IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2012 MTWCC 13

WCC No. 2011-2775

CHRISTIAN CORNELIUS

Petitioner

vs.

LUMBERMEN'S UNDERWRITING ALLIANCE

and

EMPLOYERS INSURANCE COMPANY

Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Petitioner reached MMI for an industrial injury to her back and settled her claim with medical benefits reserved. After changing employers, she began to suffer increased back problems approximately a year and a half later – which was also approximately two months after she switched to a workstation which she did not find ergonomically suitable. After the insurer liable for her industrial injury denied further payment of medical benefits, she filed an occupational disease claim against her new employer. The new employer's insurer denied liability and did not pay benefits. Petitioner alleges that she is suffering from an occupational disease for which the second insurer is liable. Petitioner contends that she is entitled to total disability benefits because a doctor has opined she is unable to work. Petitioner contends that the insurer unreasonably refused to pay her benefits under § 39-71-407(5), MCA, since the liability dispute was between insurers.

Held: Petitioner suffers from an occupational disease. She reached MMI for her previous industrial injury and suffered a permanent aggravation while working for her post-injury employer. Petitioner presented the undisputed medical opinion that she is unable to work and she is therefore entitled to indemnity benefits. Since the liability dispute was between two insurers, the insurer for her then-current employer was unreasonable in refusing to pay her benefits as required by § 39-71-407(5), MCA. She is therefore entitled to her attorney fees and a penalty.

Topics:

Medical Evidence: Objective Medical Findings. Under the definition in § 39-71-116(19), MCA, the "global motion deficits" and decreased sensation in one leg noted by Petitioner's medical providers constitute objective medical findings.

Injury and Accident: Aggravation: Occupational Disease. Where the medical evidence indicated that Petitioner's condition is worse now than it was when she reached medical stability, and that her condition had been stable prior to the worsening of her symptoms, and where the parties presented no evidence to suggest that Petitioner's condition is temporary, the Court interpreted a doctor's opinion that Petitioner's work "substantially" aggravated her condition to mean that the doctor believed it was a permanent aggravation.

Occupational Disease: Subsequent Disease. Since the Court determined Petitioner suffered a work-related, permanent, and material aggravation of an underlying work-related condition, the Court concluded that the insurer at risk at the time of the aggravation was now liable for Petitioner's condition and is therefore liable for her medical benefits from the date she filed her occupational disease claim forward.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-407. Petitioner previously suffered an industrial injury, and later filed an occupational disease claim for an alleged permanent aggravation of her condition under a new employer. Since Petitioner's claim was either compensable under her previous industrial injury claim or her new occupational disease claim, the subsequent insurer had a duty to pay her benefits under § 39-71-407(5), MCA, and its failure to do so was unreasonable.

Insurers: Duties. Where Petitioner's claim was either compensable under her previous industrial injury claim or her new occupational disease claim, the subsequent insurer had a duty to pay her benefits under § 39-71-407(5), MCA, and its failure to do so was unreasonable.

Unreasonable Conduct by Insurers. An insurer acted unreasonably when it failed to pay benefits under § 39-71-407(5), MCA, in a case in which Petitioner's condition was either compensable under her previous

industrial injury claim or her new occupational disease claim. The subsequent insurer had a duty to pay her benefits under § 39-71-407(5), MCA, and its failure to do so was unreasonable.

¶ 1 The trial in this matter occurred on October 18, 2011, in Great Falls, Montana. Petitioner Christian Cornelius was present and was represented by Jay P. Dufrechou. Kelly M. Wills represented Respondent Lumbermen's Underwriting Alliance (Lumbermen's). Charles G. Adams represented Respondent Employers Insurance Company (Employers). Employers' claims adjuster Teri Bohnsach also attended.

¶ 2 Exhibits: I admitted Exhibits 1 through 17 without objection. Counsel removed pages 79 through 86 and added pages 94 and 95 to Exhibit 2 pursuant to their agreement reached during the pretrial conference. Counsel stipulated to the addition of pages 37 and 38 to Exhibit 13. I admitted Exhibit 18, offered by Cornelius at trial. I admitted Exhibit 19, offered by Employers at trial.

¶ 3 Witnesses and Depositions: The parties agreed that Cornelius' deposition could be considered part of the record; however, the transcript was not yet available. The parties agreed this case would be deemed submitted upon the filing of Cornelius' deposition. Cornelius and Claudia Cornelius were sworn and testified.

¶ 4 Issues Presented: The Pretrial Order sets forth the following issues:[1]

Issue One: Which, if either, of the Respondent insurers is liable for medical benefits payable on behalf of Petitioner under the Workers' Compensation/Occupational Disease Act following October 21, 2009, the date of her occupational disease claim alleging aggravation of her back condition through employment with Cable Technology of Montana?

Issue Two: If Employers Insurance Company is liable for benefits following October 21, 2009, is Petitioner entitled to total disability benefits following termination of her employment with Cable Technology of Montana?

Issue Three: If Employers Insurance Company is liable for benefits, is that insurer liable for attorney fees and a penalty based on unreasonable denial of the claim?

[1] Pretrial Order at 3, Docket Item No. 15.

FINDINGS OF FACT

¶ 5 Cornelius testified at trial. I found her to be a credible witness.

¶ 6 Cornelius resides in Great Falls.[2] She works for a few hours each Saturday at a veterinary clinic in Great Falls.[3] Cornelius testified that she has a "service-for-service agreement" and receives credit on her account in exchange for the work she performs.[4]

¶ 7 On August 14, 2003, Cornelius herniated a disk in her back while working for Follett Countryside Villages (Follett) in Great Falls. She filed a workers' compensation claim and Follett's insurer accepted liability. Cornelius ultimately had a diskectomy.[5]

¶ 8 On August 19, 2005, Cornelius suffered an industrial injury to her low back arising out of and in the course and scope of her employment with Follett. At the time, Lumbermen's insured Follett and it accepted liability for Cornelius' claim. Intermountain Claims, Inc. (Intermountain) adjusted the claim for Lumbermen's.[6]

¶ 9 In July 2006, Cornelius' employment with Follett ended.[7]

¶ 10 On January 27, 2007, John G. VanGilder, M.D., performed a lumbar fusion at L4 through S1 on Cornelius.[8]

¶ 11 On January 22, 2008, Dr. VanGilder placed Cornelius at maximum medical improvement (MMI).[9]

¶ 12 On February 19, 2008, K. Allan Ward, M.D., assigned Cornelius a 17% whole person impairment rating and restricted her to light-duty work.[10]

¶ 13 On June 10, 2008, the Employment Relations Division of the Department of Labor and Industry (ERD) approved a full and final compromise settlement of Cornelius' workers' compensation claim. Pursuant to the terms of the settlement, Cornelius and

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[2] Cornelius Dep. 5:6-10.

[3] Cornelius Dep. 6:9-17.

[4] Cornelius Dep. 6:20-23.

[5] Trial Test.

[6] Pretrial Order, Statement of Uncontested Facts, at 2, ¶¶ 1, 2.

[7] Trial Test.

[8] Pretrial Order, Statement of Uncontested Facts, at 2, ¶ 3.

[9] Pretrial Order, Statement of Uncontested Facts, at 2, ¶ 4.

[10] Pretrial Order, Statement of Uncontested Facts, at 2, ¶ 5.

Lumbermen's resolved all benefits except for medical benefits, which were reserved to the extent allowed by law.[11]

¶ 14 On September 29, 2008, Cornelius began working for Cable Technology of Montana (Cable Technology). Cornelius' job duties were within her work restrictions and included procurement, determining bids, and ordering parts.[12] Cornelius testified that she was pain-free prior to beginning her job at Cable Technology.[13]

¶ 15 On January 20, 2009, Dr. VanGilder saw Cornelius for a post-fusion follow-up examination. He noted that Cornelius was doing well and that he would see her on an as-needed basis.[14]

¶ 16 On March 18, 2009, Cornelius was promoted to a new position and she changed workstations.[15] Cornelius described her new workstation as consisting of a low L-shaped desk with a laptop computer. Because of the height of the desk, she had to stretch her arms and lean forward in order to reach the keyboard.[16] Cornelius spent the majority of each shift at the workstation.[17]

¶ 17 Sometime in late May or early June of 2009, Cornelius began to experience intermittent pain in her back. She had been using the L-shaped workstation approximately two months.[18] By late July or early August of 2009, the pain had become constant.[19] Cornelius noted that an air vent directly above her workstation blew a constant stream of cold air on her during her shifts.[20] Cornelius testified that she wore a sweater and ran a space heater throughout the summer, but her hands were cold and she sat in a "hunched" position.[21] Cornelius testified that she wore fingerless gloves at times and her muscles were tense from the constant cold air.[22] Cornelius testified that

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[11] Pretrial Order, Statement of Uncontested Facts, at 2, ¶ 6.

[12] Pretrial Order, Statement of Uncontested Facts, at 2, ¶ 7.

[13] Cornelius Dep. 13:20-23.

[14] Ex. 11 at 49.

[15] Pretrial Order, Statement of Uncontested Facts, at 2, ¶ 8.

[16] Cornelius Dep. 16:21 – 17:17.

[17] Cornelius Dep. 17:25.

[18] Cornelius Dep. 18:12-19.

[19] Cornelius Dep. 19:12-14.

[20] Cornelius Dep. 19:15-22.

[21] Cornelius Dep. 20:3-7.

[22] Trial Test.

she began to have pain in her left leg and if she was extremely tired, her left leg would drag and she had difficulty going up stairs.[23]

¶ 18 On July 20, 2009, Cornelius left a telephone message for Dr. VanGilder in which she reported that she was having problems with her left leg. Dr. VanGilder spoke to Cornelius the following day and noted that she was having a sharp, chronic pain in her left thigh with numbness into her calf and foot.[24] On July 22, 2009, Dr. Van Gilder's office requested authorization to order a lumbar spine MRI and a follow-up visit with Dr. VanGilder. Intermountain's claims adjuster Leslie Connell authorized the request on September 3, 2009.[25]

¶ 19 On September 15, 2009, Cornelius had an MRI, with and without contrast, taken of her lumbar spine. The radiologist reported that the postoperative alignment of her L4-S1 fusion was unchanged, and no spinal canal, lateral recess, or neural foraminal narrowing was present.[26]

¶ 20 On September 15, 2009, Dr. VanGilder saw Cornelius to assess her new symptoms. Dr. VanGilder found Cornelius to have diffusely decreased sensation in the left leg, especially in the S1 distribution. He noted that her left foot appeared like it "isn't working exactly right." Cornelius reported a new onset of low-back pain in May 2009 which gradually worsened. Dr. VanGilder recommended physical therapy.[27]

¶ 21 On September 29, 2009, Cornelius attended a physical therapy evaluation with Jeff Swift, R.P.T. Swift treated Cornelius with a pain reflex release technique which alleviated Cornelius' pain.[28]

¶ 22 Cornelius testified that while she was talking to Swift, she realized that her workstation was probably causing her problems.[29] Cornelius testified that her physical therapist offered to evaluate her workstation to see if some simple ergonomic adjustments might alleviate her back problems. Cornelius asked her supervisor if her

[23] Trial Test.

[24] Ex. 11 at 50.

[25] Ex. 11 at 51.

[26] Ex. 5 at 27-28.

[27] Ex. 11 at 52.

[28] Ex. 16 at 7-9.

[29] Trial Test.

physical therapist could evaluate her workstation, but her supervisor did not grant her request. Instead, he told Cornelius that he would "get back" to her.[30]

¶ 23 On October 8, 2009, Cornelius informed Dr. VanGilder's office that she had been discharged from physical therapy because her physical therapist was concerned that her treatment was more harmful than helpful. Dr. VanGilder recommended a CT scan.[31]

¶ 24 In mid-October 2009, Cornelius got a new supervisor. She asked the new supervisor about the ergonomic evaluation and her new supervisor also said he would "get back" to her, but he never did so.[32] Cornelius then asked one of the company managers who was higher in the chain of command than her supervisor. He also told Cornelius that he would "get back" to her.[33]

¶ 25 On September 24, 2009, Cornelius called Dr. VanGilder's office and reported that her workplace was extremely cold and she wondered if her back problems could be caused by the temperature since her back pain started when her employer turned on the air conditioning for the summer. One of Dr. VanGilder's staff members relayed the message to him and then returned Cornelius' call, stating that Dr. VanGilder had opined that the cold air would not aggravate her back condition, but that it could be aggravated by sitting in a rigid position for a prolonged length of time.[34]

¶ 26 On October 20, 2009, Cornelius had a CT scan without contrast of her lumbar spine. The radiologist found a stable alignment at L4-5 and L5-S1, with very mild spondylosis.[35]

¶ 27 On November 2, 2009, Cornelius was terminated from her job at Cable Technology.[36] Cornelius testified that on that day, she realized that she would probably have to enter a pain management program so she approached a supervisor to discuss a leave of absence. The supervisor told Cornelius that he would meet with her later that afternoon. Near the end of the day, the supervisor asked Cornelius to report to his office. In the supervisor's office, Cornelius explained that she believed she might have to enter a pain management program to deal with her back problems and that she would know later that week if she was going to do so. The supervisor replied that they

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[30] Trial Test.

[31] Ex. 11 at 56.

[32] Trial Test.

[33] Trial Test.

[34] Ex. 11 at 55.

[35] Ex. 5 at 29.

[36] Pretrial Order, Statement of Uncontested Facts, at 2, ¶ 9.

should go talk to the human resources department. Cornelius and the supervisor went to the human resources office where Cornelius was terminated from her job position. Cornelius testified that she was informed that she was being terminated because the company was downsizing and because they had issues with her job performance.[37]

¶ 28 On November 4, 2009, Cornelius saw K. Allan Ward, M.D., for a pain management evaluation. After examination, Dr. Ward recommended that Cornelius try a prescription for Neurontin for her leg pain.[38] Cornelius continued to see Dr. Ward for pain management.[39]

¶ 29 On November 15, 2009, Swift discharged Cornelius from physical therapy after she received a TENS unit to try for pain management. Swift noted that subjectively, Cornelius complained of significant low-back pain and bilateral lower extremity pain. Under "Objective," Swift noted that Cornelius had global motion deficits at the lumbar spine due to pain. He further noted that Cornelius' response to therapy had been poor and that her treatment goals remained unmet. He noted that the therapy did not resolve Cornelius' pain complaints.[40]

¶ 30 On January 20, 2010, Dr. Ward noted that Cornelius' pain remained poorly controlled. He opined that she had been totally disabled since he first saw her in November 2009.[41]

¶ 31 On January 28, 2010, Cornelius wrote to Connell and asked to reopen her settlement. Cornelius stated that her back pain had increased significantly and that her physical therapist had refused to see her for further treatment because the therapy was not improving her condition. Cornelius noted that she had been taken off work in November 2009, and had not yet been released to return to work.[42]

¶ 32 On February 5, 2010, Connell responded to Cornelius' letter. Connell denied Cornelius' request to reopen her settlement, but noted that Cornelius could contact ERD and file for mediation.[43] Cornelius subsequently did so.[44] During the mediation process,

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[37] Trial Test.

[38] Ex. 13 at 5.

[39] Ex. 13 at 6-38.

[40] Ex. 16 at 15.

[41] Ex. 13 at 13.

[42] Ex. 2 at 76.

[43] Ex. 2 at 77.

[44] Ex. 2 at 78.

Cornelius learned that she could file an occupational disease claim against Cable Technology.[45]

¶ 33 On March 2, 2010, Dale M. Schaefer, M.D., saw Cornelius to evaluate her low-back pain with left lower extremity pain and numbness and to provide a second opinion. Dr. Schaefer summarized Cornelius' history of back problems, noting that Cornelius did well after her fusion until approximately May 2009, when she began developing back pain which radiated down her left leg, with numbness in her left calf and foot. Dr. Schaefer further noted that new MRI and CT scans did not reveal a new surgical lesion. After examination, Dr. Schafer opined that Cornelius' fusion was likely solid and he saw no evidence of new nerve root impingement, canal stenosis, hardware loosening, or any other condition which would account for her increase in pain. Dr. Schaefer stated that he did not have anything to offer Cornelius in terms of surgical intervention, although he also did not believe that long-term narcotic use was her best option.[46]

¶ 34 On April 5, 2010, Cornelius filed an occupational disease claim against Cable Technology. She listed the date of onset as October 21, 2009.[47] Employers insured Cable Technology at the time of Cornelius' occupational disease claim.[48]

¶ 35 On April 22, 2010, Dr. Ward opined that Cornelius would probably not be able to resume gainful employment because of her back condition. He stated, "Specifically, I do not think that she can work more than sporadically in a job situation, with no lifting, sitting, standing at will."[49]

¶ 36 On May 3, 2010, Employers denied liability for Cornelius' claim. Employers maintains its denial of Cornelius' claim and has refused to pay benefits.[50]

¶ 37 On August 3, 2010, Dr. Ward responded via e-mail to an inquiry from Cornelius' counsel and stated, in pertinent part:

> I am not entirely certain that she is actually unable to engage in ***any*** employment, but I don't question that she feels that way. I believe there are significant psychosocial issues involved which are beyond the issue of

[45] Trial Test.

[46] Ex. 10 at 3.

[47] Pretrial Order, Statement of Uncontested Facts, at 2, ¶ 10.

[48] Pretrial Order, Statement of Uncontested Facts, at 2, ¶ 11.

[49] Ex. 13 at 25.

[50] Pretrial Order, Statement of Uncontested Facts, at 2-3, ¶¶ 12, 14.

> pain. I believe that she has what would be referred to as an adjustment disorder following surgery, or, more succinctly, **chronic pain syndrome.**
>
> I would agree that the return to work did substantially aggravate her post-surgical state, making her unable to perform that particular job, with its specific expectations.[51]

¶ 38 On April 8, 2011, Lumbermen's denied liability for further medical treatment for Cornelius' 2005 industrial injury claim. Lumbermen's contends that any medical treatment Cornelius now requires for her back condition relates to a subsequent occupational disease she sustained while working for Cable Technology.[52]

¶ 39 At her deposition, Cornelius testified that her current pain is in the same location as the pain she experienced after her 2005 industrial accident, but it is more intense.[53] Cornelius testified that her pain has progressively worsened since she left Cable Technology.[54]

CONCLUSIONS OF LAW

¶ 40 An employee's last day of work is the point in time from which an occupational disease claim must flow.[55] Cornelius' last day of work with Cable Technology was on November 2, 2009. Therefore the 2009 statutes apply.

ISSUE ONE: Which, if either, of the Respondent insurers is liable for medical benefits payable on behalf of Petitioner under the Workers' Compensation/Occupational Disease Act following October 21, 2009, the date of her occupational disease claim alleging aggravation of her back condition through employment with Cable Technology of Montana?

¶ 41 Cornelius bears the burden of proving by a preponderance of the evidence that she is entitled to the benefits she seeks.[56] I conclude Cornelius has met her burden.

¶ 42 An occupational disease is "harm, damage, or death arising out of or contracted in the course and scope of employment caused by events occurring on more than a

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[51] Ex. 13 at 30. (Emphasis in original.)

[52] Pretrial Order, Statement of Uncontested Facts, at 3, ¶ 13. *See* Ex. 2 at 94-95.

[53] Cornelius Dep. 13:14:19.

[54] Cornelius Dep. 14:5-9.

[55] *Fleming v. Int'l Paper Co.*, 2008 MT 327, ¶ 27, 346 Mont. 141, 194 P.3d 77.

[56] *Ricks v. Teslow Consol.,* 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wickens Bros. Constr. Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

single day or work shift."[57] Under § 39-71-407(9), MCA, occupational diseases are considered to arise out of or be contracted in the course and scope of employment if the occupational disease is established by objective medical findings and the events occurring on more than a single day or work shift are the major contributing cause of the occupational disease. Section 39-71-407(13), MCA, defines "major contributing cause" as "a cause that is the leading cause contributing to the result when compared to all other contributing causes."

¶ 43 Employers argues that Cornelius has not proven her claim because she has presented no objective medical findings as required by § 39-71-407(2), MCA, to establish the existence of an occupational disease. Employers notes that neither the September 2009 MRI nor the October 2009 CT scan revealed new objective findings.[58]

¶ 44 Section 39-71-116(19), MCA, defines objective medical findings as "medical evidence, including range of motion . . . or other diagnostic evidence, substantiated by clinical findings." As the findings above indicate, Swift found Cornelius to have "global motion deficits." Furthermore, at his September 15, 2009, examination of Cornelius, Dr. VanGilder found her to have decreased sensation in her left leg, among other findings. Cornelius has presented objective medical findings to support the existence of an occupational disease.

¶ 45 Employers argues that the "circumstances" of Cornelius' claim are somehow suspect because she first pursued the claim under her accepted liability claim with Lumbermen's prior to filing an occupational disease claim with Cable Technology. Employers categorizes Cornelius' pursuit of her previous workers' compensation claim as "instructive."[59] However, Employers offers no insight into what specific instruction the Court is to find here.

¶ 46 As this Court has previously explained in *Montana Contractor Compen. Fund v. Liberty Northwest Ins. Corp. (In re: Rusco),* when a dispute arises regarding liability between insurers:

> The rules are straightforward. If a claimant has reached MMI with respect to a first industrial injury and he thereafter suffers a work-related, permanent, and material aggravation of his medical condition, then the insurer at risk at the time of the aggravation is liable for compensation and medical benefits attributable to the condition. If, on the other hand, the

[57] § 39-71-116(20)(a), MCA.

[58] Employers' Insurance Company's Trial Brief (Employers' Trial Brief), Docket Item No. 16, at 1-2.

[59] Employers' Trial Brief at 3, 4.

> subsequent aggravation is temporary or immaterial, and the disabling condition results from a natural progression set in motion by the first injury, then the insurer for the original injury is liable for compensation and medical benefits for the condition.[60]

¶ 47 In *Rusco*, the claimant suffered an industrial injury while his employer was insured by Liberty Northwest Insurance Corporation (Liberty).[61] Liberty accepted liability for the claim.[62] The claimant returned to his time-of-injury job and later suffered a work-related flare-up of his back condition after his employer had become insured by Montana Contractor Compensation Fund (MCCF).[63] MCCF began paying benefits under a reservation of rights.[64] MCCF contended that Rusco's flare-up was a temporary and immaterial aggravation of his underlying condition and it therefore was not liable.[65] In the present case, no one has disputed that Cornelius reached MMI for her industrial injury on January 22, 2008. The issue is whether she suffered a work-related, permanent, and material aggravation of her condition so as to cause liability for her back condition to pass from Lumbermen's to Employers.

¶ 48 In *Rusco*, this Court observed, "While the claimant's history of pain and symptoms is certainly important in determining whether [the] aggravation was permanent and material, the issue of permanence and materiality are medical issues."[66] The Court then turned to the opinions expressed by the medical providers involved in Rusco's case.[67] In the present case, the only medical opinion regarding whether Cornelius' present condition is permanent and material comes from Dr. Ward, who stated, "[T]he return to work did substantially aggravate her post-surgical state . . ." as set forth above.

¶ 49 Employers alleges that Cornelius' work at Cable Technology did not materially aggravate her underlying condition.[68] Cornelius argues that she submitted a medical opinion in which her doctor opined that her work at Cable Technology "substantially aggravate[d]" her underlying condition, and that if Employers wishes to refute that

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[60] *Montana Contractor Compen. Fund v. Liberty Northwest Ins. Corp. (In re: Rusco)*, 2003 MTWCC 10, ¶ 35. (Citing *Burglund v. Liberty Mut. Fire Ins. Co.*, 286 Mont. 134, 950 P.2d 1371 (1997).)

[61] *In re: Rusco*, ¶ 2.

[62] *In re: Rusco*, ¶ 10.

[63] *In re: Rusco*, ¶ 2.

[64] *In re: Rusco*, ¶ 24.

[65] *In re: Rusco*, ¶ 37.

[66] *In re Rusco*, ¶ 39.

[67] *Id.*

[68] Employers' Trial Brief at 3.

opinion, it must present evidence to the contrary. Cornelius argues that, taking Dr. Ward's statement in context, it is clear he believes she suffered a permanent aggravation.

¶ 50 The medical evidence presented in this case is uncontroverted. The evidence indicates that Cornelius' condition is worse now than it was when she reached MMI. The evidence further indicates that Cornelius' condition was stable from the time she reached MMI until approximately May 2009, when she began to experience the symptoms set forth above. Although Cornelius has seen several medical providers, none has been able to offer her any real help for her condition, nor has any expressed the expectation that she will return to the condition she was in at the time she reached MMI. Since no evidence has been presented to suggest that Cornelius' condition is temporary, it stands to reason that when Dr. Ward opined that her work "substantially" aggravated her condition, that he believed this aggravation to be permanent in nature.

¶ 51 Since I have determined that Cornelius suffered a work-related, permanent, and material aggravation of her underlying condition, I conclude that Employers – the insurer at risk at the time of the aggravation – is liable for Cornelius' condition. Therefore, Employers is liable for Cornelius' medical benefits from October 21, 2009, forward.

Issue Two: If Employers Insurance Company is liable for benefits following October 21, 2009, is Petitioner entitled to total disability benefits following termination of her employment with Cable Technology of Montana?

¶ 52 On January 20, 2010, Dr. Ward opined that Cornelius was unable to work because of her pain, and that she had been unable to do so since she saw him on November 4, 2009. Since Cornelius' employment with Cable Technology ended November 2, 2009, that job is no longer available to her. However, under § 39-71-701(1)(b), MCA, a worker is eligible for temporary total disability (TTD) benefits until the worker has been released to return to the employment in which the worker was engaged at the time of the injury or to employment with similar physical requirements. In the present case, Cornelius has not been released to return to employment with similar physical requirements. Therefore, she is entitled to TTD benefits from November 4, 2009, forward.

Issue Three: If Employers Insurance Company is liable for benefits, is that insurer liable for attorney fees and a penalty based on unreasonable denial of the claim?

¶ 53 Pursuant to § 39-71-611, MCA, an insurer shall pay reasonable attorney fees if the insurer denies liability for a claim for compensation, the claim is later adjudged compensable by this Court, and this Court determines the insurer's actions in denying

liability were unreasonable. Pursuant to § 39-71-2907, MCA, the Court may increase by 20% the full amount of benefits due a claimant during the period of delay or refusal to pay if the insurer's delay or refusal to pay is unreasonable.

¶ 54 Cornelius further argues that she satisfied her initial burden of proving that her current condition is work-related, and that under § 39-71-407(5), MCA, Employers had a duty to undertake further investigation if it did not believe the evidence she supplied supporting her occupational disease claim was sufficient.[69]

¶ 55 Section 39-71-407(5), MCA, states:

> If there is no dispute that an insurer is liable for an injury but there is a liability dispute between two or more insurers, the insurer for the most recently filed claim shall pay benefits until that insurer proves that another insurer is responsible for paying benefits or until another insurer agrees to pay benefits. If it is later proven that the insurer for the most recently filed claim is not responsible for paying benefits, that insurer must receive reimbursement for benefits paid to the claimant from the insurer proven to be responsible.

¶ 56 No one has argued that Cornelius' present condition is not work-related; however, Lumbermen's and Employers disagree as to which insurer is liable for it. Section 39-71-407(5), MCA, clearly sets forth the procedures insurers are to follow in situations such as this. In the factually similar *In re: Rusco*, cited above, the subsequent insurer correctly followed this procedure. Once Cornelius filed her occupational disease claim against Cable Technology – and in the absence of any dispute that Cornelius' condition was compensable either under her 2005 industrial injury claim or her new occupational disease claim – Employers had a duty to pay benefits unless and until it proved that Lumbermen's was liable for those benefits.

¶ 57 I find Employers' disregard of the provisions of § 39-71-407(5), MCA, to be unreasonable in its adjustment of Cornelius' occupational disease claim. Therefore, I conclude she is entitled to reasonable attorney fees pursuant to § 39-71-611, MCA, and a 20% penalty pursuant to § 39-71-2907, MCA.

JUDGMENT

¶ 58 Employers Insurance Company is liable for medical benefits payable on behalf of Cornelius under the Workers' Compensation Act following October 21, 2009.

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[69] Petitioner's Trial Brief, Docket Item No. 14, at 9.

¶ 59 Cornelius is entitled to total disability benefits from November 4, 2009.

¶ 60 Employers Insurance Company is liable for attorney fees and a penalty based on unreasonable denial of the claim.

¶ 61 Pursuant to ARM 24.5.348(2), this Judgment is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

DATED in Helena, Montana, this 27th day of April, 2012.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Jay P. Dufrechou
Kelly M. Wills
Charles G. Adams

Submitted: October 27, 2011