IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2006 MTWCC 5

WCC No. 2005-1337

MARY ANN GAMBLE

Petitioner

vs.

SEARS, THE PARENT SEARS HOLDINGS CORPORATION, SUBSIDIARIES AND AFFILIATES K-MART, THE PARENT SEARS HOLDINGS CORPORATION, SUBSIDIARIES AND AFFILIATES

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Appealed to Supreme Court 02/23/06
Affirmed 06/05/07

Summary: Petitioner petitioned for the May 15, 2001 settlement by the parties to be set aside based on a mutual mistake of fact.

Held: Where Petitioner and Respondent mistakenly believed Petitioner had reached MMI at the time the parties entered a settlement agreement, when in fact she had a non-healed fracture in her neck which required surgical treatment, the mutual mistake of fact was material and the settlement agreement is set aside.

Topics:

Contracts: Generally. The full and final settlement entered into by the parties is a contract. Therefore, contract law governs the agreement. *Morrissette v. Zurich American Ins. Co.*, 2000 MTWCC 2, ¶ 61 (citing *Kienas v. Peterson*, 191 Mont. 325, 329, 624 P.2d 1, 3 (1980)).

Settlements: Reopening: Rescission. The full and final settlement entered into by the parties is a contract. Therefore, contract law governs the agreement. *Morrissette v. Zurich American Ins. Co.*, 2000 MTWCC 2, ¶ 61

(citing *Kienas v. Peterson*, 191 Mont. 325, 329, 624 P.2d 1, 3 (1980)). In *South v. Transportation Ins. Co.*, 275 Mont. 397, 401, 913 P.2d 233, 235 (1996), the Montana Supreme Court explained that a material mistake of fact concerning a worker's medical condition may justify rescission of the contract if the mistake is so fundamental as to defeat the object of the parties in making the contract.

Settlements: Reopening: Mistake of Fact. Where the record illustrates that both parties were mistaken as to the status of Petitioner's neck injury, and mistakenly determined that Petitioner was at MMI for a soft-tissue injury or neck strain when she actually had an undiscovered odontoid fracture, the settlement is properly set aside for mistake of fact.

Settlements: Reopening: Materiality of Mistake. Where the record illustrates that both parties were mistaken as to the status of Petitioner's neck injury, and mistakenly determined that Petitioner was at MMI for a soft-tissue injury or neck strain when she actually had an undiscovered odontoid fracture, this mistake was material to the settlement and is properly set aside.

Medical Conditions (by Specific Condition): Cervical Fracture. Where a Petitioner had a heavy piece of furniture fall on her head in 1997, was diagnosed with a neck strain or soft-tissue injury, continued to experience pain, and was ultimately determined to have an odontoid fracture after a CT scan was taken in 2004, and her doctor testified that an odontoid fracture is typically caused by trauma and that Petitioner's accident was consistent with the type of trauma which could cause an odontoid fracture, and no plausible alternative was advanced as a source of the odontoid fracture other than the 1997 accident, the Court found that Petitioner suffered the fracture in 1997 and it was not discovered until 2004.

Benefits: Medical Benefits: Liability. Where Respondent did not contend that surgery was not medically necessary, nor that Petitioner's surgeon was not an appropriate doctor to perform the surgery, and where Respondent's IME doctor found the surgery to be "very reasonable" and Petitioner's surgeon did not opine until after the surgery that Petitioner's injury stemmed from her industrial accident, Petitioner's failure to receive pre-authorization for the surgery does not absolve Respondent from liability for the medical expenses Petitioner incurred as a result of her condition.

Benefits: Medical Benefits: Surgery. Where Respondent did not contend that surgery was not medically necessary, nor that Petitioner's surgeon was not an appropriate doctor to perform the surgery, and where Respondent's IME doctor found the surgery to be "very reasonable" and Petitioner's surgeon did not opine until after the surgery that Petitioner's injury stemmed from her industrial accident, Petitioner's failure to receive pre-authorization for the surgery does not absolve Respondent from liability for the medical expenses Petitioner incurred as a result of her condition.

Physicians: Treatment: Preauthorization. Petitioner's failure to obtain pre-authorization for surgery will not preclude Respondent's liability when no one knew at the time she obtained treatment that her medical problem stemmed from her industrial accident. The fact that Petitioner petitioned this Court after the surgery was performed, and after the surgeon came to his conclusion that the fracture stemmed from the industrial accident, does not somehow absolve Respondent of its liability.

Penalties: Insurers. Where most of the x-ray, MRI, and CT myelogram films taken shortly after Petitioner's injury had been destroyed, and where doctors disagreed as to whether Petitioner's newly-discovered neck fracture stemmed from her industrial accident several years earlier, Respondent did not act unreasonably in opposing reopening the settlement and thus no penalty is assessed.

Costs: Workers' Compensation Court Costs. Petitioner is entitled to her costs since she prevailed on the substantive issues of this action.

¶ 1 The trial in this matter was held on January 9, 2006, in Great Falls, Montana. Petitioner, Mary Ann Gamble, was present and represented by Mr. Mark M. Kovacich. Respondent was represented by Mr. Michael P. Heringer.

¶ 2 Exhibits: Exhibits 1 through 31 were admitted without objection.[1]

¶ 3 Witnesses and Depositions: The depositions of Michael A. Dube, M.D.; Dale Schaefer, M.D.; George Ro, M.D.; Gary L. Schumacher, M.D.; Jerry Speer, M.D.; Steven Rizzolo, M.D.; Allen M. Weinert, Jr., M.D.; Gary Rapaport, M.D.; John C. Hackethorn, M.D.;

[1] Exhibit 31 is a composite of exhibits used at various depositions and was admitted to the extent that it is not duplicative of other exhibits, and subject to the objections on record with each respective deposition.

and Mary Ann Gamble were taken and submitted to the Court. Mary Ann Gamble and Jack Gamble were sworn and testified at trial.

¶ 4 Issues Presented: The Pretrial Order states the following contested issues of law:

> ¶ 4a Whether Petitioner's claim was settled based on a mutual mistake of fact in 2001 requiring that the settlement be set aside.
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> ¶ 4b Whether Respondent is liable to Petitioner for past and future medical expenses relating to her cervical condition.
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> ¶ 4c Whether Petitioner is entitled to a 20% penalty.
>
> ¶ 4d Whether Petitioner is entitled to attorney fees and costs.

(Pretrial Order at 2-3.)

FINDINGS OF FACT

¶ 5 Petitioner was a credible witness and the Court finds her testimony at trial credible.

¶ 6 Jack Gamble was a credible witness and the Court finds his testimony at trial credible.

¶ 7 Petitioner is 59 years old. She resides with her husband, Jack Gamble, in Great Falls, Montana. She is the mother of four adult children.[2]

¶ 8 Petitioner obtained her GED in 1965. In October 1988, she began working for K-Mart.[3] Petitioner held several job positions with K-Mart in its retail store in Great Falls, Cascade County, Montana. Petitioner was promoted to housewares department manager in 1996 and was working in that position at the time of her injury.[4]

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[2] Gamble Dep. at 4-5 (July 26, 2005).

[3] Respondent is the successor to K-Mart Corporation and has assumed liability for K-Mart's workers' compensation claims.

[4] Gamble Dep. at 5-6.

¶ 9 Throughout the term of Petitioner's employment with K-Mart, the corporation was self-insured for workers' compensation purposes.[5]

¶ 10 On May 16, 1997, Petitioner suffered an injury in the course and scope of her employment with Respondent.[6] She was sliding a heavy piece of furniture from a cart to a shelf when it slipped and fell onto her head.[7] Petitioner immediately felt pain in her neck and knee, and heard a crunching sound in her neck.[8]

Pre-Settlement Medical History

¶ 11 Petitioner visited a chiropractor soon after the accident.[9] She continued to experience neck pain and sought medical treatment from Dr. Jerry Speer on November 19, 1997.[10]

¶ 12 Dr. Speer is a family practitioner, board certified in family medicine, who has had a family practice in Great Falls, Montana, for several years.[11] Based upon his examination, Dr. Speer believed Petitioner suffered a muscular injury with underlying osteoarthritic problems. He prescribed Naprosyn, an anti-inflammatory.[12]

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[5] Pretrial Order, Uncontested Fact, ¶ 2.

[6] *Id.*, ¶ 3. This case is governed by the 1995 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Petitioner's industrial accident. *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986). Any reference to statutes cited from the Montana Code will employ the language from the 1995 version.

[7] Gamble Dep. at 10-11.

[8] *Id.* at 11. Only Petitioner's neck injury is at issue in the present case, and her other injuries will not be discussed further.

[9] Ex. 27A at 4.

[10] Gamble Dep. at 28.

[11] Speer Dep. at 3 (Dec. 2, 2005).

[12] *Id.* at 7-8.

¶ 13 Petitioner filed a Claim for Compensation on January 22, 1998.[13] Respondent accepted liability for the claim and has paid benefits for Petitioner's neck and knee conditions.[14]

¶ 14 Dr. Speer referred Petitioner to Dr. Dale Schaefer, a board-certified neurosurgeon, for further treatment.[15] Dr. Schaefer diagnosed Petitioner's condition as a soft-tissue strain injury and recommended physical therapy.[16]

¶ 15 In subsequent examinations, Dr. Schaefer noted that physical therapy had not improved Petitioner's pain. He recommended a cervical myelogram and CT scan to assess Petitioner's condition.[17]

¶ 16 Dr. Gary L. Schumacher, a radiologist, performed the cervical myelogram and CT scan tests recommended by Dr. Schaefer.[18] Both Dr. Schumacher and Dr. Schaefer examined the films and neither observed an odontoid fracture.[19] After reviewing Dr. Schumacher's films and Petitioner's lack of improvement following physical therapy, Dr. Schaefer concluded that Petitioner's neck pain was related to arthritic degenerative changes.[20]

¶ 17 Petitioner continued to work at K-Mart until March 1998.[21] At trial, Petitioner testified that in the months following her industrial accident, she would leave work because of headaches and she would get nauseous if she leaned forward.[22] Although she was

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[13] Pretrial Order, Uncontested Fact, ¶ 4; Gamble Dep. Ex. 1.

[14] Pretrial Order, Uncontested Fact, ¶ 5.

[15] Speer Dep. at 8.

[16] Schaefer Dep. at 10 (Dec. 2, 2005).

[17] *Id.* at 12.

[18] Schaefer Dep. at 14; Schumacher Dep. at 6-7 (Dec. 19, 2005).

[19] Schaefer Dep. at 14; Schumacher Dep. at 9-11.

[20] Schaefer Dep. at 18-19.

[21] Ex. 28 at 24.

[22] Trial Test.

released to light-duty employment, Petitioner felt that she could not work because of her pain.[23]

¶ 18 On September 9, 1998, Dr. Allen M. Weinert placed Petitioner at maximum medical improvement (MMI) with respect to her cervical condition and assigned a 5% whole person impairment to the condition. Dr. Weinert diagnosed "mechanical neck pain, related to cervical myofascial pain, related to work injury of 5/16/97, with additional aggravation of preexistent degenerative arthritis of cervical facets."[24]

¶ 19 On September 17, 1998, Petitioner reported to Dr. Speer that she was suffering from severe headaches.[25] Dr. Speer ultimately diagnosed cervicogenic headaches that he believed arose from muscular problems in Petitioner's neck.[26]

¶ 20 On May 15, 2001, the parties settled Petitioner's claims for disability and rehabilitation benefits for a total of $57,500. At the time, the parties did not disagree on the diagnosis of Petitioner's cervical condition. Both parties believed, based on the medical evidence available at the time, that Petitioner had attained MMI. Although the parties agreed Petitioner had reached MMI, they disagreed on whether Petitioner could return to work. Pursuant to the settlement, Petitioner's medical benefits remained open.[27]

Post-Settlement Medical

¶ 21 Petitioner's neck pain and headaches did not improve in the years following the incident, and she also had range-of-motion limitations in her neck.[28]

¶ 22 Petitioner also experienced numbness or a burning sensation in her face. The numbness and burning sensations worsened in 2004 and Petitioner reported them to Dr. Legan, who had become Petitioner's treating physician after Dr. Speer ceased to see patients.[29]

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[23] Ex. 14 at 1; Gamble Dep. at 43.

[24] Pretrial Order, Uncontested Fact, ¶ 6; Weinert Dep. at 14 (Nov. 29, 2005).

[25] Speer Dep. at 11.

[26] *Id.* at 14.

[27] Ex. 5.

[28] Gamble Dep. at 49; Speer Dep. at 13-14.

[29] Gamble Dep. at 49-50.

¶ 23 Dr. Legan referred Petitioner to Dr. Michael A. Dube, a board-certified orthopedic surgeon.[30] Dr. Dube saw Petitioner for the first time on August 5, 2004.[31] After reviewing an MRI, Dr. Dube recommended a CT scan.[32] On August 19, 2004, after reviewing the CT scan, Dr. Dube diagnosed a nonunion fracture of the dens in Petitioner's cervical spine.[33]

¶ 24 In his deposition, Dr. Dube testified that Petitioner's symptoms of headaches and neck pain were consistent with an unhealed odontoid fracture.[34] He further testified that evidence of callous formation around the fracture visible on the CT scan indicated that the fracture was a chronic, or old, fracture.[35] Dr. Dube recommended surgery and on September 17, 2004, he performed a multilevel fusion of Petitioner's cervical spine.[36]

¶ 25 Following the surgery, and based on Petitioner's history, the findings of the radiology studies, and the findings of his surgery, Dr. Dube opined that the fracture in Petitioner's neck had been present for a long time.[37] Dr. Dube testified that an odontoid fracture is typically caused by trauma and that the industrial accident Petitioner described was consistent with the type of trauma which could cause an odontoid fracture.[38] He stated that he believed Petitioner's odontoid fracture occurred when the furniture fell on her head while she was working at K-Mart.[39]

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[30] *Id.* at 55.

[31] Dube Dep. at 5 (Jan. 3, 2006).

[32] *Id.* at 6.

[33] *Id.*

[34] *Id.* at 7.

[35] *Id.* at 8.

[36] *Id.* at 11.

[37] *Id.* at 10.

[38] *Id.*

[39] *Id.* at 18.

¶ 26 Petitioner had undergone multiple radiological studies of her cervical spine prior to the settlement in 2001, including x-rays, an MRI, and a CT myelogram.[40] By 2004, most of the films from those studies had been destroyed. Two films from x-rays taken in March 1998 were available to the witnesses and the Court.[41]

¶ 27 Dr. Dube reviewed the 1998 films and testified that the fracture he treated in 2004 was present at the time the earlier films were taken. Dr. Dube asserted that a lucency on the x-ray films was present at the location of the fracture.[42]

¶ 28 Dr. George Ro, a board-certified radiologist, testified by deposition. Dr. Ro reviewed MRI and CT scan studies of Petitioner's cervical spine in 2004.[43] Based on those studies, Dr. Ro agreed with Dr. Dube that Petitioner's odontoid fracture had been present for a long time.[44] Dr. Ro also reviewed the 1998 x-ray films and testified that the fracture was present in Petitioner's dens at the time those films were taken.[45]

¶ 29 Some of the physicians who treated Petitioner prior to 2001 also testified by deposition but did not identify an odontoid fracture on the 1998 x-ray films.[46] However, all of these physicians agreed that fractures can be missed in the reasonable interpretation of radiological studies.[47]

¶ 30 Dr. Schaefer testified that the condition of Petitioner's neck as shown on the August 4, 2004 MRI required surgery.[48] Dr. Steven Rizzolo, a board-certified orthopedic surgeon, testified that if medical management did not control Petitioner's pain, the surgery

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[40] Speer Dep. at 7-9.

[41] Ex. 2.

[42] Dube Dep. at 8-9 (Jan. 3, 2006).

[43] Ro Dep. at 6-8 (Dec. 2, 2005).

[44] *Id.* at 19.

[45] *Id.* at 16.

[46] Speer Dep. at 9; Schaefer Dep. at 14; Schumacher Dep. at 19-20; Hackethorn Dep. at 24-25 (Dec. 19, 2005); Rizzolo Dep. at 19 (Jan. 4, 2006); Weinert Dep. at 22-23.

[47] Speer Dep. at 19; Schaefer Dep. at 33; Schumacher Dep. at 23; Hackethorn Dep. at 31; Rizzolo Dep. at 33; Weinert Dep. at 28.

[48] Schaefer Dep. at 17.

that Dr. Dube performed would be "very reasonable."[49] Dr. Speer testified that he would typically refer a patient with an odontoid fracture to a surgeon.[50]

¶ 31 Dr. Rizzolo completed an IME on Petitioner on March 20, 1998.[51] Based on his review of x-rays and an MRI, he concluded Petitioner had underlying arthritic changes and wanted to rule out rheumatoid conditions in Petitioner's neck.[52] Dr. Rizzolo later reviewed the August 2004 radiographic reports. In his deposition, Dr. Rizzolo opined that an odontoid fracture such as Petitioner's could be caused by rheumatoid arthritis. Aside from rheumatoid arthritis, Dr. Rizzolo offered no alternative theory to a traumatic cause of the fracture.[53]

¶ 32 Petitioner testified that she had been tested for rheumatoid arthritis and that the test results indicated she does not have the disease. Petitioner's testimony is borne out by her medical records which reflect a test for rheumatoid arthritis being ordered by Dr. Speer. [54] Petitioner further testified that she has experienced no other traumas, such as a car accident, fall, or being struck in the head since she was hit by the falling furniture at K-Mart in May 1997.[55]

¶ 33 The Court finds the testimony of Dr. Dube and Dr. Ro persuasive. No plausible alternative has been advanced as a source of the odontoid fracture other than the injury which occurred while Petitioner was working for K-Mart in May 1997. Moreover, the mechanism of injury, as Petitioner described it, is consistent with an incident that would cause such a fracture. Based on the record before it, the Court does not find that Petitioner's treatment prior to 2001 was inappropriate. However, the Court finds that Petitioner suffered the odontoid fracture in 1997 and the fracture was not discovered until 2004.

¶ 34 When the parties settled Petitioner's claim in 2001, they were operating under a mutual mistake of fact. The parties believed Petitioner was suffering from a connective

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[49] Rizzolo Dep. at 23.

[50] Speer Dep. at 22.

[51] Ex. 23.

[52] *Id.* at 3.

[53] Rizzolo Dep. at 21-22.

[54] Ex. 27 A at 17.

[55] Trial Test.

tissue disorder in her neck and had attained MMI. In fact, Petitioner was suffering from a fracture in her neck and had not attained MMI. The parties' mutual mistake was material. Had the parties known Petitioner's neck was fractured, Petitioner would have received additional temporary total disability benefits, and the settlement value of her claim would have been substantially higher.

¶ 35 Since May 1997, Petitioner has sought treatment of her injuries with multiple physicians. Respondent has never required Petitioner to seek preauthorization for treatment by any physician.[56]

¶ 36 When Petitioner sought treatment with Dr. Dube, she was uncertain as to the nature and cause of her cervical condition.[57] Her prior physician, Dr. Jerry Speer, had diagnosed connective tissue disorders relating to the industrial accident.[58] A medical opinion that the fracture in Petitioner's cervical spine was related to her industrial injury was not available until after Dr. Dube performed surgery on her neck.[59]

¶ 37 Since her neck surgery in August 2004, Petitioner's pain and facial numbness have improved significantly.[60] However, Dr. Dube testified that she may require an additional fusion surgery in the future.[61]

CONCLUSIONS OF LAW

¶ 38 This case is governed by the 1995 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Petitioner's industrial accident.[62]

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[56] *Id.*

[57] *Id.*

[58] Speer Dep. at 14.

[59] Dube Dep. at 10.

[60] Gamble Dep. at 64-65; Trial Test.

[61] Dube Dep. at 11.

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

¶ 39 Petitioner bears the burden of proving by a preponderance of the evidence that she is entitled to the benefits she seeks.[63]

I. Reopening of Settlement Position

¶ 40 The full and final settlement entered into by the parties is a contract. Therefore, contract law governs the agreement.[64] A contract may be rescinded when the parties were laboring under a mutual mistake regarding a material fact when the contract was made.[65] The contract may be rescinded only where "the parties share a common misconception about a vital fact upon which they based their bargain."[66]

¶ 41 In *South*, the Montana Supreme Court explained that a material mistake of fact concerning a worker's medical condition may justify rescission of the contract if the mistake regards a fact that is vital to the completion of the contract and the mistake is so fundamental as to defeat the object of the parties in making the contract.[67]

¶ 42 The record illustrates that both parties were mistaken as to the status of Petitioner's neck injury. Neither Petitioner nor the doctors who examined her prior to Dr. Dube in 2004 suspected an odontoid fracture.

¶ 43 Similarly, the record illustrates that both parties relied upon the diagnosis of a soft-tissue injury or neck strain when the mistaken MMI determination was made.

II. Liability for Past and Future Medical Expenses Related to Cervical Condition

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[63] *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).

[64] *Morrissette v. Zurich American Ins. Co.*, 2000 MTWCC 2, ¶ 61 (*citing Kienas v. Peterson*, 191 Mont. 325, 329, 624 P.2d 1, 3 (1980)).

[65] *Morrissette*, ¶ 61 (*citing South v. Transportation Ins. Co.*, 275 Mont. 397, 401, 913 P.2d 233, 235 (1996)).

[66] *Morrissette,* ¶ 61 (*quoting Mitchell v. Boyer*, 237 Mont. 434, 437, 774 P.2d 384, 386 (1989) (citations omitted)).

[67] *South v. Transportation Ins. Co.*, 275 Mont. 397, 401, 913 P.2d 233, 235 (1996); *see also Morrissette*, ¶ 62.

¶ 44 Pursuant to § 39-71-704, MCA, Respondent is liable for Petitioner's reasonable medical expenses incurred as a result of her industrial injury. The Court has found that Dr. Dube's treatment, including the surgery, was necessary as a result of the industrial injury. Respondent argues it is not liable for the treatment because Dr. Dube was not the treating physician, and Respondent did not authorize Dr. Dube's treatment.

¶ 45 The record indicates that Petitioner has treated with several physicians for the injuries resulting from her industrial accident. None of the physicians diagnosed Petitioner's cervical fracture. Rather, the physicians advised Petitioner that she did not require further treatment. Therefore, when Petitioner began treating with Dr. Dube, she had no reason to request authorization from the workers' compensation carrier. It was not until after her surgery that Dr. Dube opined Petitioner's cervical fracture resulted from her industrial accident. At that point, Petitioner notified Respondent and requested reimbursement for the necessary medical expenses.

¶ 46 Under these circumstances, the Court concludes it was unreasonable to expect Petitioner to seek preauthorization for the treatment she obtained from Dr. Dube because no one knew at the time she sought treatment with Dr. Dube that her medical problem stemmed from her industrial accident. Moreover, since Respondent has maintained the position that Petitioner's odontoid fracture did not occur as a result of her industrial accident, had Petitioner sought preauthorization, Respondent obviously would have denied payment. Had Petitioner then petitioned this Court regarding Respondent's denial, this Court would have ruled – as it has in the case as it stands – that the odontoid fracture did occur as a result of Petitioner's industrial accident, and Respondent would have been liable. The fact that Petitioner petitioned this Court after the surgery was performed, and after the surgeon came to his conclusion that the fracture stemmed from the industrial accident, does not somehow absolve Respondent of its liability.

¶ 47 Respondent did not contend the surgery was not medically necessary, nor did it contend that Dr. Dube was not an appropriate doctor to perform the surgery. In fact, Respondent's IME doctor found the surgery to be "very reasonable."[68] Thus, the preauthorization rule upon which Respondent relies cannot apply. Respondent is liable for the medical expenses Petitioner incurred as a result of her cervical condition.

III. Attorney Fees, Penalty, and Costs

[68] *See ¶ 30, above.*

¶ 48 Attorney fees and a penalty may be awarded only if the insurer's conduct was unreasonable.[69] Taking into consideration that the films from Petitioner's 1997 and 1998 tests were largely destroyed, and the doctors disagreed as to whether Petitioner's neck fracture stemmed from the industrial accident, the Court does not conclude the insurer acted unreasonably in opposing reopening the settlement.

¶ 49 Petitioner is, however, entitled to her costs in the judgment of this Court since she prevailed on the substantive issues of this action.[70]

JUDGMENT

¶ 50 The settlement agreement between the parties is hereby set aside and Petitioner's claim is reopened.

¶ 51 Petitioner is entitled to costs pursuant to § 39-71-611, MCA. The parties shall follow the procedures set forth in ARM 24.5.342.

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

¶ 53 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 30th day of January, 2006.

(SEAL)

JAMES JEREMIAH SHEA
JUDGE

[69] §§ 39-71-611 through -612, and -2907, MCA.

[70] *Marcott v. Lousiana Pac. Corp.*, 1994 MTWCC 109 (*aff'd after remand at* 1996 MTWCC 33).

c: Mr. Mark M. Kovacich
Mr. Michael P. Heringer
Submitted: January 9, 2006