correlate them with her headaches. Dr. Moseley, a neurosurgeon practicing in Billings, has been claimant's treating physician since that time. (*Id.*)

22. Dr. Moseley suspected that claimant's headaches were due to impingement of the occipital nerve. He ordered a cervical MRI to investigate possible causes of her arm complaints. (*Id.* at 9.) The MRI, taken May 24, 1994, showed a "degenerative disk at C5-6, skewed to the left, and some narrowing of the left neural foramen." (*Id.*) Dr. Moseley felt that claimant's arm symptoms were due to the degenerative disk but concluded that her symptoms did not warrant further treatment at that time. He theorized that the degenerative disk was caused by an automobile accident 22 years earlier. (*Id.* at 10.)

23. Dr. Moseley diagnosed the cause of claimant's headaches as occipital nerve entrapment behind her ear. (*Id.* at 17-18.) He performed an occipital neurectomy on claimant on August 31, 1994. (*Id.* at 18.)

24. The operation reduced claimant's headaches. On November 15, 1994, Dr. Moseley reported that claimant still had occasional headaches but not of the nature of occipital neuralgia headaches. He discharged claimant from his care. (Ex 17. at 51-53.)

25. Dr. Moseley acknowledged that at the time he discharged claimant from his care she still had arm symptoms which he felt were related to her cervical disk disease; however, he did not feel surgery for that condition was warranted at the time. (Moseley Dep. at 21.)

26. Claimant returned to Dr. Moseley on February 8, 1995. (*Id.* at 22.) She reported severe headaches and, over the previous month, pain in the outer part of her upper left arm and numbness in her left three-through-five fingers. (*Id.*) Dr. Moseley felt the arm and hand symptoms were due to the degenerative disk at C5-6 and recommended cervical traction with a physical therapist. (*Id.*) He also prescribed an anti-inflammatory. (*Id.*) Although concerned about the additional numbness in claimant's fingers, Dr. Moseley did not at that time believe that surgery or additional diagnostic procedures were warranted. (*Id.* at 25-26, 33.)

27. Claimant began physical therapy with Mark Amendola on February 16, 1995. From February 16 to March 9, 1995, she underwent eight treatments with limited success. (Amendola Dep. at 5, 29, 32, 34-38.)

#### b. Depression

28. Claimant has been treated for severe depression since at least November of 1992. Since September 1993 she has been principally treated by Dr. William P. Bredehoft, a

clinical psychologist, who has seen her almost on a weekly basis. (Bredehoft Dep. at 51.) Claimant has also seen other mental health professionals prior to and during this time period. (*Id.* at 8-11.)

29. Dr. Bredehoft testified that the claimant's diagnosis is, and continues to be, depression. (*Id.* at 51-53.) While she has some time periods in which she feels better, she continues to suffer from depression. Events in her personal life have contributed to her depression.

30. In late December 1994, and again during parts of January 1995, claimant's depression caused her to take time off work. (*Id.* at 28-29; Ex. 18 at 91-93.) Although she returned to work, Dr. Bredehoft and claimant discussed the possibility of other employment. She was not getting enough sleep and generally felt unsatisfied with her work. (Bredehoft Dep. at 14, 23-24.)

31. On February 2, 1995, claimant was taken off work by her supervisors because her coworkers and supervisors felt she was a safety hazard. Claimant was over-medicated and severely depressed at the time. (Ford Dep. at 30; Bredehoft Dep. at 31.) Michelle Mattfeldt testified that claimant was slow and seemed confused. Michelle had never seen claimant in such a bad shape.

32. Claimant saw Dr. Bredehoft on February 27, 1995. His office notes for this session reflect the following:

Marian seems quite depressed. She says that it is all she can do to get herself to work and cook meals for her children occasionally. She doesn't have the energy to put on makeup or take a bath. She is concerned that she won't be able to go on like this. **She has begun to think about whether there is any way she can get on disability.** It sounds as if she is taking relatively minimal amounts of medication and she certainly doesn't seem over medicated right now.

(Ex. 18 at 85; emphasis added.)

33. In his deposition, Dr. Bredehoft was asked about the note and commented:

Well, I used that word in my notes, but I -- again, I don't know whether that was the word that she used.

The context of what we were talking about was, she was so depressed that she kept finding herself unable to work and was asking for releases. And I think she had begun to wonder whether she was going to be able to continue working.

I don't know whether disability is the right word to describe that. But I was -- I was interpreting her to say that she was feeling so depressed that she wasn't sure she was going to be able to continue working.

(Bredehoft Dep. at 59-60.)

34. Dr. Moseley was asked about discussions he may have had with claimant regarding disability. He related:

Q Did Mrs. Maas ever discuss the possibility of trying to get on disability coverage?

A No, she actually went back to work without me releasing her in the fall. Usually patients come and ask me if they can go back; she just went back to work.

And then she took herself off work in February, and then she went back to work without my release. So I at that time had no control over her work performance.

(Moseley Dep. at 33.)

35. After listening to claimant testify at trial, I adopt Dr. Bredehoft's explanation for his February 27th note. I do not believe that claimant was in any way indicating an intention to fabricate an industrial accident. I do believe that her remarks reflected her self-doubt concerning her ability to continue working in light of her depression. My impression after listening to claimant testify at trial is that she genuinely wished to work but was at times overwhelmed by her depression.

#### c. Long Version of the Incident

36. According to claimant, her fall occurred when the bun wrap operators were switching lines. They were moving from Pillow Pack to United to begin packaging on that line. However, according to claimant, the switches in the conveyor line had not been properly set, buns were incorrectly going to Formost, and she went to the Formost line to set the switch so the product would go to United.

37. Claimant testified that the change in lines was due to a change in the product. She thought that the product requiring the switch was "coney", i.e., hot dog buns. However, her recollection, which was first tested during her deposition some eight months after the incident, and at trial some eight and a half months after, was less than definite. She testified during her deposition that she "**believe[d]** we were just starting to run coney." (Maas Dep. at 40, emphasis added.) Her testimony at trial was similarly hedged.

38. Claimant put the time of the change over at 10:30 a.m. (*Id.*)

39. Interstate's bun production schedule was introduced at trial. (Ex. 20.) In light of questions posed by the Court concerning the accuracy and completeness of the schedule, the trial was recessed after the first day so the parties could explore the matter further. The trial was thereafter reconvened and the production schedules considered in detail.

40. Initially, it appeared that the schedules did not support claimant's testimony. While the schedules do not provide times for the arrival of buns at the bun wrap area, the schedules failed to disclose any run of coney buns which would have required a change over from Pillow Pack to United.

41. In a "Perry Mason moment," however, Ben Auck, the baker on duty that day, disclosed that the last run of buns that morning had been changed from the scheduled hard rolls to steak buns. He noted that the dough formula specified for the hard rolls had been written over with the dough formula used for the steak buns. Steak buns are packaged on United. The product immediately preceding this last run of steak buns was *Hardee Braided 30 ct.*, which are packaged on Pillow Pack. Thus, the last bun run required the bun wrap operators to change from Pillow Pack to United, as asserted by the claimant.

42. The actual time the steak bun completed proofing after remixing was 9:10 a.m. Various Interstate employees estimated the time the steak buns would have arrived at the bun wrapping area was between 10:40 a.m. and 11:10 a.m., which is not too distant a time from that indicated by claimant.

43. As the Court noted at the time of hearing, while steak buns are not identical to coney buns they have a similar shape and appearance. It can be argued that claimant's years of experience make it unlikely that she would have mistaken steak rolls for coneys, but I note that she was not asked to recall the type of bun until eight months after the accident. If she had been asked the same question within days or even weeks after the incident, the discrepancy might be significant. In light of the length of time between the incident and her testimony, her recollection actually lends credence to her claim.

44. The accident occurred at the top of Formost. Claimant recalled that Sherry and Michelle had already walked from Pillow Pack, around Formost, to United. Claimant had been palleting and noticed that new buns were being conveyed to Formost rather than United because the conveyor had not been properly switched. Changing to United required two switches be changed manually. Sherry changed one switch, while the claimant went to switch the other at the conveyor, which was at the top of the Formost line.

45. Claimant switched the conveyor so that it conveyed the buns to the United. She also pushed buns that had already been conveyed onto Formost back onto the main conveyor so they would go to United.

46. As she turned around to go to her palleting position at the end of United, claimant tripped over a cardboard box that was lying on the floor. She fell, catching herself with her hands but striking her left shoulder and hip on the cement floor. She also struck the left side of her jaw and head on a large upright scale positioned between Formost and United.

47. Claimant felt immediate pain in her neck and shoulder. However, she got up, dusted herself off, walked over to her palleting position on United, and resumed work.

48. Claimant thought Michelle may have seen the accident. However, Michelle denied seeing it, as did Sherry. I do not believe any of the three were untruthful. Rather, I believe and find that Michelle and Sherry were occupied with other tasks and in fact did not observe the accident.

49. Claimant did not inform either Michelle or Sherry of the accident. They finished the bun run and apparently performed other cleanup jobs, then left the area.

50. Claimant finished her shift and checked out. She testified that she did not see, and therefore did not inform, her supervisors of the accident prior to her leaving.

51. Two of her supervisors recalled seeing claimant leave that day. Their testimony conflicts with claimant's recollection that she did not see her supervisors upon leaving.

52. Michelle and Sherry also felt that claimant would have informed them of any accident. They testified as to prior occasions on which such information had been shared among the three of them.

53. While the failure of claimant to inform her coworkers and supervisors of the accident is troublesome, I believe there is a rational explanation for her behavior and recollection. As noted previously, claimant was severely depressed. The most recent psychotherapy note of March 6, 1995, indicated that "Marian continues to be quite depressed." (Ex. 18 at 84.) Both Sherry and Michelle testified that claimant had become uncommunicative. I find it more likely than not that claimant's failure to discuss her accident with her coworkers and report it to her supervisors, or even remember her supervisors being present, was due to her depression. She also did not recognize the severity of the accident at the time.

54. Sherry and Michelle also did not observe any unusual dirt on claimant's uniform on March 13th. All three bun wrap operators wear white uniforms. The uniforms become dirty during their work shift. Both Sherry and Michelle noted that the floor of the bakery has flour and grease that would be evident on a uniform if a fall occurred. Claimant's fall, however, occurred at the very end of her shift. The contact points between her uniform and the floor could also have affected the appearance of her uniform. Under these circumstances, I am not persuaded by Sherry's and Michelle's failure to observe anything unusual about claimant's uniform.

#### d. Aftermath

55. Claimant had a regular physical therapy session scheduled on the afternoon of March 13, 1995. She kept her appointment and testified that she told her physical therapist, Mark Amendola, about her fall, indicating she thought she was alright and wished to proceed with therapy. Amendola's office note for this day states "slight HA [headache] today otherwise doing slightly better." (Amendola Dep. Ex. unnumbered.) Amendola testified at trial. He had no independent recollection of the session or his conversation with claimant but said that he would normally include information about a fall in his office notes.

56. Whether claimant's report of the incident was significant or not for purposes of recordation may well have depended on the manner in which the claimant mentioned the event. At the time of the session, claimant did not believe that her fall was any big deal, and

Amendola's failure to note the incident is neither conclusive nor persuasive under the circumstances.

57. Claimant noticed an increase of pain in her left hand, left arm, left shoulder, and the left side of her neck later on the evening of March 13, 1995, and the morning of the 14th. She was not scheduled to work the 14th and remained at home, applying ice to the painful areas. (Maas Dep. at 55.) The pain did not abate and she called Dr. Moseley's office and arranged for an examination.

58. Shortly before she was scheduled to return to work at 2:00 a.m. on March 15th, claimant called Steve Massey, a production supervisor, and told him that she was unable to work. She said that her left arm hurt, however, she did not tell him she had fallen at work. (Maas Dep. at 56.) She asked Massey to have Deb Weisgarber, safety personnel coordinator for Interstate, call her. Claimant intended to tell Weisgarber about her fall at work. However, the message was never relayed to Weisgarber.

59. Claimant saw Dr. Moseley on March 15, 1995. She reported neck pain and pain down her left arm into the left hand. She told Dr. Moseley she had "tripped on a box and fell at work, landing on her left side and striking her left side of the head against the scale." (Ex. 17 at 43.) Her description was consistent with her trial testimony. I also note that her report to Dr. Moseley occurred within approximately 48 hours of her accident.

60. Dr. Moseley examined claimant and noted that her left biceps "were slightly weak at five minus over five [meaning] they lost about ten percent of power." (Moseley Dep. at 27.) Her biceps and triceps tendon reflex were trace on the left, whereas before they had been normal. Additionally, she was having increased tingling in her first and second fingers. Claimant's symptoms were more severe than they previously had been and Dr. Moseley ordered another cervical MRI. He was concerned she had aggravated the C5-6 disk condition, injured another disk, or stretched a nerve root. (*Id.* at 27-28, 30-31.)

61. Claimant underwent a cervical MRI on April 12, 1995. Dr. Moseley interpreted the results as showing

at C4-5 some minimal changes of aging but no disk herniation. **C5-6 showed a degenerative broad-based disk pulling to the left, extending into the lateral recess, moderate to severe foraminal stenosis with some compromise of her canal as well, her central canal. The C6-7 level was normal, so I interpreted this to be equated with aggravation of her prior disk bulge was now worse.**

(*Id.* at 35, emphasis added.) The scan showed nerve root compression that was not present on the May 24, 1994 MRI.

62. The change in claimant's symptoms and MRI support claimant's allegation concerning the occurrence of an industrial accident on March 13th.

63. Dr. Moseley concluded that something had happened to permanently worsen claimant's condition:

[S]o something happened to make that situation change. Usually it is not aging. Usually aging is much more slowly insidious, more numbness, occasional weakness, slowly the exam changes, they don't lose their reflexes. When they lose reflexes, usually means the nerve is impinged pretty acutely and it usually takes a traumatic event to do that, in most cases. It can be repetitive vomiting, coughing, whiplash injuries, falling, blow to the back of the head, something in an unprepared state that would make that distortion worse.

*(Id. at 36-37.)*

64. Dr. Moseley did not believe that claimant's condition was merely the result of continuing degeneration of her preexisting condition:

She had a preexisting degenerative C5-6 disk level with a distorted annulus. It was sort of giving her intermittent complaint, but no hard neurology abnormalities that I could pick up. Something happened to make that distortion worse, and that put enough pressure on the nerve root that exited at that level to start giving her the clinical changes that I described.

*(Id. at 41.)* Continuing, he said:

It would be most unusual to see it change that quickly, having seen her the month before[,] with what was really a new complaint in terms of nerve root distribution, having normal power and reflexes, for it to change within one month. . . . **The most probable thing is something happened to her neck in that month time frame.**

*(Id. at 52-53; emphasis added.)*

65. On May 5, 1995, Dr. Moseley performed a left hemilaminotomy and decompression of the nerve root at the C5-6 level. He enlarged the foramen at the C5-6 level where the nerve exits. *(Id. at 37.)*

66. Claimant recovered well from the operation. When Dr. Moseley saw her on June 15, 1995, her left arm symptoms were gone and her strength was normal. However, he noted she was extremely depressed. She continued to improve and by August 1995, Dr. Moseley felt she should be able to return to work when her problems with depression were resolved. *(Id. at 45-47.)*

67. At the time of the resumption of the trial on February 6, 1996, claimant had returned to work at Interstate.

68. Dr. Moseley testified that if claimant injured herself in the manner she describes it is not unusual that she did not immediately feel the full effects of her injury:

Q How soon after a traumatic event would someone notice an increase in the symptoms?

A It can be almost instantly, days, hours, depends on how much room there is and what the etiology of the aggravation.

Q How soon would you expect it, given Mrs. Maas, from what you know and how she described the injury?

A Oh, **she probably knew within the next day or two.** I mean, if this is how she fell and hit her head, number one, you're stunned; number two, you expect to be sore. And most people go home and figure I will be better tomorrow, and when they are[n't], when their arm isn't, that is when they get concerned. That is the usual scenario.

*(Id. at 62-63, emphasis added.)*

69. Dr. Bredehoft saw claimant on March 20, 1995. His office notes reflect that she "fell at work, injuring her shoulder and arm." (Ex. 18 at 82.) At his deposition, when questioned about how claimant described the fall he said " I think she told me that she was working at some kind of conveyor belt, and pulled on something and fell backwards, as near as I can recall. But I think my memory is very poor for that at this point." (Bredehoft Dep. at 44.) However poor, his recollection is consistent with claimant's report.

70. Dr. Bredehoft testified it would be "completely out of character" for the claimant to falsify a claim for compensation. *(Id. at 54.)* I reach the same conclusion but I do so independently after considering all of the evidence in this case and especially claimant's testimony at trial.

#### e. Finale

71. Claimant aggravated her preexisting cervical disk disease in an industrial accident occurring on March 13, 1995, at approximately 10:30 a.m. The accident occurred in the course and scope of claimant's employment.

#### Reasonableness of Denial

72. Even though I have found for claimant, the reasonableness of the insurer's denial of this claim should be self-evident from the previous findings. The claim was reasonably debatable. It is only after two days of trial and careful consideration of the numerous exhibits, depositions, and witnesses that I have ultimately resolved the factual conflicts in favor of claimant.

#### CONCLUSIONS OF LAW

1. The claimant has the burden of proving that she sustained an injury and that the injury occurred in the course and scope of her employment. *Gerlach v. Champion International*, 254 Mont. 137, 836 P.2d 35 (1992).
2. This case involves no significant issues of law, only issues of credibility. Therefore, no extended legal discussion is required.
3. Based upon a preponderance of evidence, including and especially my resolution of credibility issues, I am persuaded that claimant suffered an industrial injury on March 13, 1995, as she claims. She is entitled to medical and compensation benefits. Since the Court has not been asked to determine the amount of those benefits, it does not do so.
4. The insurer's denial of the claim, however, was reasonable. Therefore, claimant is not entitled to either attorney fees or a penalty. §§ 39-71-611 and -2907, MCA.

#### JUDGMENT

1. Claimant herein suffered an industrial injury on March 13, 1995. The injury occurred in the course and scope of her employment with Interstate. Interstate's insurer, Lumbermens Mutual Casualty, is liable for medical and compensation benefits attributable to the injury.
2. The Court makes no determination as to the amount of benefits due claimant. If the parties cannot agree on the amounts due, then they may request the Court to make that determination.
3. Claimant is not entitled to attorney fees or a penalty. She is entitled to costs in an amount to be determined by the Court. Claimant shall have 10 days in which to serve and file her application for costs. Lumbermens will then have 10 days in which to file its objections, if any.
4. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.
5. Any party to this dispute may have 20 days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 22nd day of March, 1996.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Patrick R. Sheehy

Mr. Michael P. Heringer

Date Submitted: March 11, 1996

Attached: [Appendix A - Diagram](#)

