IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2007 MTWCC 50

WCC No. 2006-1636

LYNDA FEUERHERM

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Petitioner injured her shoulder in an industrial accident in August 2001. She was placed at maximum medical improvement and given an impairment rating in December 2002. She subsequently attended school and worked at jobs whose duties were within her permanent restrictions. Her shoulder was never pain free from the time of her industrial accident forward, and it significantly worsened in the summer of 2004. A 2005 MRI revealed rotator cuff tears. Upon his review of her 2002 shoulder MRI, her treating physician concluded that a tear had been missed on the older MRI. He further opined that the condition had progressed and was probably caused by Petitioner's 2001 industrial accident and that surgery was warranted. Respondent denied liability.

Held: Petitioner's current problems with her right shoulder, including the rotator cuff tears, were caused by her August 2001 industrial accident. Respondent is liable for continuing medical care for Petitioner's right shoulder.

Topics:

> **Credibility.** Where the Court found Petitioner to otherwise be a credible witness and where her explanation of tripping and hitting a doorway differed from the exam note of a doctor who did not testify and who was never questioned as to whether he possibly confused the tripping incident with Petitioner's industrial accident, and where a second doctor testified that his description of Petitioner's tripping incident was not recorded by him but by another doctor who also did not testify, the Court finds Petitioner's explanation of the tripping incident to be credible.

Witnesses: Credibility. Where the Court found Petitioner to otherwise be a credible witness and where her explanation of tripping and hitting a doorway differed from the exam note of a doctor who did not testify and who was never questioned as to whether he possibly confused the tripping incident with Petitioner's industrial accident, and where a second doctor testified that his description of Petitioner's tripping incident was not recorded by him but by another doctor who also did not testify, the Court finds Petitioner's explanation of the tripping incident to be credible.

Defenses: Subsequent Injury. Once a claimant has proven a work-related injury and produced evidence that the injury is a cause of a present disability, an insurer who alleges that subsequent events are the actual cause of the claimant's current disability has the burden of proving that allegation, which is in the nature of an affirmative defense, by a preponderance of the evidence. *Briney v. Pacific Employers Ins.*, 283 Mont. 346, 351, 942 P.2d 81, 84. Where the only evidence Respondent presented are two doctors' histories, and neither of the doctors who took the histories testified in this case, and where Petitioner was found credible and offered a plausible explanation as to why the doctors' histories may have misstated the event which allegedly may have caused a subsequent injury, the Court concludes Respondent did not meet its burden of proof.

Maximum Medical Improvement (MMI): When Reached. Where a doctor's uncontroverted opinion is that a complete tear of the subscapularis tendon was missed by the radiologist who initially examined Petitioner's films, Petitioner was placed at MMI on the basis of that misread MRI film, and Petitioner's treating physician testified that Petitioner's condition would be reasonably expected to improve with surgery, the Court concludes Petitioner has not reached MMI from her industrial injury.

¶ 1 The trial in this matter was held on Wednesday, April 18, 2007, in Billings, Montana. Petitioner Lynda Feuerherm was present and represented by Paul E. Toennis. Respondent was represented by Larry W. Jones.

¶ 2 Exhibits: Exhibits 1-3 and 5 were admitted without objection. Petitioner withdrew her objection to Exhibit 4 and it was admitted. Exhibit 6, additional medical records, had not been received by the parties at the time of trial. The parties subsequently provided Exhibit 6 to the Court. Upon receipt of Exhibit 6 and the parties' proposed findings of fact and conclusions of law, this matter was deemed submitted.

¶ 3 Witnesses and Depositions: The depositions of Petitioner and Dr. Randy C. Watson were taken and submitted to the Court. Petitioner was sworn and testified at trial.

¶ 4 Issues Presented: The following contested issues of law from the Pretrial Order are restated as follows:

> ¶ 4a Whether Petitioner is entitled to continuing medical care under her August 16, 2001, date of injury, including surgical repair of her rotator cuff.
>
> ¶ 4b Whether the parties settled the indemnity portion of the August 16, 2001, injury under a mutual mistake of fact situation, allowing Petitioner to revoke the previous agreement and seek indemnity benefits.[1]

¶ 5 At the start of trial, counsel for Respondent stated that Respondent had agreed to reopen Petitioner's settlement of her August 16, 2001, industrial injury. Therefore, only the issue of continuing medical care is left for the Court to decide.

FINDINGS OF FACT

¶ 6 Petitioner was sworn and testified at trial. I found her testimony credible.

¶ 7 On August 16, 2001, Petitioner suffered an industrial injury arising out of and in the course and scope of her employment with Edsall Construction in Custer County, Montana. She injured her shoulder when she tripped and fell over a half-buried wire.[2] Petitioner fell with her right arm extended and the force of the impact hit her shoulder.[3]

¶ 8 On April 17, 2003, Petitioner and Respondent entered into a settlement agreement regarding this industrial injury. Petitioner's medicals were left open.[4]

¶ 9 Petitioner has taken prescription pain medications consistently since August 2001.[5] Petitioner has not had any accidents or injuries that required medical treatment since she signed the settlement agreement.[6]

¶ 10 Petitioner treated with Dr. James F. Schwarten for her shoulder injury shortly after her industrial accident in August 2001. She also received treatment for carpal tunnel

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[1] Pretrial Order, filed April 9, 2007, at 2.

[2] Pretrial Order, filed April 9, 2007, Uncontested Facts at 2.

[3] Trial Test.

[4] *Id.*

[5] Petitioner Dep. 9:2-4.

[6] Petitioner Dep. 10:12-17.

syndrome and had surgery for that condition in 2002.[7] Dr. Schwarten had performed surgery on Petitioner's shoulder in 1996 for a previous injury and assigned her a 6% impairment rating. Petitioner testified that the August 2001 industrial injury was not an aggravation of the previous condition, but was a separate injury to a different part of her shoulder.[8]

¶ 11 In a January 25, 2002, examination note, Dr. Schwarten noted that Petitioner's shoulder did not seem to be improving, and that he intended to order an MRI. However, Dr. Schwarten further noted that he thought Petitioner's shoulder was never going to improve.[9]

¶ 12 An MRI was performed on February 8, 2002. The report includes these findings:

> No full-thickness tear is identified. There is a small amount of fluid in the subacromial subdeltoid bursae which nicely outlines the cuff and no focal full-thickness defect is identified. The cuff is somewhat thickened and there are some focal areas of bright signal suggesting either tendinopathy or partial tear. There is also evidence of cystic hyperintensity within the humeral head subjacent to the tendon insertion. Mild hypertrophic acromioclavicular joint changes are noted. The biceps tendon and labrum are intact.[10]

¶ 13 On April 22, 2002, Dr. Schwarten noted that Petitioner reported increased problems with her right shoulder, including pain from raising her arm overhead and sleep interruption. Dr. Schwarten treated Petitioner with an injection. On May 20, 2002, Dr. Schwarten noted that Petitioner's shoulder had improved since the injection, although it continued to bother her occasionally.[11]

¶ 14 Dr. Schwarten again injected Petitioner's shoulder on June 24, 2002. At that time, he informed her "that there are some things that are not going to get better." He told her not to be concerned about the popping in her shoulder, but that she should avoid heavy lifting, using jack hammers, troweling, and cement work. He noted that she might need

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[7] Trial Test.

[8] *Id*.

[9] Ex. 2 at 9.

[10] Ex. 2 at 11.

[11] Ex. 2 at 12.

occasional injections in her shoulder.[12] Dr. Schwarten subsequently injected Petitioner's shoulder on July 2, 2002, noting that she also had neck pain.[13]

¶ 15 On July 12, 2002, Dr. Schwarten placed Petitioner at MMI with a permanent impairment. He opined that Petitioner was not able to return to her time-of-injury employment. Dr. Schwarten noted that Petitioner's permanent physical restrictions were no repetitive or heavy lifting, and no use of a jack hammer.[14] On December 4, 2002, Dr. Schwarten noted that Petitioner had been given a 10% impairment rating for her shoulder, and while Petitioner reported continuing problems with her shoulder, her condition remained essentially unchanged.[15] Petitioner testified at trial that her shoulder was still bothering her at the time she received the impairment rating. Petitioner further testified that at that time, no one had suggested she might need surgery on her shoulder.[16]

¶ 16 Petitioner currently resides in Reno, Nevada, where she has lived for the last three years. Prior to moving to Reno, Petitioner resided in Miles City for a year and a half while she attended community college. Petitioner started school approximately in the spring of 2003. She was not employed during her time in Miles City and her schooling did not require any physically demanding tasks. During the time she attended school, Petitioner did not have any accidents or injuries that affected her right shoulder.[17]

¶ 17 After Petitioner moved to Reno, but prior to returning to work, she did not have any injuries to her shoulder. In the summer of 2004, Petitioner worked for Schnable Foundation Company at a job where the duties were within the restrictions Dr. Schwarten gave her. Her job duties included cutting bars and attaching nuts and washers, occasional parts running, traffic control, and cleanup. After that job ended, Petitioner got a job with Clark & Sullivan, a construction company, during March and April 2005. Her job duties included general labor such as cleanup, stacking wood, and grouting. The wood she stacked consisted of small pieces and the job did not require any heavy lifting.[18]

¶ 18 During the time that she worked for the two construction companies, Petitioner did not have any accidents or injuries, but her shoulder continued to bother her. It ached constantly and was painful with pinching sensations and jolting pain at night. Petitioner's

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[12] Ex. 2 at 13.

[13] Ex. 2 at 14.

[14] Ex. 2 at 15.

[15] Ex. 2 at 16.

[16] Trial Test.

[17] *Id*.

[18] *Id*.

shoulder would also catch or lock up with pain flaring into her neck. Petitioner testified that from the date of her August 2001 injury forward through both construction jobs she worked in Nevada, her shoulder continued to worsen.[19]

¶ 19 In approximately September 2004, Petitioner sought treatment for her shoulder with Dr. Ronald Hicks in Sparks, Nevada. Petitioner continued to treat with Dr. Hicks after she left her construction job in April 2005. She then treated with Dr. John K. Lees when Dr. Hicks was no longer available.[20]

¶ 20 On May 17, 2005, Petitioner's labor union listed her as disabled because of her shoulder condition after Dr. Lees put her on total disability. Since that time, Petitioner has been unable to work.[21]

¶ 21 During the summer of 2005, Petitioner experienced a significant increase in her shoulder pain. Petitioner does not recall any specific incident that predated the increase in pain. In August 2005, Petitioner treated with Dr. Richard C. Mullins. According to the history taken by Dr. Mullins on August 26, 2005, Petitioner reported significant pain in her right shoulder and neck but "does not recall any specific injury that started it although since then has tripped a couple of times and landed on her extended arm."[22] At trial, Petitioner explained that subsequent to moving to Nevada, she had tripped over a cat box in the hallway of her trailer. She did not fall to the ground, but fell into the bathroom door, hitting it with her ***left*** shoulder. At the time that she tripped, Petitioner was wearing a sling on her right arm. Petitioner explained that she wore a sling on her right arm as much as possible because she was having problems with her shoulder.[23]

¶ 22 Petitioner subsequently treated with Dr. Glenn G. Miller, who ordered a follow-up MRI of Petitioner's right shoulder.[24] In his notes from Petitioner's September 26, 2005, appointment, Dr. Miller noted that Petitioner had neck, back, and shoulder pain, and that she reported having "really bad" pain in her shoulder for the past two months for unknown reasons. Petitioner reported that any use of her right shoulder caused pain and she believed she was losing strength.[25]

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[19] *Id*.

[20] *Id*.

[21] *Id*.

[22] Ex. 2 at 32.

[23] Trial Test.

[24] *Id*.

[25] Ex. 2 at 35.

¶ 23 The September 30, 2005, MRI report states that a preliminary radiograph revealed "some contrast extension craniad into the acromioclavicular joint consistent with tear of the rotator cuff and capsular tear of the acromioclavicular joint allowing contrast entry."[26] The MRI revealed a full thickness tear of the distal supraspinatus tendon, a full thickness tear of the subscapularis tendon, disruption of the rotator interval capsule, and moderate hypertrophic change of the acromioclavicular joint. Scarring of the proximal coracoacromial ligament, fraying, thinning, and degenerative tearing of the superior labrum, mild to moderate long biceps tendinosis with longitudinal intrasubstance degeneration and fraying, and prominent pitting of the humeral head were also noted.[27]

¶ 24 Dr. Miller referred Petitioner to Dr. Randy C. Watson.[28] Dr. Watson is an orthopedic surgeon employed at the Lake Tahoe Orthopaedic Institute in Nevada.[29] He is board certified in orthopedic surgery.[30] Dr. Watson regularly diagnoses and treats shoulder conditions, which he estimates make up 65% of his practice.[31]

¶ 25 Dr. Watson initially examined Petitioner on October 19, 2005. He noted that Petitioner's right shoulder pain had been worsening over the last several months. He further stated, "She was able to work up until about May or June of this year when she fell on her right shoulder . . . ." Dr. Watson noted that the recent MRI revealed a full-thickness tear of the supraspinatus tendon and a "chronic-appearing complete tear of the subscapularis tendon . . . ."[32] Dr. Watson informed Petitioner about the MRI findings.[33] Dr. Watson diagnosed Petitioner with impingement syndrome of the right shoulder, with a complete tear of the supraspinatus tendon, a complete tear of the subscapularis tendon, and severe arthritis of the AC joint.[34] The tendon tears are included in the general

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[26] Ex. 2 at 37.

[27] Ex. 2 at 38.

[28] Trial Test.

[29] Watson Dep. 5:2-4.

[30] Watson Dep. 6:7-8.

[31] Watson Dep. 6:14-17.

[32] Ex. 2 at 40.

[33] Trial Test.

[34] Watson Dep. 7:24 - 8:2.

diagnosis of a "rotator cuff" tear.[35] Dr. Watson and Petitioner discussed a surgical repair of the tendons.[36]

¶ 26 At his deposition, Dr. Watson clarified that the fall he reported in Petitioner's history taken on October 19, 2005, was not related to him by the Petitioner, but the history was written by Dr. Foote, with whom Dr. Watson worked at the time. Dr. Watson does not recall asking Dr. Foote or Petitioner about the fall.[37] Dr. Watson stated that he could not state with reasonable medical certainty that, if a fall like the one Dr. Foote recorded had occurred, it would account for Petitioner's need for shoulder surgery.[38] Dr. Watson further stated that the fall possibly, but not probably, could have significantly aggravated a preexisting condition.[39]

¶ 27 Petitioner testified that when she was asked whether she had suffered any injuries or accidents, she stated that she had tripped over a cat box. She testified that she also explained that her right arm was in a sling at the time she tripped, and that she only said she tripped, not that she fell. Petitioner explained that she did not fall to the ground when she tripped over the box.[40]

¶ 28 On November 16, 2005, Dr. Watson noted that it was "very plausible" that Petitioner's shoulder condition stems from her August 2001 industrial accident, and that he was always under the impression that the rotator cuff tear occurred in 2001 as a result of that injury and had progressed since that time. He further explained:

> It seems like her shoulder was fixed after the 1996 surgery, from her 1994 injury, and this is a new industrial injury from 2001. . . .
>
> The patient had a scan done, from February of 2002, that showed a partial tear. . . . There is no reason to believe that the present complete tears, without any history of antecedent injury in the meantime, is simply a propagation of that partial tear onto a complete tear.[41]

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[35] Watson Dep. 8:6-10.

[36] Ex. 2 at 41.

[37] Watson Dep. 19:7 - 20:3.

[38] Watson Dep. 21:14-19.

[39] Watson Dep. 22:2-8.

[40] Trial Test.

[41] Ex. 2 at 45.

¶ 29 On December 9, 2005, Dr. Watson reviewed the February 2002 MRI and compared it to the September 2005 MRI. He found that the older scan contained the same abnormalities as he found in the 2005 scan, but further found that these changes had worsened over time.[42] He concluded that the radiologist's report from February 8, 2002, was incorrect in that he saw a full-thickness isolated subscapularis tear on the films. Dr. Watson further noted:

> Compared to the new scan there has been a progression of the rotator cuff tear to include not only the subscapularis but also the supraspinatus and infraspinatus with a "bald-eagle" configuration that is now present all the way around to the teres minor. The supraspinatus and infraspinatus have not retracted as far medially as the subscapularis has. On the present films the subscapularis is nowhere to be found and it's going to be very difficult to find it and retrieve it.[43]

Dr. Watson further concluded that Petitioner's rotator cuff tear had progressed from February 2002 until September 2005, to include three tendons. Dr. Watson opined that Petitioner had a severe abnormality with her rotator cuff tear in February 2002 as a result of her August 2001 industrial accident. Dr. Watson further opined that he could not state with certainty how much of the progression was natural and how much was "related to the fall she took in May or June of this year . . . ."[44]

¶ 30 At his deposition, Dr. Watson testified:

> A. The scan in February of 2002 showed only a complete tear of the subscapularis which was missed by the radiologist. But that's, you know, beside the fact. And the infraspinatus and the supraspinatus tendons were still intact at that time. There was some tearing of the supraspinatus, but it was partial tearing.
>
> And the more recent scan shows that the -- actually, the rotator cuff tears progressed to involve all three of the four tendons of the rotator cuff, the subscapularis, the infraspinatus and the supraspinatus, are now all torn, and the only cuff tendon that is still intact is the teres minor.

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[42] Watson Dep. 9:10-25.

[43] Ex. 1 to Watson Dep.

[44] Ex. 1 to Watson Dep.

> Q. Doctor, if there were no significant trauma between the two scans, would these changes be a natural or normal progression of the condition that was previously determined to be related to an injury in 2001?
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> A. I feel with medical probability that that certainly could be the case, yes.[45]

¶ 31 Dr. Watson testified that a subscapularis tear which was visible on Petitioner's February 2002 MRI was missed by the radiologist at that time.[46] Dr. Watson testified that based on Petitioner's history of developing symptoms after her fall in 2001, had he seen her MRI in February 2002 and seen the subscapularis tear at that time, he would have recommended surgery at that point.[47]

¶ 32 Jack Randolph (Randolph), Field Investigator for Respondent, took a recorded statement from Petitioner on April 12, 2006. Randolph asked Petitioner if she had tripped or fallen over a cat box in May or June of 2005. Petitioner responded that she tripped over a cat box in her hallway and that she fell into the wall to the left. She stated that her right arm was in a sling at the time that she tripped and that she did not fall to the floor. She further stated that when she received a copy of Dr. Watson's report, she saw that the incident was worded incorrectly and she contacted her attorney and Dr. Watson's office to inform them of the error.[48]

¶ 33 I have found Petitioner to be a credible witness. I further specifically find Petitioner's account of tripping over the cat box while her right arm was in a sling, causing her to hit the wall with her left shoulder without falling on the floor, to be credible. Petitioner has consistently offered this explanation, and Respondent has offered no testimony to contradict it. What Respondent offers is an exam note from Dr. Mullins, whose description of Petitioner's alleged fall in Nevada, as Petitioner points out, accurately describes Petitioner's August 2001 industrial accident. Petitioner surmised that Dr. Mullins may have confused her description of the industrial accident with her account of tripping over a cat box in her hallway. I find this to be a plausible explanation for the discrepancy. With no testimony from Dr. Mullins, I cannot guess whether Dr. Mullins would stand by his history as being accurate or concede that he may have confused two separate events. Likewise, although Dr. Watson reported a similar incident in the history portion of his exam notes during his first visit with Petitioner, Dr. Watson testified that he did not take the history, but

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[45] Watson Dep. 10:7-24.

[46] Watson Dep. 17:13-19.

[47] Watson Dep. 18:10 - 19:6.

[48] Ex. 5 at 13-15.

that it was taken by Dr. Foote. Again, with no testimony from Dr. Foote, I cannot determine whether Dr. Foote believes the history to be accurate in light of Petitioner's assertion that it is not.

¶ 34 Petitioner testified that her shoulder has felt the same since the August 2001 injury.[49] She experiences a constant ache in the shoulder and she has had some limitations in her ability to use her right arm. She cannot lift items as heavy as those she was previously able to lift, and her two shoulders are noticeably different in size. She cannot carry a purse on her right side without her shoulder bothering her.[50]

¶ 35 At his January 16, 2007, deposition, Dr. Watson testified that as of the last time he saw Petitioner, he believed she was a surgical candidate.[51]

CONCLUSIONS OF LAW

¶ 36 This case is governed by the 2001 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Petitioner's injury.[52]

¶ 37 Petitioner bears the burden of proving by a preponderance of the evidence that she is entitled to the benefits she seeks.[53] Petitioner has met her burden. Dr. Watson's uncontroverted testimony was that Petitioner's current condition is a natural or normal progression of the condition that was previously determined to be related to her 2001 industrial injury.

¶ 38 Once a claimant has proven a work-related injury and produced evidence that the injury is a cause of a present disability, an insurer who alleges that subsequent events are the actual cause of the claimant's current disability has the burden of proving that allegation, which is in the nature of an affirmative defense, by a preponderance of the evidence.[54] Respondent has not met that burden. The ***only*** evidence that Respondent has presented is a history taken by Dr. Mullins which reports that Petitioner "has tripped a couple of times and landed on her extended arm," and Dr. Watson's history of October 19,

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[49] Petitioner Dep. 6:24-25.

[50] Petitioner Dep. 7:3 - 8:2.

[51] Watson Dep. 8:15-24.

[52] *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

[53] *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).

[54] *Briney v. Pacific Employers Ins. Co.*, 283 Mont. 346, 351, 942 P.2d 81, 84 (*citing Walker v. United Parcel Serv.*, 262 Mont. 450, 456, 865 P.2d 1113, 1117 (1993)).

2005, which Dr. Watson testified he did not personally take and whose accuracy he cannot vouch for. Furthermore, it is Dr. Watson's opinion that this alleged fall possibly, but ***not*** probably, could account for the current state of Petitioner's shoulder.

¶ 39 Neither Dr. Mullins nor Dr. Foote, who took the history for Dr. Watson, testified at trial and the Court has no way to assess their credibility. On the other hand, Petitioner testified that she believes Dr. Mullins confused her description of her August 2001 industrial accident – in which she tripped and fell onto her extended arm – with her report of tripping over a cat box in her hallway and hitting the wall with her left shoulder. I have found this to be a reasonable explanation. I have further found Petitioner to be a credible witness at trial. Respondent has presented no testimony to contradict Petitioner's account of events.

¶ 40 Furthermore, I question whether Petitioner was at MMI at the time Dr. Schwarten declared her to be. Section 39-71-116(18), MCA, defines "maximum medical healing" as a point in the healing process when further material improvement would not be reasonably expected from primary medical treatment. In *Boster v. Liberty Mutual Fire Insurance Company*, this Court held that maximum healing occurs at the point of time when further treatment cannot be reasonably expected to materially improve a claimant's condition.[55]
¶ 41 The uncontroverted opinion of Dr. Watson is that a complete tear of the subscapularis tendon was missed by the radiologist who reported Petitioner's February 2002 MRI. Dr. Watson testified that based on Petitioner's history of developing symptoms after her fall in 2001, had he seen her MRI in February 2002 and seen the subscapularis tear at that time, he would have recommended surgery at that point. Given the fact that a tear was missed and that the uncontroverted testimony of Petitioner's treating physician is that Petitioner's condition would be reasonably expected to improve with surgery, I cannot say that Petitioner is now, or ever was, at MMI from her August 16, 2001, industrial injury.

¶ 42 Section 39-71-407(5), MCA, states, "If a claimant who has reached maximum healing suffers a subsequent nonwork-related injury to the same part of the body, the workers' compensation insurer is not liable for any compensation or medical benefits caused by the subsequent nonwork-related injury." Assuming, for the sake of argument, that Petitioner had suffered a subsequent nonwork-related injury, she was not at maximum healing at the time it occurred. Therefore, Respondent would not be relieved of liability in any event.

¶ 43 Petitioner has met her burden of proof. She is therefore entitled to the relief she seeks.

JUDGMENT

[55] *Boster*, 2002 MTWCC 64, ¶ 72.

¶ 44 Petitioner is entitled to continuing medical care under her August 16, 2001, date of injury, including surgical repair of her rotator cuff.

¶ 45 This JUDGMENT is certified as final for purposes of appeal.

¶ 46 Any party to this dispute may have twenty days in which to request reconsideration from these FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT.

DATED in Helena, Montana, this 4th day of December, 2007.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Paul E. Toennis
Larry W. Jones
Submitted: June 25, 2007