

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 74A-1

WCC No. 9307-6842

LUCY OSBORNE,

Petitioner,

vs.

PLANET INSURANCE COMPANY,

Respondent/Insurer for

RHONE-POULENC BASIC CHEMICAL COMPANY,

Employer.

ORDER AMENDING CONCLUSIONS OF LAW

Respondent has filed a petition for amendment to findings of fact and conclusions of law. In the petition the respondent argues that the Court erred in making benefits retroactive to October 26, 1992; erred in imposing a penalty and attorney fees; and erred in concluding that claimant's industrial accident "caused" her disabling myofascial pain syndrome. The matter has been briefed and is deemed submitted.

Retroactive Date Of Benefits

In Conclusion of Law 2 at page 16 the Court stated that benefits should be retroactive from November 19, 1992. However, in its judgment the Court made benefits retroactive to October 26, 1992, which was the date claimant's temporary total disability benefits were terminated.

The judgment sets out the correct date for reinstatement of benefits. Dr. Murphy's release of claimant on October 26, 1992, was communicated in a conversation with Dr. Knutsen. (Finding of Fact 17.) Similarly, Dr. Gilboy's deferral to Dr. Murphy's release was communicated in a telephone conversation with Dr. Knutsen. (Finding of Fact 18.) Dr. Murphy did not give claimant a release to work (Murphy Dep. at 6-7, 18), and there is no evidence that he told her she could return to work. Dr. Gilboy did not give claimant a release to work (Gilboy Dep. at 12-13), and there is no evidence that he told her she could return to work on or after October 26, 1992. Dr. Knutsen communicated the content of his conversations to respondent's plant manager on October 27, 1992 (Ex. 10 at 102) but not to

claimant. Thus, claimant's physicians never effectively communicated the releases to claimant. Indeed, a November 12, 1992 letter from respondent's counsel to claimant's counsel reflects a dispute over whether the two doctors had in fact released claimant. (Ex. 17.) Claimant was entitled to rely on what was communicated, or not communicated, to her by her physicians. Lacking evidence that the physicians communicated their releases to claimant, claimant was not required to return to work. Thus, benefits must be reinstated retroactive to the date they were cut off, i.e., October 26, 1992.

In light of the foregoing discussion, Finding of Fact 20 will be amended as follows:

20. Based on his October 26, 1992 and November 2, 1992 conversations with Dr. Murphy and Dr. Gilboy, respectively, Dr. Knutsen reasonably believed that claimant's treating physicians had released her to return to work. Though oral, the statements made by Drs. Murphy and Gilboy to Dr. Knutsen amounted to their releases for claimant to return to at least light-duty work. Dr. Gilboy and Dr. Murphy never gave claimant a release to return to work on October 26, 1992, nor did they ever tell her that she was released to return to work on that date. (Gilboy Dep. at 12-13; Murphy Dep. at 6-7, 18.)

Finding of Fact 49 a. will be amended to read as follows:

a. As of November 2, 1992, the claimant was released by her treating physicians to return to work in at least a light-duty position. However, the physicians never effectively communicated the release to the claimant.

The fourth full paragraph on page 16, which is part of Conclusion of Law 2, will be amended to read as follows:

Since Dr. Dewey's release was not effectively and unequivocally communicated to claimant, and since neither Dr. Murphy and Dr. Gilboy gave claimant a written release to return to work on October 26, 1992, and did not orally tell her she could return to work at that time, claimant is entitled to temporary total disability benefits from October 26, 1992, to the present.

Causation

Respondent also argues that claimant failed to prove that her disabling condition was caused by her industrial accident and that she is therefore entitled to benefits. Respondent cites Dr. Dewey's testimony that claimant's industrial accident did not "cause" her disabling myofascial pain syndrome. (Dewey Dep. at 14, 27.) However, Dr. Dewey also testified that the industrial accident "precipitated" the disabling myofascial pain syndrome. (Finding of Fact 31.)

Respondent says, "At most, the myofascial problem may have been a preexisting condition which was aggravated by the work-related injury. However, there was no admissible

medical evidence meeting the standard of proof necessary to establish aggravation of a preexisting condition." (petition for amendment at 8.) Having once more reviewed Dr. Dewey's testimony, it is clear to the Court that Dr. Dewey was not talking about "mere possibilities" when discussing the role of claimant's industrial accident but was expressing a medical opinion that the industrial accident in fact triggered her condition. His testimony on this point was as follows:

Q Could you explain to me and for the record, what myofascial syndrome is.

A Myofascial syndrome is a generic title applied to a pain problem that involves migratory muscle spasms; that is, spasms that occur both on the left and then on the right side, both sides up and down. They tend to have very limited relief of pain.

The pain is very characteristic in some respects of a charley horse in the leg, which we're all familiar with. There can be an underlying aching-type of pain, such as the kind of pain one experiences with the flu after it has went [sic] into the muscles. But it is very persistent with periods of migration within one side then moving to the other, from the coccyx to the base of the skull.

. . . .

Q Now, Doctor, I'm going to ask you to explain a little bit about myofascial pain syndrome. In your experience, is there an occasion or has there been occasion that you have treated myofascial pain syndrome where it has been precipitated or caused by physical trauma?

A Well, I see it both ways. It's hard to say that physical trauma causes that. Because I see it in people who have never had any physical trauma in their lives. And in my opinion, the myofascial problem may be the result of trauma. I don't think trauma causes it. I think that the cause is some underlying psychophysiologic environment that creates or manufactures or keeps stress within a patient.

The precipitating event may very well be a traumatic one, but the cause is not the traumatic event. The cause is within the person who has experienced that traumatic event. The same traumatic event in a dozen other people may precipitate in the form of a bruise, which clears up in three or four days, and then there is no further trouble.

Q Doctor, would it be fair to say then, that in at least some of your opinion, that you feel that the myofascial problem may be a dormant situation where it is laying there just waiting to happen and then is precipitated by some event?

A Ah, yes. And that event can be physical, or it can be mental.

Q So falling down the stairs can be the trigger, or having a death in the family might also be the trigger?

A Yes, absolutely.

...

A Well, if you want me to address if she's a malingerer, no; I think she's got pain. If you want to know if I think that the problem is real for her, yes, I think it is. I don't think the injury caused it. I think it precipitated it, but I think the cause is something else.

I think that the cause is something underlying in her emotional or psychophysiologic background, which instead of filtering out the stress, it magnifies it. I want to make it clear that it is real to her. I don't think she's a malingerer. I don't think she's faking the disability.

(Dewey Dep. at 12-14, 27.) It is clear from the foregoing testimony that Dr. Dewey was using the word "cause" in a broad sense and not in a legal sense. It was clearly his opinion that claimant's fall triggered or precipitated her myofascial pain syndrome.

Under Montana workers' compensation law, an insurer is liable for aggravations of preexisting or underlying conditions. "That an employee was suffering from or afflicted with a pre-existing disease or disability does not preclude compensation if the disease or disability was **lit up, aggravated or accelerated** by an industrial injury." *Birnie v. U.S. Gypsum Co.*, 134 Mont. 39, 45, 328 P.2d 133 (1958). Moreover, "[t]he foregoing rule is that a workman is entitled to compensation when a **previous existing latent condition** which does not keep him from performing his work and labor is **lit up . . .**" *Id.* (Emphasis added.)

The Court reaffirms its finding that claimant is entitled to temporary total disability benefits on account of her industrial accident.

Penalty

Respondent requests the Court to rescind the penalty and attorney fees it has imposed with respect to benefits payable for the period of November 19, 1992 to February 1, 1993. In awarding the penalty the Court characterized respondent's arguments regarding its failure to reinstate benefits upon receiving Dr. Gilboy's November 19, 1992 note as "after-the-fact" arguments. (Conclusion of Law 3.) After further review the Court has determined that its "after-the-fact" characterization is factually unsupported, and that it overlooked significant facts affecting the imposition of the penalty and attorney fees.

Dr. Gilboy's November 19, 1992 note took claimant off work on account of a herniated cervical disc. Upon receipt of the note, the respondent requested confirmation that the herniation was in fact related to claimant's industrial accident. It arranged to have claimant

evaluated by Dr. Gary Cooney, a neurologist. Dr. Cooney examined claimant and referred her to Dr. Dewey. Pending Dr. Dewey's examination on December 7, 1992, respondent advised claimant's attorney that if Dr. Dewey established a causal connection between the herniated disc and the accident, it would accept liability for that condition. (Ex. 14.) Respondent was then provided with a December 3, 1992 medical report from Dr. Dewey stating, "Most of her pain is muscular and there is nothing that is discernible which is related to the C6-7 disc." (Ex. 2 at 32.) Ultimately, Dr. Dewey concluded that the claimant's symptoms (principally pain) were unrelated to the herniated disc. (Dewey Dep. at 42.)

Dr. Dewey did not comment on the relationship of claimant's muscular pain to her accident when he examined her on December 3rd. (Ex. 2 at 32.) He scheduled a further examination for January 21, 1993.

Respondent continued to seek a release for claimant to return to work, and contacted Dr. Dewey through Dr. Knutsen. That contact, in late January 1993, resulted in yet another stage of the saga, i.e., the controversy over whether Dr. Dewey released claimant to return to work at that time.

It was not unreasonable for respondent to question whether the herniated disc discovered in November 1992 was related to the industrial accident and to request verification that it was. Verification was not forthcoming, rather the matter appeared moot after Dr. Dewey's examination. Thus, at the time, respondent's denial was not unreasonable.

The question facing the Court is whether the insurer's failure later on to pay benefits retroactive to November 19th was unreasonable. Under all of the circumstances of this case, I conclude that it was not. The primary focus of attention was on getting claimant back to work in a light-duty position. In conversations with respondent's medical advisor, claimant's physicians appeared to release her for such work, but did not effectively communicate that release to her. Claimant on her part transmitted a clear message of resistance to any return to work. Frankly, the situation as presented to the Court at hearing was a mess.

The finding of unreasonableness and award of a penalty and attorney fees are rescinded. Finding of Fact 50 is amended to read as follows:

50. Rhone-Poulenc's termination of benefits as of October 26, 1992, was not unreasonable. Its failure to reinstate and pay temporary total disability benefits upon receipt of Dr. Gilboy's note of November 19, 1992, also was not unreasonable since it took reasonable steps to determine whether the herniated cervical disc diagnosed by Dr. Gilboy was related to claimant's industrial accident. That inquiry later became moot in light of Dr. Dewey's opinion that "there is nothing that is discernible which is related to the C6-7 disc" (Ex. 2 at 32.) Rhone-Poulenc's continued refusal to pay benefits after Dr. Knutsen communicated with Dr. Dewey

on January 26, 1993, was not unreasonable since Dr. Dewey's statements could reasonably be construed as a release to return to work and claimant was notified of this.

Conclusion of Law 3 as originally written is deleted and is amended to read as follows:

3. An award of attorney fees and/or a penalty requires a finding of unreasonableness on the part of the insurer. §§ 39-71-611 and -2907, MCA (1991).

Rhone-Poulenc reasonably relied on the conversations between its medical advisor and Drs. Murphy, Gilboy and Dewey with regard to claimant's ability to return to light-duty work. This case arises because of a break-down in communications among the doctors, Rhone-Poulenc's medical advisor, and the claimant, not because Rhone-Poulenc took an unreasonable position concerning claimant's ability to return to work.

The only period for which there was a note clearly taking claimant off work was the period of November 19, 1992 until late January. Dr Gilboy's November 19th note took claimant off work on account of a herniated cervical disc. Upon receipt of the note, Rhone-Poulenc requested confirmation that the herniation was in fact related to claimant's industrial accident and it arranged to have claimant evaluated by Dr. Gary Cooney, a neurologist. Dr. Cooney examined claimant and referred her to Dr. Dewey. Pending Dr. Dewey's examination, on December 7, 1992, Rhone-Poulenc advised claimant's attorney that if Dr. Dewey established a causal connection between the herniated disc and the accident, it would accept liability for that condition. (Ex. 14.) Rhone-Poulenc was then provided with a December 3, 1992 medical report from Dr. Dewey stating, "Most of her pain is muscular and there is nothing that is discernible which is related to the C6-7 disc." (Ex. 2 at 32.) Ultimately, Dr. Dewey concluded that the claimant's symptoms (principally pain) were unrelated to the herniated disc. (Dewey Dep. at 42.)

Dr. Dewey did not comment on the relationship of claimant's muscular pain to her accident when he examined her on December 3rd. (Ex. 2 at 32.) He scheduled a further examination for January 21, 1993.

Rhone-Poulenc continued to seek a release for claimant to return to work, and contacted Dr. Dewey through Dr. Knutsen. That contact, in late January 1993, resulted in yet another stage of the saga, i.e., the controversy over whether Dr. Dewey released claimant to return to work at that time.

It was not unreasonable for Rhone-Poulenc to question whether the herniated disc discovered in November 1992 was related to the industrial accident and to request verification that it was. Verification was not forthcoming, rather the matter appeared

moot after Dr. Dewey's examination. Thus, at the time, Rhone-Poulenc's denial was not unreasonable.

Rhone-Poulenc's failure later on to pay benefits retroactive to November 19th was also not unreasonable. The primary focus of attention was on getting claimant back to work in a light-duty position. In conversations with Rhone-Poulenc's medical advisor, claimant's physician's appeared to release her for such work, but did not effectively communicate that release to claimant. Claimant on her part transmitted a clear message of istance to any return to work. Frankly, the situation as presented to the Court at hearing was a mess.

The requests for a penalty and attorney fees are denied.

Paragraphs 3 and 4 of the judgment are amended as follows:

3. Claimant is not entitled to a penalty.
4. Claimant is entitled to her costs but not to an attorney fee.

The full text of the Amended Findings of Fact, Conclusions of Law and Judgment accompany this order. This matter is certified as final for purposes of appeal.

Dated in Helena, Montana, this 14th day of December, 1994.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Leonard J. Haxby
Mr. Brendon J. Rohan