

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2015 MTWCC 4

WCC No. 2014-3477

SHEILA COLE

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

ORDER DENYING PETITIONER'S MOTION FOR SUMMARY JUDGMENT

Summary: Relying upon the opinions of her treating physician and his PA, and her medical records, Petitioner moves for summary judgment on the grounds that she indisputably suffered a compensable shoulder injury when she fell at work on February 19, 2014. Respondent argues that there are issues of material fact as to whether Petitioner either injured her shoulder or aggravated a pre-existing shoulder injury when she fell at work.

Held: There are issues of material fact that preclude summary judgment. While Petitioner's treating physician and his PA have opined that Petitioner tore her rotator cuff when she fell at work, their opinions appear to be based mostly, if not entirely, on what Petitioner told them. Respondent has presented admissible evidence from which it can be reasonably inferred that Petitioner's statements to her treating physician and his PA were not entirely truthful and/or that they did not know all the facts when they gave their opinions. This Court will have to evaluate Petitioner's credibility and her providers' testimony at trial to determine whether she suffered a compensable injury or aggravation.

Topics:

Constitutions, Statutes, Regulations, and Rules: Administrative Rules of Montana: 24.5.329. Summary judgment is improper where Petitioner's credibility is crucial to decisions of material fact, particularly when inconsistent statements in medical records attributed to her create issues of material fact as to whether she injured her shoulder at work.

Summary Judgment: Disputed facts. Summary judgment is improper where Petitioner's credibility is crucial to decisions of material fact, particularly when inconsistent statements in medical records attributed to her create issues of material fact as to whether she injured her shoulder at work.

Credibility. Summary judgment is improper where Petitioner's credibility is crucial to decisions of material fact, particularly when inconsistent statements in medical records attributed to her create issues of material fact as to whether she injured her shoulder at work.

Evidence: Credibility. Summary judgment is improper where Petitioner's credibility is crucial to decisions of material fact, particularly when inconsistent statements in medical records attributed to her create issues of material fact as to whether she injured her shoulder at work.

Proof: Conflicting Evidence: Medical. Inconsistent statements attributed to Petitioner in her medical records create issues of material fact as to whether she injured or aggravated her shoulder when she fell at work and therefore summary judgment is improper.

Constitutions, Statutes, Regulations, and Rules: Montana Rules of Evidence: Rule 803. Under M.R.Evid. 803(7), the fact that Petitioner's physician's detailed record does not mention Petitioner's fall at work is evidence indicating that she did not tell him about her fall or resulting injuries. The Court can draw a reasonable inference that Petitioner did not suffer an injury when she fell at work since it stands to reason she would have reported the injury to her physician during her appointment six days later.

Evidence: Credibility. Under M.R.Evid. 803(7), the fact that Petitioner's physician's detailed record does not mention Petitioner's fall at work is evidence indicating that she did not tell him about her fall or resulting injuries. The Court can draw a reasonable inference that Petitioner did not suffer an injury when she fell at work since it stands to reason she would have reported the injury to her physician during her appointment six days later.

¶ 1 Petitioner Sheila Cole moves for summary judgment, arguing that it is indisputable that she suffered a torn rotator cuff when she fell at work on February 19,

2014. Cole relies upon her treating physician and his physician assistant (PA), who have opined that Cole's injury occurred when she fell at work. She also argues that Respondent Montana State Fund's (State Fund) continued denial of liability is unreasonable, since State Fund does not have a medical opinion refuting that of her treating physician. State Fund opposes the motion on the grounds that there are issues of material fact as to whether Cole injured her shoulder or aggravated a pre-existing shoulder injury when she fell at work.

FACTS

¶ 2 Cole saw Steven C. Cohen, MD, on July 22, 2013, with complaints of shoulder pain. Dr. Cohen noted, "She has had three weeks of shoulder pain, it kind of goes down her arm, towards her hand. It is worse when she raises her arm up. She feel [sic] on it last Thursday and it hurt. She also wonders if it could be from her previous neck fusion." An x-ray of Cole's neck was "unremarkable," as was an x-ray of her right shoulder. Dr. Cohen's impression was that Cole had a "possible shoulder sprain/strain."¹

¶ 3 In the fall of 2013, Cole experienced episodes of dizziness and falls, which resulted in intermittent right-shoulder and arm pain.²

¶ 4 On December 2, 2013, Cole saw Melanie A. Schmitz, PA-C, at the Billings Clinic. The medical record from that appointment states, in relevant part, "Her right shoulder has been bothering her since one of her falls. It is in her right upper arm actually and is worse with movement typically. It is not severe." PA Schmitz also noted, "Right shoulder pain. I am going to have her start icing twice daily and use ibuprofen 400 mg one to two times daily for the next one to two weeks, and if she is still having persistent pain, she will call in, and I will get her referred to physical therapy."³

¶ 5 On December 30, 2013, Cole saw Beth Hamilton, PA-C, because she had a sore throat and was worried she had a strep infection. Hamilton noted that Cole presented as, "A well-appearing 51-year-old female in no apparent acute distress."⁴

¶ 6 Cole fell at work on February 19, 2014, and alleges that she injured her "[s]houlder and knees."⁵

¹ Respondent's Brief in Opposition to Petitioner's Motion for Summary Judgment (Respondent's Brief), Ex. 1, Docket Item No. 16.

² Petitioner's Motion for Summary Judgment and Supporting Brief (Petitioner's Brief), Exs. 3 and 4, Docket Item No. 11.

³ Petitioner's Brief, Ex. 4.

⁴ Petitioner's Brief, Ex. 5.

¶ 7 On February 25, 2014 — six days after her fall at work — Cole saw Baskar S. Duval, MD, at the Billings Clinic for her annual exam. Dr. Duval noted: “She had a history of fall **2 months ago** and she has been doctoring it with the [sic] our [physician assistant] **the discomfort has not improved**. She has trouble raising her arm reaching for the back. She has not been using it much and has noticed some amount of weakness.” Dr. Duval also noted that Cole had limited range of motion and inflammation in her shoulder. Finally, Dr. Duval noted that functional tests for a torn rotator cuff were positive. Thus, Dr. Duval’s impression was that she had a right rotator cuff tear. He ordered an MRI of her right shoulder and referred her to an orthopedist.⁶

¶ 8 Cole filed her First Report on February 28, 2014. The report notes the part of Cole’s body injured was her “[s]houlder and knees” caused by a “[s]lip and [f]all” when she fell at work on February 19, 2014. She checked the box stating that she had not received any treatment for her alleged injuries.⁷

¶ 9 On April 16, 2014, Cole had a preoperative examination with Cindy L. Murray, PA. In the history section of her report, PA Murray noted: “Patient had an injury to her right shoulder late last year [and] was having improvements in symptoms however slipped and fell at work in February and reinjured the shoulder. When she came in for her annual exam Dr. DuVal [sic] examined her and was suspicious for rotator cuff tear, he ordered an MRI which was consistent with a rotator cuff tear, he then referred the patient to orthopedics for surgical consultation. Dr. Schmitt [sic] evaluated her and felt she would benefit from surgical intervention so she is here today for her preoperative exam.”⁸

¶ 10 Guy R. Schmidt, MD, surgically repaired Cole’s right shoulder on April 30, 2014.⁹

¶ 11 On June 10, 2014, Cole saw Dr. Schmidt’s PA, Elie J. Soueidi, PA-C. In his Progress Report, PA Soueidi stated: “Upon review of [Cole’s] chart, specifically those notes dictated by Dr. Guy Schmidt, her surgeon, . . . it is obvious that this injury is due to a fall at work at the Montana Rescue Mission. This was discussed with the patient,

⁵ Petitioner’s Brief, Ex. 7.

⁶ Petitioner’s Brief, Ex. 8 (emphasis added).

⁷ Petitioner’s Brief, Ex. 7; Respondent’s Brief, Ex. 5.

⁸ Petitioner’s Reply Brief in Support of Her Motion for Summary Judgment (Petitioner’s Reply Brief), Ex. 1 at 1, Docket Item No. 19.

⁹ Petitioner’s Brief, Ex. 12.

that there is no pre-existing injury that caused her current diagnosis and assessed need for surgery.”¹⁰

¶ 12 On September 9, 2014, Cole saw Dr. Duval. As to that visit, Dr. Duval issued an “[a]ddendum” on September 16, 2014, stating: “The patient is in today. She stated that she had a fall at work at Montana Rescue Mission in February prior to my visit on the 25th of February 2014. The patient had stated this to Dr. Schmidt and also to his physician assistant Elie Soueidi.”¹¹

¶ 13 In a letter dated October 23, and signed November 5, 2014, in response to a letter from Cole’s attorney, Dr. Schmidt wrote: “I agree with PA Soueidi’s assessment that this is an injury due to a fall while working at the Montana Rescue Mission. I believe I also stated this in one of my notes from 03/07/2014. Specifically, my note states, ‘The patient states that she fell while at work at Montana Rescue Mission some time ago.’ I have no reason not to believe the patient.”¹²

¶ 14 State Fund denied liability for Cole’s claim on April 7, 2014.¹³

LAW AND ANALYSIS

¶ 15 “[A]t the summary judgment stage, the court does not make findings of fact, weigh the evidence, choose one disputed fact over another, or assess the credibility of witnesses. Rather, the court examines the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits to determine whether there is a genuine issue as to any material fact relating to the legal issues raised and, if there is not, whether the moving party is entitled to judgment as a matter of law on the undisputed facts.”¹⁴ When examining the evidence, the court is to draw all reasonable inferences in favor of the party opposing summary judgment.¹⁵

¶ 16 Under these standards, there are material issues of fact as to whether Cole injured or aggravated her right shoulder when she fell on February 19, 2014. This Court is not persuaded by the three arguments Cole makes in support of her position.

¹⁰ Petitioner’s Brief, Ex. 14.

¹¹ Petitioner’s Brief, Ex. 16.

¹² Petitioner’s Brief, Ex. 17.

¹³ Affidavit of Bridget Disburg Re: Brief in Opposition to Motion for Summary Judgment at 2, Docket Item No. 17.

¹⁴ *Andersen v. Schenk*, 2009 MT 399, ¶ 2, 353 Mont. 424, 220 P.3d 675 (citing Rule 56(c), M.R.Civ.P and *Corporate Air v. Edwards Jet Center*, 2008 MT 283, ¶ 28, 345 Mont. 336, 190 P.3d 1111).

¹⁵ *Morrow v. Bank of America, N.A.*, 2014 MT 117, ¶ 24, 375 Mont. 38, 324 P.3d 1167 (citation omitted).

¶ 17 First, State Fund is not unreasonably ignoring the opinion of Cole's treating physician.¹⁶ The opinion of a treating physician is generally accorded more weight than other physicians. However, State Fund is correct that a treating physician's opinion is not conclusive, and an insurer does not have to accept it when there is reliable and credible evidence indicating that the treating physician does not have all the relevant facts or is relying upon information that is false.¹⁷

¶ 18 Although Dr. Schmidt and PA Soueidi have opined that Cole tore her rotator cuff when she fell on February 19, 2014, it appears they based their opinions mostly, if not entirely, on what Cole told them. This Court cannot determine from the evidence presented whether Dr. Schmidt's and PA Soueidi's opinions are based upon an accurate or complete medical history. This Court has not been presented with any evidence that either Dr. Schmidt or PA Soueidi know that Cole saw Dr. Cohen on July 22, 2013, with complaints of right shoulder pain, or that they know that on December 3, 2013, PA Schmitz noted that Cole reported right shoulder pain due to a fall. In fact, the evidence presented indicates that they do not know about Cole's previous complaints of shoulder pain. In support of his opinion, PA Soueidi stated, "there is no pre-existing injury that caused her current diagnosis and assessed need for surgery."¹⁸ Likewise, this Court has not been presented with any evidence that Dr. Schmidt or PA Soueidi know that Dr. Duval's record of February 25, 2014, did not mention the February 19, 2014, fall and, instead, states that Cole had a fall that occurred two months before the appointment and that her shoulder "discomfort had not improved."

¶ 19 A reasonable inference can be drawn from Dr. Cohen's, PA Schmitz's, and Dr. Duval's medical records that Cole injured her right shoulder before February 19, 2014, and that she did not injure or aggravate her right shoulder when she fell at work. Although Dr. Schmidt has stated that he has "no reason not to believe" Cole, Dr. Cohen's, PA Schmitz's, and Dr. Duval's records call Cole's credibility into question and might give Dr. Schmidt a reason to disbelieve her. The credibility issue in this case creates an issue of material fact as to whether Cole injured her shoulder when she fell

¹⁶ Petitioner's Brief at 4-5; Petitioner's Reply Brief at 3 (relying upon *S.L.H. v. State Comp. Mut. Ins. Fund*, 2000 MT 362, 303 Mont. 364, 15 P.3d 948).

¹⁷ See, e.g., *Christensen v. Rosauer's Supermarkets, Inc.*, 2003 MTWCC 62, ¶ 26 (rejecting a physician's opinion because it was based upon what claimant had told him, a story that this Court found to be false). See also *EBI/Orion Group v. Blythe*, 1998 MT 90, ¶ 13, 288 Mont. 356, 957 P.2d 1134 (citations omitted) (stating, "a treating physician's opinion is not conclusive. To presume otherwise would quash the role of the fact finder in questions of an alleged injury. The Workers' Compensation Court, as the finder of fact, is in the best position to assess witnesses' credibility and testimony. It is the function of a finder of fact to weigh the credibility of both non-medical and medical evidence.").

¹⁸ Petitioner's Brief, Ex. 14.

on February 19, 2014. Summary judgment is improper where the credibility of a witness is crucial to decisions of material fact.¹⁹

¶ 20 Second, the medical records from before February 19, 2014, do not conclusively establish that Cole's shoulder pain substantially increased as a result of her fall at work. Cole emphasizes that on December 2, 2013, PA Schmitz stated that Cole was "actually" complaining of upper arm pain and that it was not "severe." However, PA Schmitz's ultimate diagnosis was "[r]ight shoulder pain."²⁰ While PA Hamilton's note from December 30, 2013, states that Cole was "in no apparent acute distress," Cole saw PA Hamilton because she had a sore throat and was concerned that she had a strep infection. There is no indication that PA Hamilton examined Cole's shoulder or asked Cole about it. (And, given Cole's presentation, this Court does not see any reason why PA Hamilton would have done either.)²¹ Moreover, in Dr. Duval's record from February 25, 2014, he does not state that Cole's right shoulder pain was new, that it had increased, that it was "severe," or that Cole was in "acute distress," even though she now claims that she tore her rotator cuff in a fall that occurred six days before that appointment. In fact, Dr. Duval stated that Cole's shoulder discomfort had "not improved" during the two months before her appointment.²² A reasonable inference can be drawn from these records that Cole's shoulder pain remained steady throughout this time and did not increase as a result of her fall on February 19, 2014. Although Cole told PA Murray on April 16, 2014, that she was "having improvements in symptoms" to her right shoulder injury of "late last year" and that she "fell at work in February and reinjured the shoulder,"²³ these statements cannot be reconciled with the statements attributed to her in Dr. Duval's record. The inconsistent statements in these medical records attributed to Cole create issues of material fact as to whether she injured or aggravated her shoulder when she fell at work.

¶ 21 Finally, despite Cole's claim,²⁴ Dr. Duval did not document her fall at work in his addendum dated September 9, 2014. Rather, Dr. Duval merely states that on September 9, 2014, Cole came to the Billings Clinic and told him that she had fallen at work in February 2014, before her appointment on the 25th, and that she had stated this to Dr. Schmidt and PA Soueidi.²⁵ Dr. Duval's addendum does not state whether he recalled that Cole had told him about her February 19, 2014, fall when he saw her on

¹⁹ *Ponderosa Pines Ranch, Inc. v. Hevner*, 2002 MT 184, ¶ 28, 311 Mont. 82, 53 P.3d 381.

²⁰ Petitioner's Brief, Ex. 4.

²¹ Petitioner's Brief, Ex. 5.

²² Petitioner's Brief, Ex. 8.

²³ Petitioner's Reply Brief, Ex. 1 at 1.

²⁴ Petitioner's Brief at 6.

²⁵ Petitioner's Brief, Ex. 16.

February 25, 2014. Moreover, this Court disagrees with Cole's claim that State Fund "provides no basis or factual support for [its] assertion" that Cole did not tell Dr. Duval about her alleged February 19, 2014, fall when she saw him on February 25, 2014.²⁶ Under Rule 803(7), M.R.Evid., the fact that Dr. Duval's detailed record from February 25, 2014, does not mention a fall that occurred six days previously is evidence indicating that Cole did not tell him about that fall or of the injuries she claims to have suffered in the fall.²⁷ A reasonable inference can be drawn from this record that Cole did not injure or aggravate her right shoulder when she fell on February 19, 2014, as it stands to reason that she would have reported an injury to her shoulder or a worsening of her symptoms to Dr. Duval during her appointment on February 25, 2014, if either had occurred. Although Cole apparently now claims that she did, in fact, tell Dr. Duval that she had fallen at work and injured her shoulder, the discrepancy between what she claims she said and what Dr. Duval's record says she said creates issues of material fact.

¶ 22 The evidence presented shows there are issues of material fact and therefore, Cole is not entitled to summary judgment in her favor.²⁸ Since there are genuine issues of material fact that preclude summary judgment on State Fund's liability, it is premature to rule upon Cole's claim that State Fund's denial of her claim was unreasonable.²⁹

¶ 23 Petitioner's motion for summary judgment is **denied**.

DATED this 18th day of March, 2015.

(SEAL)

/s/ DAVID M. SANDLER

JUDGE

c: Thomas A. Mackay
Stephanie A. Hollar

Submitted: March 10, 2015

²⁶ Petitioner's Reply Brief at 2 (emphasis omitted).

²⁷ Rule 803, M.R.Evid., states, in relevant part, "The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . (7) . . . Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness."

²⁸ See ARM 24.5.329(2).

²⁹ See §§ 39-71-611 and -2907, MCA (generally stating that this Court can award a penalty and attorney fees only if the claimant prevails and if the insurer's denial of liability was unreasonable).