**IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA**

**2009 MTWCC 3**

**WCC No. 2007-1838**

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**MONTANA STATE FUND**

**Petitioner/Insurer**

**vs.**

**ZURICH AMERICAN INSURANCE COMPANY**

**Respondent**

**IN RE: MARY GOLT**

**Claimant.**

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FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

**Summary:** In 1995 Petitioner and Claimant settled a 1993 workers' compensation claim for Claimant's low back, closing indemnity benefits but leaving medical benefits open. In 1998 Claimant purchased a bar and restaurant which she ran as a sole proprietor. Claimant eventually accepted a clerical position for an employer insured by Respondent, while continuing to run her bar and restaurant. Claimant's job duties with Respondent's insured changed over time, requiring her to spend more of her workday seated. Claimant experienced increased pain in her back which she attributed to sitting in one place for too long. Petitioner's claims adjuster believed that Claimant's condition could no longer be attributed to her 1993 industrial injury and he suggested she file a claim with Respondent while Petitioner continued to pay her benefits under a reservation of rights. Respondent denied liability. Petitioner continued to pay for Claimant's medical care, including back surgery, while pursuing indemnification from Respondent.

**Held:** The evidence presented in this case leads me to conclude that the current condition of Claimant's back was neither caused by her 1993 industrial injury nor her 2006 occupational disease. Therefore, neither Petitioner nor Respondent are entitled to receive indemnification from the other. Since Claimant is not a party to this action, this Court cannot order her to reimburse either insurer.

**Topics:**

**Proof: Burden of Proof: Between Insurers.** Since Claimant did not prove that her current back condition is compensable as a work-related injury, neither insurer has the burden to prove the other is liable for a condition which is not work-related.

**Indemnification: Between Insurers.** Since Claimant did not prove that her condition is compensable as a work-related injury, neither insurer who paid Claimant benefits can be ordered to indemnify the other.

**Claims: Reservation of Rights.** Where Claimant was not made a party to an action between insurers, this Court cannot order Claimant to reimburse the insurer who paid benefits under a reservation of rights.

**Constitutions, Statutes, Regulations, and Rules: Administrative Rules of Montana: 24.5.308.** Claimant is not joined as a party to an action between insurers where she was never made a third-party respondent. When the evidence put Respondent on notice that Claimant's condition might be related to her activities outside of her employment with both Petitioner's and Respondent's insureds, Respondent could have moved to have her named as a third-party respondent, but did not do so.

**Procedure: Joining Third Parties.** When the evidence put Respondent on notice that Claimant's condition might be related to her activities outside of her employment with both Petitioner's and Respondent's insureds, Respondent could have moved to have her named as a third-party respondent, but did not do so. Therefore the Court cannot hold Claimant liable for reimbursement because she has the right to due process which was not afforded to her via her non-party status in the case.

**Procedure: Pretrial Order.** In an indemnification dispute, Claimant had contentions in the Pretrial Order and signed it along with counsel for Petitioner/Insurer and Respondent/Insurer. However, Claimant was never made a third-party respondent, and when she signed the Pretrial Order, she did so in her capacity as the claimant whose claims were the subject of the action between insurers and not as a party to the action.

¶ 1 The trial in this matter was held on September 5, 2007, in Great Falls, Montana. Petitioner was represented by Greg E. Overturf. Respondent was represented by Michael P. Heringer. Claimant Mary Golt appeared pro sé.

¶ 2 Exhibits: Exhibits 1 through 66 and 68 were admitted without objection. Petitioner objected to Exhibits 67 and 69 through 72 on the grounds that they were not exchanged by the date set forth in the Scheduling Order and are therefore untimely. Exhibit 67 was

admitted over Petitioner's objection as the Court determined Respondent had shown good cause for its untimeliness and Petitioner was not prejudiced by it. Exhibits 69 and 72 were admitted after Petitioner withdrew objections to those exhibits, and with the provision that both would be admitted. Petitioner's objections to Exhibits 70 and 71 were sustained.

¶ 3 Witnesses and Depositions: The depositions of Claimant, Howard C. Chandler, Jr., M.D., and Ronald M. Peterson, M.D., were submitted to the Court and can be considered part of the record. Claimant, Lynn Lutz, Marlena Halko, Alvie Kinaman, and Marie Welsh were sworn and testified at trial.

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

¶ 4a Which insurer is liable for Claimant's continuing low-back problems, including her need for surgery in September 2006;

¶ 4b Whether Claimant's low-back condition is the natural progression of her November 12, 1993, injury;

¶ 4c Whether Claimant suffered a compensable injury or occupational disease in the course and scope of her employment at Montana Refining Company, relieving Petitioner of liability for her low-back condition;

¶ 4d Whether Respondent is entitled to indemnification from Petitioner or reimbursement from Claimant for the temporary total disability (TTD) benefits it has paid Claimant under a reservation of rights retroactive to her date of surgery on September 26, 2006; and

¶ 4e Whether Petitioner is entitled to indemnification for medical benefits paid to Claimant under a reservation of rights.

## FINDINGS OF FACT

### Claimant's Industrial Injury and Time-of-Injury Employer

¶ 5 Claimant began working for Worldwide Press, Inc., in 1983 or 1984.[2] She injured her low back on November 12, 1993, while working there.[3] Claimant was lifting a box and felt a pop in her back.[4] She did not immediately seek medical treatment because the

[1] Pretrial Order at 2-3.

[2] Golt Dep. 9:7-10.

[3] Pretrial Order, Uncontested Fact 1.

[4] Trial Test.

workers were rushing to fill an order.[5] Over the next few days, she continued to have pain and began to drag her leg. Her supervisors advised her to seek treatment. Claimant was put on light-duty office work while her medical providers tried to determine the cause of her symptoms. At the time, she could not bend over, and standing in one place for extended periods of time caused back pain.[6]

¶ 6 Worldwide Press, Inc., was insured under Plan 3 of the Workers' Compensation Act with Petitioner as its insurer. Petitioner accepted liability for Claimant's low-back injury and paid medical and wage-loss benefits.[7]

¶ 7 Claimant worked at Worldwide Press, Inc., in a light-duty position until approximately 1995, when her then-treating physician concluded that she would not be able to return to her preinjury position.[8] In early 1995 Claimant's treating physician reviewed a number of job analyses and noted that for a job to be within Claimant's functional capacity, she would need to be able to alternately sit and stand throughout the workday.[9] On June 13, 1995, Petitioner informed Claimant that it had received a report which placed her impairment rating at 11%. Claimant elected to have her future benefits paid in a lump sum.[10]

¶ 8 Petitioner and Claimant entered into a settlement agreement which was approved by the Employment Relations Division of the Department of Labor and Industry on August 31, 1995. The agreement settled Claimant's entitlement to biweekly benefits, but expressly reserved her medical and hospital benefits. The agreement further provided for Petitioner to pay Claimant rehabilitation benefits.[11] Claimant understood that as long as she continued to see a doctor for treatment of her industrial injury on a regular basis, Petitioner would pay for Claimant's injury-related medical treatment.[12]

## Claimant's Post-Injury Retraining

¶ 9 Claimant pursued vocational retraining, earning an associate's degree in accounting and business management. Petitioner paid for Claimant's schooling and other workers'

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[5] Golt Dep. 12:20 - 13:8.

[6] Trial Test.

[7] Pretrial Order, Uncontested Facts 2 and 3.

[8] Trial Test.

[9] Ex. 43 at 37.

[10] Ex. 8.

[11] Ex. 11 at 1.

[12] Golt Dep. 38:4-10.

compensation benefits during that time.[13] While she attended school, Claimant did not have trouble with sitting for too long. The classes were short and she would walk between classes. Sitting for too long caused her pain which originated in her left hip and side.[14] She also experienced increased pain if she stood in one spot or tried to lift anything heavy. As long as she was able to walk around, Claimant's back pain was alleviated.[15]

Claimant's Operation of Mary's Midway

¶ 10 In January 1998 Claimant purchased a restaurant and bar called Mary's Midway.[16] At the time Claimant purchased Mary's Midway, she had work restrictions imposed by her treating physician Dr. Terry L. Jackson. Claimant operated the business as a sole proprietorship.[17] Running the restaurant was a full-time job and she worked there seven days a week.[18] Claimant hired employees, filled in for missed shifts, and did scheduling and payroll.[19] Claimant purchased workers' compensation insurance for her employees, but she excluded herself from the policy.[20] She testified that she did not violate her restrictions while working at the restaurant[21] and that Mary's Midway did not cause her additional back pain because she was able to stand and move around as needed. She also had her employees do all the lifting.[22]

¶ 11 However, Claimant's contemporary medical records do not support her testimony. Dr. Jackson noted on several occasions that Claimant's work at Mary's Midway exacerbated her pain. On June 16, 1998, Dr. Jackson reported that Claimant spent a great deal of time on her feet and experienced a corresponding increase in back pain, which was further exacerbated by bending, lifting, and stooping.[23] On August 21, 1998, Dr. Jackson reported, "[Claimant] does relate that, since she purchased and began running her own restaurant, she has had [sic] been spending more time on her feet." Dr. Jackson noted that

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[13] Trial Test.

[14] Trial Test.

[15] Golt Dep. 21:2-9.

[16] Trial Test.

[17] Golt Dep. 46:1-3.

[18] Golt Dep. 46:11-12.

[19] Trial Test.

[20] Golt Dep. 55:17 - 56:1.

[21] Golt Dep. 50:21 - 51:5.

[22] Trial Test.

[23] Ex. 43 at 58.

Claimant had experienced right-sided, low-back pain radiating into her right leg which Claimant did not attribute to any particular activity or incident.[24]

¶ 12 Claimant continued to report flareups of pain. On September 18, 1998, Dr. Jackson noted that "because of [Claimant's] difficulty with pain, [she] is seriously considering getting out of the restaurant business."[25] On October 19, 1998, Dr. Jackson opined that Claimant's flareups were related both to her previous injury and to the increase in time she spent on her feet.[26]

¶ 13 On November 9, 1998, Dr. Jackson noted:

> [Claimant] currently has her own restaurant and is on her feet for what she describes as up to 12-16 hours a day. Since she purchased a restaurant and has been working those long hours, she has had difficulty with flare-up in back pain. She realizes she is going to need to change her life-style.[27]

Dr. Jackson further noted, "In the meantime, she is going to be working on changing her life-style so she is not on her feet more than 8-10 hours per day."[28] However, Claimant was unsuccessful in doing so. A year and a half later, Dr. Jackson noted that Claimant was still working 12-14 hours per day at Mary's Midway and spending the majority of that time on her feet. Claimant also reported that her pain continued to worsen.[29]

¶ 14 On January 16, 2001, Dr. Jackson reported that Claimant continued to be on her feet for most of the day and evening at her restaurant. Claimant continued to report increased pain, which was now left-sided in nature.[30]

¶ 15 Claimant began treating with Dr. Ronald M. Peterson in October 2001, after Dr. Jackson died.[31] Dr. Peterson is certified by the American Board of Independent Medical Examiners and is a fellow of the American Academy of Disability Evaluating Physicians.

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[24] Ex. 43 at 61.

[25] Ex. 43 at 63.

[26] Ex. 43 at 64.

[27] Ex. 43 at 65.

[28] *Id*.

[29] Ex. 43 at 68.

[30] Ex. 43 at 70.

[31] Golt Dep. 62:23 - 63:1.

At the time of his deposition in this matter, taken May 15, 2007, his board certification in emergency medicine had lapsed and Dr. Peterson was in the process of recertifying.[32]

¶ 16 Claimant reported her medical history to Dr. Peterson and informed him of Dr. Jackson's treatment. Dr. Peterson ran several tests and made some changes to Claimant's prescriptions and treatments.[33] From Dr. Jackson's medical records, Dr. Peterson understood Claimant's industrial injury to be left hip and lower back pain which Dr. Jackson believed was primarily caused by left SI joint dysfunction.[34] Dr. Peterson learned that Dr. Jackson found Claimant to be at maximum medical improvement (MMI) on May 1, 1995. Dr. Peterson stated that he would defer to Dr. Jackson's finding.[35] Dr. Peterson found Dr. Jackson's 11% whole person impairment rating of Claimant to be appropriate.[36]

¶ 17 Dr. Peterson's first treatment note with Claimant is from October 30, 2001. Dr. Peterson noted that Claimant's back problems originated with her November 1993 industrial accident, but he further noted that her pain – which Claimant described as constant and averaging about 8 out of 10 on the pain scale – was "aggravated by the long hours she works, she spends a long time standing, then sits for a few minutes . . . ."[37] Dr. Peterson noted Claimant's employment as the owner and operator of Mary's Midway, and stated that Claimant's job duties varied, but included cooking, bartending, and bookkeeping.[38] Although Dr. Peterson recommended a physical therapy visit at that time, as of February 5, 2002, Claimant had not yet managed to schedule that visit because she was too busy both with personal matters and with Mary's Midway.[39] Dr. Peterson noted that Claimant informed him she had been unable to schedule the physical therapy review "due to [the] whole month they have been missing a morning bartender and bookkeeper."[40]

¶ 18 In January 2002 Dr. Peterson ordered an MRI because Claimant complained of increased low-back pain in addition to left leg pain. A comparison of the 2002 MRI with Claimant's August 1998 MRI showed a small disk protrusion, but no evidence of nerve root

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[32] Peterson Dep. 3:18-22.

[33] Golt Dep. 63:13-23.

[34] Peterson Dep. 7:3-7.

[35] Peterson Dep. 7:8 - 8:5.

[36] Peterson Dep. 8:12-19; *see also* Ex. 43 at 41-42.

[37] Ex. 49 at 1.

[38] Ex. 49 at 2.

[39] Ex. 49 at 13.

[40] *Id.*.

compression. Dr. Peterson did not believe Claimant's condition was surgical and he continued conservative treatment.[41]

¶ 19 In his notes of April 16, 2002, Dr. Peterson reported that Claimant related that she continued to be self-employed at Mary's Midway and on her feet "95%-plus of the time when I work."[42] Dr. Peterson placed work restrictions on Petitioner which included no sitting, standing, or walking for longer than 60 minutes at a time; no repetitive bending, stooping, or twisting; and a lifting restriction of 20 pounds maximum.[43]

¶ 20 On June 12, 2002, Claimant reported to Dr. Peterson that she had sold Mary's Midway and would turn the business over to its new owners by July 14, 2002.[44] However, the sale fell through and on August 12, 2002, Claimant reported that she had lost her employees and she was working longer and harder hours which had resulted in increased flareups of back pain radiating into her left buttock and leg.[45] Dr. Peterson noted that Claimant's work restrictions of April 16, 2002, remained unchanged.[46] However, it is clear that Claimant continued to exceed those restrictions.

¶ 21 On October 8, 2002, Dr. Peterson reported that Claimant continued to work 12-hour shifts at Mary's Midway due to staff vacancies and had been unable to schedule physical therapy because of her business commitments. Claimant reported constant low-back pain averaging 6 out of 10 on her days off work, and 10 out of 10 on her work days.[47] On November 5, 2002, Dr. Peterson noted that Claimant's staffing difficulties at Mary's Midway continued to prevent her from attending physical therapy.[48]

¶ 22 On February 24, 2003, Dr. Peterson wrote a letter to Petitioner's claims adjuster Gina Keltz, apparently in response to a letter from Keltz inquiring about Claimant's condition. Dr. Peterson opined that Claimant's pain flares were caused by muscle fatigue and were temporary in nature.[49]

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[41] Peterson Dep. 13:2-25.

[42] Ex. 49 at 18.

[43] Ex. 49 at 20.

[44] Ex. 49 at 22.

[45] Ex. 49 at 24.

[46] Ex. 49 at 25.

[47] Ex. 49 at 26.

[48] Ex. 49 at 28.

[49] Ex. 49 at 31.

¶ 23 In his March 4, 2003, note, Dr. Peterson reported that Claimant's business had been partially destroyed by fire in January 2003, and that she was rebuilding. Claimant continued to have constant left-sided, low-back pain with flares radiating into her left thigh "with standing or walking more than three hours."[50] Clearly, this violated Dr. Peterson's work restriction of April 16, 2002, which was still in effect and which limited Claimant to no more than one hour of standing at a time. On March 4, 2003, Dr. Peterson updated Claimant's work restrictions which included no sitting for longer than 60 minutes at a time; no standing or walking for longer than 120 minutes at a time; no repetitive bending, stooping, or twisting; and a lifting restriction of 35 pounds on occasion from floor to waist, occasional 20 pounds to chest level, and occasional 10 pounds maximum overhead lifting.[51]

¶ 24 At some point during 2003, Claimant applied for a temporary part-time accounting position at Montana Refining Company, Inc. (MRC) through an employment service. She worked at MRC for five or six weeks. Her job duties did not require her to sit for extended periods of time.[52] After Claimant's temporary position ended, she occasionally had other temporary office positions, and also worked occasionally as a cashier at horse races. None of the temporary jobs required Claimant to sit for extended periods of time.[53] During this time, Claimant continued to work long hours at Mary's Midway.[54]

¶ 25 In March 2004 Dr. Peterson changed Claimant's treatment to include epidural steroid injections both to treat her pain and to help him pinpoint its source.[55] From Claimant's response to the injections, Dr. Peterson believed she was having more discogenic pain than previously, when her pain seemed to originate from the left SI joint.[56]

¶ 26 In Dr. Peterson's March 3, 2004, treatment note, he reported that Claimant had hired more staff at Mary's Midway and was standing less: "She now works four to six hours per day cooking, as compared to 18 hrs per day, five to six days per week previously."[57]

¶ 27 Claimant also treated with Robert A. Whiteford, D.O., for her low-back and left leg pain. On March 26, 2004, Dr. Whiteford noted that he reviewed Claimant's March 23,

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[50] Ex. 49 at 32.

[51] Ex. 49 at 34.

[52] Trial Test.

[53] Trial Test.

[54] Ex. 49 at 35.

[55] Peterson Dep. 14:1-20.

[56] Peterson Dep. 14:21 - 15:5.

[57] Ex. 49 at 39.

2004, MRI and compared it to her 2002 MRI. Dr. Whiteford opined that the newer MRI showed more nerve root impingement on the left L5 nerve root. Dr. Whiteford performed a lumbar epidural steroid injection on that day. He further suggested that decompression surgery at L4-5 should be considered.[58] Dr. Whiteford saw Claimant again on April 16, 2004. Dr. Whiteford's March 26, 2004, epidural injection had provided Claimant with about 10 days of pain relief. He noted that he discussed "at length" with Claimant the possibility of surgery, but informed Claimant that she would need to lose weight before surgery could be considered. Dr. Whiteford planned to pursue a course of steroid injection treatments, noting that if they did not provide relief, a surgical referral might be appropriate.[59]

¶ 28 Claimant returned to Dr. Whiteford on May 21, 2004. Dr. Whiteford performed another injection, but noted that the relief Claimant received from the injections was short-lived. He again suggested that Claimant should consider a decompression at L4-5 or foraminotomy at the L5 nerve root if Claimant were determined to be a surgical candidate.[60]

Claimant's Employment with MRC

¶ 29 Claimant was again hired to work at MRC in a temporary position on June 30, 2004.[61] Claimant worked directly for MRC rather than through an employment agency.[62] At the time, MRC was insured under Plan 2 of the Workers' Compensation Act with Respondent as its insurer.[63] Claimant was initially hired for a three- or four-month position. Claimant generally worked five or six hours per day in that position. When she was hired, she informed MRC about her previous back injury and explained that she needed to be able to move around throughout the day.[64] Claimant gave MRC a list of the medications which she took for her back condition.[65] She explained that she could not sit still for long periods of time. Most of her job duties were at the front desk or reception area and included mailing and filing, which required her to leave her desk.[66]

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[58] Ex. 50 at 1.

[59] Ex. 50 at 3.

[60] Ex. 50 at 4.

[61] Ex. 66 at 100.

[62] Trial Test.

[63] Pretrial Order, Uncontested Fact 5.

[64] Trial Test.

[65] Golt Dep. 80:10-16.

[66] Golt Dep. 80:17-23.

¶ 30 Claimant became a permanent employee at MRC in August 2004, as a full-time administrative assistant/receptionist.[67] Claimant felt "fine" while performing her job duties.[68] Claimant does not recall when she began to feel additional discomfort in her back, but at some point she noticed that she was getting tired and stiff from sitting and she made an effort to get up and move around more.[69] Claimant was working weekends at Mary's Midway and doing its payroll on a weeknight. She estimates that she averaged about 16 hours per week at Mary's Midway during this period.[70]

¶ 31 On August 24, 2004, Dr. Peterson noted that Claimant reported an improvement in her back pain since she changed jobs and began working full time at MRC. Dr. Peterson noted that Claimant continued to work at Mary's Midway on a limited basis, "mainly on weekends, occasionally one other night a week."[71]

¶ 32 Dr. Whiteford saw Claimant on September 10, 2004. Claimant reported to Dr. Whiteford that she had been pain free for a significant period of time, but that she was now working at MRC and trying to sell Mary's Midway and was experiencing increased symptoms. Dr. Whiteford noted, "[Claimant] states she spends a lot of time standing and after talking to Dr. Peterson about a surgical consult she feels that it is only a matter of time before she may need surgery on her low back[,] but if she can sell her business she may be able to lengthen that period of time before surgery is imminent."[72]

¶ 33 Claimant returned to Dr. Whiteford for another injection on October 29, 2004. In his notes, Dr. Whiteford stated, "[Claimant] states she was pain free for a significant period of time, but again is working at her business in the restaurant and even though she does not do a lot of heavy lifting, she states it takes a lot out of her, i.e. a lot of back pain at the end of the day." He again recommended a surgical consultation.[73] When Dr. Whiteford saw Claimant on December 10, 2004, he noted, "Again she is working at her business in the restaurant and over the holidays there is a lot of heavy lifting. I again discussed with this patient about obtaining a surgical consult . . . consideration of radiofrequency ablation of

[67] Golt Dep. 84:1-23; Ex. 66 at 100.

[68] Golt Dep. 84:24 - 85:4.

[69] Golt Dep. 81:1-8.

[70] Golt Dep. 81:9-18.

[71] Ex. 49 at 44.

[72] Ex. 50 at 5.

[73] Ex. 50 at 6.

her facet joints at L4-5 and L5-S1 . . . ."[74] Dr. Whiteford last treated Claimant on July 29, 2005. He suggested that she seek a second opinion for her back condition.[75]

¶ 34 On November 24, 2004, Dr. Peterson reported that Claimant continued to do well at the MRC job, which "involves getting up and down several times per hour, but with no lifting."[76] Claimant continued to treat with Dr. Peterson and through 2005 he continued to note that her status remained generally unchanged, and that her work restrictions remained in place.[77]

¶ 35 By March 2005 Claimant's job duties changed at MRC. She was required to sit for longer periods of time, and her back pain worsened.[78] Claimant's supervisor wanted her to move into another employee's position. The job duties did not include mailing and filing, but involved more time sitting at a desk.[79] Claimant testified that when she was required to sit for extended periods of time, she would complain to her supervisor and request a change in duties to allow her to move around more frequently during the day. In particular, Claimant requested that getting the mail be part of her regular job duties because of the amount of walking it required. However, that job duty would periodically get taken away from Claimant's responsibilities and replaced with more typing, which would cause Claimant to have to sit at a desk for longer periods of time.[80] Claimant explained that on several occasions, MRC wanted someone else to do the receptionist duties so that Claimant could do more paperwork, but for one reason or another the new receptionist would not work out, and Claimant would get transferred back into that position.[81]

¶ 36 In late 2005 Claimant began training for a position that was about to be vacated by a retiring employee. The training caused her to spend more of her day sitting.[82] In November 2005 Claimant learned that Dr. Peterson intended to retire and she began to

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[74] Ex. 50 at 7.

[75] Ex. 50 at 8.

[76] Ex. 49 at 46.

[77] Ex. 49 at 48-59.

[78] Trial Test.

[79] Golt Dep. 85:5-10.

[80] Trial Test.

[81] Golt Dep. 88:5-11.

[82] Trial Test.

search for a new treating physician.[83] She was unsuccessful in finding a new treating physician and Dr. Peterson readmitted her to his practice.[84]

¶ 37 Claimant increased her use of pain medication and injection therapy during the time she worked for MRC. She also bought a new bed because her back pain kept her awake at night.[85] Whenever she left work to get treatment, she informed her supervisor that she was going for treatment for her back condition.[86] However, she never told a supervisor that she believed she needed treatment as a result of her employment at MRC.[87] Claimant believes her back condition worsened over time. She did not notice a specific incident or a work shift which caused the pain to increase.[88] In early 2006 she told her supervisor she was dissatisfied with her changing job duties. She further stated that the increase in sitting caused her to suffer increased back pain.[89] At that time, Claimant was also working 16 to 20 hours per week at Mary's Midway.[90]

¶ 38 On April 4, 2006, Dr. Peterson noted that Claimant reported a progressive increase in her low-back and leg pain. She requested a follow-up lumbar epidural steroid injection. Dr. Peterson noted that her last injection had been in July 2005 and had given her decreased pain for approximately six months. Dr. Peterson also noted that Claimant's OxyContin prescription had been filled with a generic substitute at her last refill, and that her increase in symptoms coincided with this.[91] After the injection, Claimant reported a 75% decrease in symptoms on May 4, 2006. However, Dr. Peterson no longer considered her to be at MMI and he requested a new MRI.[92]

¶ 39 Claimant saw Dr. K. Allan Ward on Dr. Peterson's referral on April 6, 2006. Dr. Ward noted that a recent MRI indicated an additional change in Claimant's condition, specifically an annular tear on the left at the lumbosacral junction with lateral recess stenosis on the left at L4-5, borderline central canal stenosis at L3-4 and L4-5 due to epidural fat, short

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[83] Golt Dep. 95:22-24.

[84] Golt Dep. 96:3-22.

[85] Trial Test.

[86] Golt Dep. 90:4-21.

[87] Golt Dep. 90:22-25.

[88] Golt Dep. 91:12-16.

[89] Trial Test.

[90] Golt Dep. 92:8-12.

[91] Ex. 49 at 67.

[92] Ex. 49 at 71-72.

pedicles, and degenerative facets. Dr. Ward noted that Claimant was scheduled to consult with a neurosurgeon.[93]

¶ 40 On June 27, 2006, Dr. Peterson issued new work restrictions which limited Claimant to sedentary work with a 10-pound maximum lifting restriction and frequent stretch breaks of at least once every 30 minutes. Dr. Peterson limited Claimant's work hours to 4 hours per day, or 20 hours per week.[94]

¶ 41 On July 6, 2006, Dr. Peterson completed a Work Ability Report for MRC in which he limited Claimant to work up to 4 hours per day, 20 hours per week, with a position change every half-hour.[95] On July 20, 2006, he revised the report, stating, "may work as many hours as tolerated but should not sit for more than 4 hours total/day."[96]

¶ 42 After Dr. Peterson limited Claimant's work hours, her supervisor asked her to sign an agreement that stated she would not hold MRC liable for any injury and that she was going against her doctor's advice by continuing to work at Mary's Midway.[97] Either MRC or Claimant then asked Dr. Peterson for clarification and he rewrote her restrictions to reflect that she could work as long as she felt she could tolerate, but that she was not to sit for more than four hours.[98] Claimant believed that Dr. Peterson had only limited the amount of hours she could work at her desk job at MRC, and she continued to work at Mary's Midway up to about 20 hours per week.[99]

¶ 43 In July 2006 MRC gave Claimant a new work station where she could stand at her computer station instead of having to sit down. Claimant stated that the new work station did not improve her work conditions and in fact made them worse. MRC did not provide her a stool, so she was forced to stand in one position for four hours at a time in order to perform her job duties.[100] Claimant asked another employee for a chair that he was no longer using and she placed that at her work station so that she could change positions.[101] However, Claimant felt that she needed job duties which allowed her to move around the

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[93] Ex. 52.

[94] Ex. 49 at 75.

[95] Ex. 49 at 77.

[96] Ex. 49 at 78.

[97] Golt Dep. 101:10 - 102:6.

[98] Golt Dep. 117:3-6.

[99] Golt Dep. 102:7-24.

[100] Golt Dep. 103:11-25.

[101] Golt Dep. 104:20-24.

office and not remain stationary, and her assigned duties forced her to stay in one spot for most of her shift.[102]

¶ 44 On September 18, 2006, Dr. Peterson noted that Claimant reported that, "she has also been required to sit for most of her eight-hour shift for the last week, despite work statements since July 20, 2006 that have suggested that she should not sit for more than four hours total per work day."[103] Dr. Peterson again updated Claimant's work restrictions, stating, "[Claimant] should not sit for more than 4 hrs total/work shift."[104] Dr. Peterson's September 18, 2006, medical record is puzzling to me as, at this time, Claimant was working 4-hour shifts and her computer station allowed her to stand.

¶ 45 Claimant filed a First Report of Injury (FROI) dated November 22, 2006, with MRC, and an additional FROI on December 18, 2006.[105] Claimant's November 22, 2006, FROI indicated that she notified her employer of her claim on March 15, 2006, and identifying the cause of her injury as, "sitting too long in one spot." Claimant identified her back as the injured part of her body.[106] She explained that the part of her back which now bothered her was not the same area as had bothered her after her previous industrial injury, but was higher up in her back rather than in her hip.[107] On January 3, 2007, Respondent denied Claimant's claim.[108]

¶ 46 Dr. Peterson explained that the act of sitting can aggravate a low-back problem because the longer a person sits, the more that pressure builds up in a person's disks. Dr. Peterson explained:

> If the discs are healthy, usually a person does not have symptoms of discal pain. They may have symptoms of muscle fatigue and muscle stiffness. But if . . . the discs in the lower back are torn or desiccated or [are] in some way diseased, that buildup in intradiscal pressure causes increased irritability of the disc, which can cause swelling and compression of the nerve

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[102] Golt Dep. 106:1-11.

[103] Ex. 49 at 87.

[104] Ex. 49 at 89.

[105] Exs. 9 and 10 to Golt Dep.

[106] Golt Dep. 94:1-22; Exs. 9 and 10 to Golt Dep.

[107] Golt Dep. 95:1-5.

[108] Ex. 37.

roots, and as a result, the patients usually develop increased lower back pain and radiation of the pain into the legs.[109]

¶ 47 At the time of his deposition, Dr. Peterson had most recently seen Claimant on April 25, 2007.[110] Dr. Peterson also reviewed Claimant's deposition prior to the taking of his deposition in this matter.[111] Dr. Peterson stated that the opinion that he expressed in his August 16, 2006, letter to Lynn Lutz, in which he stated that he did not believe Claimant's condition was a direct and/or natural result of her 1993 industrial injury, remained his opinion at his May 2007 deposition.[112] He clarified that in response to Lutz's second question as to whether Claimant's condition was a new injury or an aggravation of her previous injury, he tried to express that he could not point to a specific incident which caused Claimant's symptoms to increase, but he believed the prolonged sitting required by her job at MRC was aggravating her lower-back and leg pain. Dr. Peterson asserted that, as of the time of his deposition, he continued to believe Claimant's work at MRC aggravated her low-back condition.[113] He further opined it was a permanent aggravation.[114]

¶ 48 Dr. Peterson admitted that his opinion on whether Claimant's work at MRC permanently aggravated her back condition had changed since August 2006. He explained that his opinion changed because Claimant required increased pain medication for activities of daily living, and she had more lower-back and leg pain as a result of sitting for her job duties.[115] He stated that, although he originally believed Claimant's aggravation from her job at MRC was temporary in nature, he later decided it was a permanent aggravation based on the history Claimant provided.[116] Dr. Peterson further opined that Claimant's permanent aggravation increased her level of disability because it further limited her ability to tolerate sitting, standing still, or repetitive movement.[117] He believes her pain went from one-sided to bilateral because of the increased sitting at MRC.[118] Dr. Peterson further opined that Claimant's need for back surgery was a result of the permanent aggravation

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[109] Peterson Dep. 21:5 -13.

[110] Peterson Dep. 5:5-9.

[111] Peterson Dep. 5:13-17.

[112] Peterson Dep. 16:25 - 17:16.

[113] Peterson Dep. 18:1-24.

[114] Peterson Dep. 19:10-17.

[115] Peterson Dep. 19:18-25.

[116] Peterson Dep. 48:23 - 49:11.

[117] Peterson Dep. 20:1-14.

[118] Peterson Dep. 65:16-19.

of her low-back condition caused by her work at MRC.[119] He stated that Claimant would not be able to return to her time-of-injury job at MRC.[120]

¶ 49 Dr. Peterson agreed that his opinion as to the cause of Claimant's increased back pain is based solely on the history she provided to him in stating that prolonged sitting at MRC increased her pain.[121] Dr. Peterson opined that Claimant's degenerative disk disease worsened over time because of her activities at MRC and Mary's Midway.[122] Dr. Peterson found Claimant to be at MMI as of April 25, 2007.[123]

¶ 50 Dr. Peterson testified that when he had the opportunity to review Claimant's deposition testimony, he was surprised to learn how many hours she had worked at Mary's Midway over the time period he treated her. He had known that she worked long hours and was short-staffed, but he did not know that she was working as many hours per day as her deposition indicated.[124] Dr. Peterson stated that Claimant's work at Mary's Midway could account for her increased symptoms, and that the work that she performed there exceeded her work restrictions.[125]

¶ 51 Dr. Howard C. Chandler, Jr., is board-certified and practiced in general neurosurgery in Montana from July 1994 until November 2006 with Montana Neurological Associates.[126] He first saw Claimant on referral from Dr. Peterson for her low-back problems.[127] Dr. Chandler's physician assistant took Claimant's history which reflected that Claimant had low-back pain since a 1993 lifting injury and she was initially treated somewhat successfully for sacroiliitis. Claimant reported that her gait was painful and that she believed her spine had become affected from her condition over the years.[128] The history did not include information about any subsequent work injury.[129]

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[119] Peterson Dep. 20:15-19.

[120] Peterson Dep. 22:19 - 23:20.

[121] Peterson Dep. 25:9-13.

[122] Peterson Dep. 50:16-25.

[123] Peterson Dep. 25:19-23.

[124] Peterson Dep. 43:11-19.

[125] Peterson Dep. 44:3-17.

[126] Chandler Dep. 5:21 - 6:16.

[127] Chandler Dep. 7:20-24.

[128] Chandler Dep. 8:1-20.

[129] Chandler Dep. 8:21 - 9:1.

¶ 52 Dr. Chandler reviewed MRIs which had been taken of Claimant's spine in February 2002, February 2004, and February 2006. Dr. Chandler noted spinal arthritis in the lumbar spine with narrowing of the spinal canal and compression of nerve roots at L3-4, L4-5, and L5-S1.[130] Dr. Chandler also conducted a physical examination of Claimant and found that she had a good range of motion with no tenderness, and no motor or sensory deficits, but diminished Achilles reflexes bilaterally.[131] Dr. Chandler diagnosed Claimant with lumbar stenosis with a disk herniation and spinal arthritis pain. He ordered further tests, but did not formulate a treatment plan.[132]

¶ 53 Dr. Chandler further reviewed an x-ray report of June 15, 2006, which showed that Claimant had a mild offset of the vertebra at L4-5, and that the offset moved when Claimant moved. Dr. Chandler believed this offset might be causing Claimant's back pain.[133] Dr. Chandler also completed a bone scan which showed results consistent with Claimant's MRIs.[134] On August 1, 2006, Dr. Chandler completed a bilateral facet joint injection at Claimant's L4-5 which temporarily relieved her pain, further supporting his supposition that Claimant's pain was originating from this location.[135] At that point, Dr. Chandler diagnosed Claimant with lumbar spondylolysis with spondylolisthesis and lumbar stenosis. He reviewed Claimant's history of treatment with her and, in light of the failure of conservative treatment to that point, he recommended that Claimant would have to either live with the pain or consider lumbar fusion surgery.[136] Dr. Chandler recommended an L4-5 posterior lumbar interbody fusion.[137] Claimant opted for the surgery, which Dr. Chandler performed on September 26, 2006.[138]

¶ 54 Dr. Chandler's Neurosurgical Consultation report of June 15, 2006, discusses Claimant's 1993 lifting injury as the onset of her low-back pain, but does not mention any subsequent injuries or aggravation. Dr. Chandler's history further notes that Claimant reported her pain as being constant and daily, and that sitting and lying on her side both provoked symptoms, while changing position or lying on her back alleviated them.[139]

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[130] Chandler Dep. 9:6-13.

[131] Chandler Dep. 9:14-25.

[132] Chandler Dep. 10:1-21.

[133] Chandler Dep. 11:16-24.

[134] Chandler Dep. 12:4 - 13:8.

[135] Chandler Dep. 13:22 - 15:25.

[136] Chandler Dep. 16:5-25.

[137] Ex. 53 at 5; Chandler Dep. 16:23-25.

[138] Chandler Dep. 17:19-23.

[139] Ex. 1 to Chandler Dep.

¶ 55 Dr. Chandler opined that Claimant's low-back problem at L4-5 was caused by a "degenerative condition that developed over time but became symptomatic after her 1993 lifting injury." Dr. Chandler noted that Claimant did not have pain before the 1993 injury and that her pain was consistently present from then forward.[140] Dr. Chandler never discussed any injury other than the 1993 lifting injury with Claimant, and he had no knowledge of any other work injury, but he opined that generally, sitting does not exacerbate a spinal problem. He noted that it can make the symptoms worse, but it does not make the underlying problem worse.[141] It is Dr. Chandler's general experience as a neurosurgeon that maintaining any particular position for an extended period of time can exacerbate pain.[142] The need to change positions frequently is a common statement among patients with low-back pain.[143] Dr. Chandler opined that maintaining a position for an extended period of time could aggravate a patient's pain without aggravating the underlying degenerative disease.[144] Dr. Chandler testified that he could not opine to a reasonable degree of medical certainty that Claimant's need for surgery was caused by her work at MRC.[145]

¶ 56 Dr. Chandler testified that spinal degenerative disease is the degeneration of a joint, and use of the joint causes it to degenerate further. He further stated, "[S]itting and lying down are the things that use the joint the least."[146] However, Dr. Chandler further testified that since Dr. Peterson had more knowledge of Claimant's job duties and work conditions at MRC, he would defer to Dr. Peterson's opinion regarding whether Claimant's work at MRC had permanently aggravated her low-back condition.[147]

¶ 57 Dr. Peterson stated that since Dr. Chandler was Claimant's treating surgeon, he would defer to Dr. Chandler's opinion as to Claimant's need for surgery.[148] Although he also agreed that he would defer to Dr. Chandler's opinion of causation, he clarified that he misspoke and that he would not defer to Dr. Chandler for causation because he did not know if Dr. Chandler understood Claimant's job duties.[149]

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[140] Chandler Dep. 19:16-21.

[141] Chandler Dep. 21:2-8.

[142] Chandler Dep. 27:16-19.

[143] Chandler Dep. 29:22 - 30:1.

[144] Chandler Dep. 30:7-13.

[145] Chandler Dep. 22:11-15.

[146] Chandler Dep. 32:1-8.

[147] Chandler Dep. 32:9-19.

[148] Peterson Dep. 61:15-23.

[149] Peterson Dep. 67:23 - 68:6.

¶ 58 Claimant worked at Mary's Midway up to the day before her back surgery.[150] Claimant took about four or five months off from working shifts at Mary's Midway after her back surgery.[151] She continued to do the payroll and ordering.[152] Prior to her surgery and during the time she was employed by MRC, Claimant worked approximately 20 hours a week at Mary's Midway. She did the payroll, worked some weekend shifts, and filled in if an employee did not show up for a shift.[153] At the time of her deposition, she had increased her responsibilities at Mary's Midway to include working as a cook from noon to 9:00 p.m. five days per week in addition to payroll and accounting.[154]

¶ 59 Claimant testified that since her September 2006 surgery, her back pain has significantly decreased.[155] Claimant's employment with MRC ended on February 20, 2007.[156] She subsequently had an SI injection in March 2007 that alleviated pain in her hip and leg. She continues to take pain medication, muscle relaxers, and anti-inflammatory medication.[157] At the time of her deposition, Claimant also participated in twice-weekly physical therapy sessions.[158]

¶ 60 On March 19, 2007, counsel for Respondent wrote to Claimant and informed her that it would pay her bi-weekly temporary total disability (TTD) benefits retroactive to her date of surgery of September 26, 2006, under a reservation of rights.[159]

Radiographic Studies

¶ 61 Claimant has periodically had lumbar MRI films taken since her 1993 industrial accident. An August 28, 1998, MRI report stated that Claimant reported low-back pain radiating into her right foot. The films revealed "satisfactory vertebral alignment" with modest dessication at the L4-5 and L5-S1 levels, and a left parasagittal disk protrusion at L4-5 causing effacement of the left ventrolateral aspect of the thecal sac and extending laterally into the inferior aspect of the L4-5 neural foramen. No definite root compression

[150] Golt Dep. 66:22 - 67:12.

[151] Golt Dep. 66:17-21.

[152] Golt Dep. 68:7-11.

[153] Golt Dep. 67:13 - 68:3.

[154] Golt Dep. 111:22 - 112:11.

[155] Golt Dep. 108:10-18.

[156] Ex. 66 at 9.

[157] Golt Dep. 110:1-13.

[158] Golt Dep. 111:13-15.

[159] Ex. 40.

or focal disk abnormalities were evident, and the paraspinal soft tissues appeared normal. The report concluded that the left parasagittal L4-5 disk protrusion was a new finding when compared to Claimant's January 1995 MRI.[160]

¶ 62 Claimant's next MRI was performed on January 28, 2002. At that time, Claimant reported low-back pain radiating into her left leg and foot with left buttock numbness, which she attributed to her 1993 industrial accident. The report notes no significant changes since the 1998 MRI.[161]

¶ 63 Claimant's next MRI was taken March 23, 2004. The report indicates disk desiccation at L3-4, L4-5, and L5-S1. Anterior herniation of the intervertebral disk was present at T12-L1 and L1-L2. An eccentric bulge at L4-5 with slight displacement on the left L5 nerve root was visible. The impression notes indicate that the eccentric disk at L4-5 was visible in 2002, but is slightly more prominent and actually displaces the left L5 nerve root posteriorly on the present MRI.[162] A lumbar spine CT scan without contrast was performed on April 12, 2005. The report details findings at various levels of Claimant's spine, and summarizes:

> Disc abnormalities eccentric to the left at L4-5 and L5-S1. At L4-5, the disc protrusion and disc and annular bulge narrows the left neural foramen moderately, and contacts the descending left L5 nerve root. It appears similar to prior MRI. At L5-S1 there is a relatively focal lateral disc herniation which is small, but moderately narrows the left neural foramen due to its location. At all levels, there are some findings of facet arthropathy, but they are most pronounced at L3-4 where there are moderate changes.

The report further notes mild spondylitic changes throughout Claimant's spine.[163]

¶ 64 Claimant also had a lumbar diskography performed on April 12, 2005. The results of the diskography were compared to the results of her March 23, 2004, MRI. The diskography produced severe concordant pain at L4-5 and L5-S1, concordant pain at L2-3, and severe non-concordant pain at L3-4. Disk protrusions or herniations eccentric to the left were present at L4-5 and L5-S1, and a diffuse disk and annular bulge was present at L3-4.[164]

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[160] Ex. 64 at 14.

[161] Ex. 64 at 16.

[162] Ex. 64 at 18.

[163] Ex. 64 at 20-21.

[164] Ex. 64 at 22-25.

¶ 65 Claimant's next MRI was performed on May 9, 2006. The report notes a small annular tear at L5-S1 which was not present on the March 23, 2004, MRI. The report found no nerve root compression at that level. The report also noted mild left lateral recess stenosis at L4-5 secondary to the lateral protrusion which was unchanged from March 23, 2004, and borderline central canal stenosis at L3-4 and L4-5 due to prominent epidural fat, vertically oriented degenerative facets, and short pedicles.[165]

Petitioner's Claim Adjustment

¶ 66 Lynn Lutz is a claims examiner for Petitioner. Lutz testified at trial and I found him to be a credible witness. Lutz has adjusted Claimant's file since February 2005. He testified that during the time he worked on Claimant's file, he spoke to Claimant on approximately 20 occasions regarding her medical benefits.[166]

¶ 67 Lutz testified that he began to question whether Claimant's medical needs were related to her claim with Petitioner. He noticed that her medication usage had increased as had the frequency of her medical appointments. From reviewing her medical records, he believed that Claimant was reporting significantly increased pain. Lutz wrote to Dr. Peterson for clarification.[167]

¶ 68 Dr. Peterson responded on August 16, 2006, stating:

> 1. I do not believe that [Claimant's] current condition and need for treatment/surgery is a direct and/or natural result of the original injury of November 12, 1993. . . . [I]t appears that [Claimant] had no evidence of disc protrusions until August 28, 1998, almost five years following her work-related injury. Prior to that, she had MRI and CT/myelogram studies of the lumbar spine that failed to show any disc bulges/herniations/extrusions, or any nerve root impingement.
>
> 2. I believe that it is impossible to apportion [Claimant's] current symptoms/condition to any one of her jobs, be that the original injury of November 1993, her work at [MRC], or her work as a restaurant/bar owner. There was no specific incident that was reported that caused increased lower back pain or lower extremity pain prior to the positive lumbosacral spine MRI done in August 1998. I do believe that [Claimant's] work at [MRC], with prolonged sitting tasks, has aggravated her lower back and lower extremity pain, but I believe this aggravation has been temporary in nature.

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[165] Ex. 64 at 26-27.

[166] Trial Test.

[167] Trial Test.

3. I believe that [Claimant's] current aggravation of symptoms related to her work at [MRC] is a temporary aggravation of her pre-existing condition . . . .[168]

¶ 69 Based on Dr. Peterson's response, Lutz concluded that Petitioner was not liable for Claimant's condition as it stood at that time.[169] Lutz sent a demand letter to Respondent on August 22, 2006, seeking reimbursement for benefits paid from January 2006 forward.[170] Respondent did not respond to Lutz's letter, and Petitioner continued to pay Claimant's medical benefits pending the outcome of this litigation.[171]

¶ 70 Lutz also wrote to Dr. Peterson for further clarification on August 31, 2006, after he received a request for surgery.[172] Lutz asked: "Does the request for surgery change your opinion that [Claimant's] most recent employment with [MRC] resulted in a temporary aggravation?" Dr. Peterson responded: "No. Dr. Chandler feels that [Claimant] is symptomatic from her spondylolisthosis – this was not caused by this work." Dr. Peterson further confirmed that he continued to believe Claimant's work at MRC caused only a temporary aggravation, and that the aggravation began in August 2004 when she began working for MRC.[173]

¶ 71 Dr. Peterson's September 5, 2006, response further convinced Lutz that Petitioner was no longer liable for Claimant's condition nor for her surgery.[174] Lutz sent another demand letter to Respondent on December 20, 2006,[175] but received no response. During this time, Lutz authorized Claimant's surgery and advised her to file a claim with MRC.[176] Lutz testified that Petitioner continues to pay Claimant's medical bills pending the resolution of this dispute as it is his policy not to terminate an injured worker's medical benefits if there is an ongoing dispute between insurers.[177]

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[168] Ex. 49 at 82 (emphasis in original).

[169] Trial Test.

[170] Ex. 28.

[171] Trial Test.

[172] Ex. 29.

[173] Ex. 49 at 85.

[174] Trial Test.

[175] Ex. 35.

[176] Trial Test.

[177] Trial Test.

## Testimony of MRC Employees

¶ 72 Marlena Halko is the Human Resources Administrator at MRC. She has been in that position since March 2006, and began working at MRC in August 2004. Halko worked at a second work station in the same area as Claimant until March 2006 when she became the Human Resources Administrator. Halko explained that at MRC, the refinery is located across the street from the office where she and Claimant worked. Claimant's work area was the reception area and had a large counter and Claimant's work station. An area toward the back of the office contains the photocopy machine, and two rows of filing cabinets are off to one side. The fax machine was located in another room and a worker would have to leave the reception area to send and retrieve faxes. Halko testified that from August 2004 until March 2006, she never saw any drastic changes in Petitioner's job duties.[178]

¶ 73 In June 2006 Claimant brought in a work restriction from Dr. Peterson. Halko testified that MRC accommodated Claimant's restriction, which stated that she could work a maximum of 4 hours per day, up to 20 hours per week, by scheduling her to work half-days.[179] MRC purchased a computer stand that could be raised to allow Claimant to stand while working at the computer.[180] Halko recalled that it was near the end of July 2006 when the stand was purchased. MRC also provided a chair that could be raised up and down.[181]

¶ 74 Halko testified that, from time to time, she kept track of whether Claimant was sitting or standing throughout the day. Halko knew that Claimant's doctor had recommended that she stand as much as possible, and Halko believed that Claimant was not doing so, so she kept a log of when Claimant was sitting and standing. However, Halko agreed that the majority of Claimant's job duties required her to be sitting.[182]

¶ 75 Halko testified that Claimant never informed her that she believed the pain she experienced was from her work at MRC. She further testified that Claimant never reported a new injury. MRC received a report of injury from Petitioner, who is not MRC's insurer. The report listed an injury date as March 2006. Halko asked the office manager if she knew of an injury in March, and the office manager did not. Halko then wrote a letter to Respondent, MRC's insurer, explaining that she did not believe the report was correct.[183]

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[178] Trial Test.

[179] Trial Test.

[180] Ex. 69 at 7-8; Ex. 70.

[181] Trial Test.

[182] Trial Test.

[183] Trial Test.

¶ 76 Alvie Kinaman was hired by MRC on May 8, 2006, as the Controller and became Claimant's supervisor on that date. I find Kinaman to be a credible witness. Claimant gave Kinaman Dr. Peterson's June 27, 2006, work restriction. Kinaman understood Dr. Peterson's work restriction to mean that Claimant was not supposed to work more than 4 hours per day up to 20 hours per week due to the fact that she could not sit.[184]

¶ 77 Kinaman asked Claimant to complete a work ability report for MRC, and she provided it to him. Kinaman knew that Claimant owned a business. An MRC representative told Claimant that if she was restricted to 4 hours per day, 20 hours per week of work, that she was to work those hours at MRC and not exceed her limits by then going to work at her business. Kinaman testified that Claimant informed MRC that she was allowed to work more than 20 hours per week so long as she only sat 4 hours per day. Kinaman asked Claimant to get something from Dr. Peterson which stated this, and Dr. Peterson sent a work restriction which stated that Claimant could work more than 4 hours per day so long as she was not sitting for more than 1 hour.[185]

¶ 78 Kinaman testified that he had asked Claimant to sign an agreement that she was not going to work more than 4 hours per day up to 20 hours per week in part because if she worked more than that, she would not be entitled to short-term sick pay benefits, but more so because he believed she would not heal if she worked beyond her restrictions. However, Dr. Peterson's new work restriction allowed her to work more than 4 hours per day as long as she was not sitting for more than 1 hour. Kinaman then had Claimant pick out a computer stand from an office supply book so that she would be comfortable standing while working on her computer.[186]

¶ 79 Marie Welsh is the office manager at MRC. She has worked for MRC for approximately 28 years and has been in the office manager position for about 15 years. I find Welsh to be a credible witness. Welsh does not recall Claimant having an accident on March 15, 2006, as indicated by the report of injury she received from Petitioner. Welsh testified that she was aware Claimant had a previous injury, and that at times Claimant had a noticeable limp and had difficulty getting around. Claimant occasionally left work for doctors' appointments, which was permitted by MRC as a company policy. Welsh asserted that Claimant never told her that she attributed any of her problems to her work at MRC.[187]

¶ 80 In May 2006 Welsh orally warned Claimant about her job performance. Welsh documented the matter in an undated note entitled "VERBAL WARNING." The note indicated that Claimant was not keeping up with her data entry duties. Welsh noted that

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[184] Trial Test.

[185] Trial Test.

[186] Trial Test.

[187] Trial Test.

Claimant was only working half-days, and that she was expected to improve her typing and ten-key skills in order to keep up with her workload.[188] Welsh explained that Claimant's work had been "going downhill" and that Welsh wanted to rectify the situation. Welsh testified that the majority of Claimant's job could be done either standing or sitting as Claimant desired, because Claimant had an adjustable stand for her computer. However, Welsh acknowledged that the stand was not purchased until July 2006. Welsh stated that, aside from work done at the computer, all of Claimant's other job responsibilities could have been performed standing up if Claimant chose.[189]

## Resolution

¶ 81 While the findings are extensive in this case, there are key findings which I found of particular importance in reaching the Conclusions of Law set forth below:

¶81a Although Claimant testified that her work at Mary's Midway did not increase her back pain, from the outset of her work at that business, Dr. Jackson's medical records report that Claimant experienced pain which increased in direct proportion to the hours Claimant worked at Mary's Midway, and Dr. Jackson opined on multiple occasions that Claimant's work at Mary's Midway directly contributed to her back pain symptoms.

¶81b Claimant's symptoms, while initially right-sided, became left-sided while she ran Mary's Midway.

¶81c At Claimant's initial appointment with him, Dr. Peterson noted that while her low-back symptoms originated with her 1993 industrial injury, her symptoms were aggravated by the long hours she spent standing while working at Mary's Midway.

¶81d From the time Claimant purchased Mary's Midway in 1998 until March 2004, her treating physicians continuously noted that she worked long hours and failed to obtain recommended physical therapy because of her work hours. While Dr. Peterson does not explicitly state that Claimant exceeded her work restrictions, it is clear from his contemporaneous descriptions of her job duties and hours that she consistently exceeded the restrictions he placed upon her.

¶81e In March 2004 Dr. Whiteford opined that Claimant's back condition might be appropriate for surgical referral.

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[188] Ex. 66:63-64.

[189] Trial Test.

¶81f In August 2004 Dr. Peterson reported that Claimant's new job at MRC, combined with a significant decrease in her hours at Mary's Midway, had improved her back condition.

¶81g In September and October 2004 Claimant continued to report to Dr. Whiteford that her work at Mary's Midway – and not her new job duties at MRC – caused increased symptoms.

¶81h Claimant apparently experienced an improvement in her back symptoms from approximately November 2004 until March 2005, when her job duties changed at MRC. Claimant then began to attribute her symptoms to prolonged periods of sitting required by her change in job duties. Claimant continued to be dissatisfied with her job duties at MRC into the early part of 2006. She continued to work an estimated 16-20 hours per week at Mary's Midway as well as full time at MRC throughout this time period.

¶81i In April 2006 Dr. Peterson treated Claimant with injections due to her increase in symptoms. In May 2006, he decided she was no longer at MMI and ordered an MRI.

¶81j In June 2006 Dr. Peterson issued new work restrictions for Claimant which limited her to working 20 hours per week, up to 4 hours per day. However, he revised these restrictions in July 2006, after Claimant had a disagreement with MRC concerning whether she could continue to work at Mary's Midway and stay within Dr. Peterson's restrictions. Claimant continued to work at Mary's Midway for approximately 20 hours per week while working 20 hours per week at MRC.

¶81k MRC provided Claimant with a new work station in July 2006 which allowed her to stand while working at the computer. Claimant was dissatisfied with the change to her work space and did not believe the new work station addressed her needs. As of September 2006 Dr. Peterson was apparently unaware of the new work station as he continued to attribute Claimant's deteriorating back condition to prolonged sitting at MRC.

¶81l In August 2006 Dr. Peterson believed that Claimant's work at MRC had caused only a temporary aggravation to her back condition. He subsequently changed his opinion and determined that the aggravation was permanent. Dr. Peterson attributed this permanent aggravation to the prolonged sitting which was reported to him.

¶81m Dr. Peterson opined that Claimant's increased back problems could be caused either by her work at Mary's Midway or her work at MRC.

After reviewing Claimant's deposition testimony, Dr. Peterson admitted that he was not aware of the extent of Claimant's work at Mary's Midway and further admitted that this work exceeded her work restrictions.

¶81n While Dr. Chandler admitted he had no knowledge of the specific nature of Claimant's work at MRC, he opined that, while remaining in a stationary position for a prolonged period of time would exacerbate the symptoms of a low-back problem, prolonged sitting would not cause a permanent aggravation of the underlying condition.

¶81o Although Dr. Peterson deferred to Dr. Chandler regarding Claimant's need for surgery, he stated that he would not defer to Dr. Chandler's opinions regarding causation because Dr. Peterson did not know if Dr. Chandler was aware of Claimant's job duties.

## Post-Trial Proceedings

¶ 82 On September 2, 2008, I initiated a conference call with Petitioner, Respondent, and Claimant to discuss the status of this case. I informed the parties that, after reviewing the evidence and drafting findings, I was reluctant to make legal conclusions on the issues presented because I was unable to find that Claimant's condition was either a natural progression of her 1993 industrial injury or an occupational disease stemming from her 2006 claim with Respondent. The purpose of the conference call was to put the parties on notice that I had reached an impasse with the case, and to give the parties an opportunity to suggest possible resolutions of the Court's dilemma.[190]

¶ 83 On September 8, 2008, another conference call was held with Petitioner, Respondent, and Claimant. After Petitioner and Respondent stated their respective positions, I requested that they file simultaneous post-trial briefs on the issue of the parties' respective burdens of proof and what the parties believe is the status of any reimbursement claim against Claimant, and whether that issue could be pursued as part of the present case or in a subsequent action. I ruled that Claimant could participate in briefing if she desired.[191] Ultimately, Petitioner and Respondent filed their simultaneous opening briefs on September 26, 2008.[192] Claimant did not file a brief, and neither Petitioner nor Respondent filed a response brief. Petitioner's and Respondent's arguments in their post-trial briefs are addressed in the Conclusions of Law below.

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[190] Minute Book Hearing No. 3973, Docket Item No. 36.

[191] Minute Book Hearing No. 3977, Docket Item No. 37.

[192] Petitioner's Brief in Response to the Court's September 8, 2008 Minute Entry ("Petitioner's Brief), Docket Item No. 38; Respondent's Response to September 2, 2008, Minute Entry and September 8, 2008 Conference, Docket Item No. 39.

## CONCLUSIONS OF LAW

¶ 84 Workers' compensation benefits are determined by the statutes in effect on the date of the claimant's injury.[193] This case is governed by the 1993 and 2005 versions of the Workers' Compensation Act since those were the laws in effect on the dates of Claimant's alleged industrial injuries.[194]

### Burden of Proof

¶ 85 Generally, in a workers' compensation case, the claimant bears the burden of proving by a preponderance of the evidence that she is entitled to the benefits she seeks.[195]

When the dispute exists between two insurers, the burden of proof is placed on the insurance company which is at risk at the time of the accident in which a compensable injury is claimed.[196] This Court has held:

> Where a worker suffers two sequential industrial injuries affecting the same part of the body, the insurer for the second injury is initially liable for benefits and bears the burden of proof when seeking to shift liability back to the prior insurer. When a subsequent injury has arguably **aggravated** a preexisting condition, the second insurer avoids liability for that condition **only** upon proving the claimant had not reached maximum medical healing with respect to his prior workers' compensation injury **or** that the second injury did not in fact permanently aggravate the underlying condition for which the prior insurer was liable.[197]

¶ 86 However, Petitioner points out in its brief that under this rule, Claimant bears the burden of first proving her claim against the second insurer (Respondent). Petitioner drew the Court's attention to *Kuntz v. Nationwide Mut. Fire Ins. Co.*[198] which Petitioner summarizes in its brief:

> Under *Belton* . . . [t]he burden of proof is on the insurer at the time of the second injury. A limitation not at issue in *Belton*, but clearly set forth therein, is that the second injury must be an aggravation of a pre-existing injury. If

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

[194] *Rausch v. State Compen. Ins. Fund*, 2002 MT 203, ¶ 17, 311 Mont. 210, 54 P.3d 25.

[195] *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).

[196] *Belton v. Carlson Transport*., 202 Mont. 384, 392, 658 P.2d 405, 409-10 (1983).

[197] *Stacks v. Travelers Property Casualty*, 2001 MTWCC 9, ¶ 108. (Emphasis in original.)

[198] *Kuntz,* 1998 MT 5, 287 Mont. 142, 952 P.2d 422.

> the new incident is an exacerbation, or temporary alteration in symptoms, but not an aggravation, or material or permanent alteration, the second insurer does not become liable for the condition following recovery from the exacerbation. If the claimant does not prove the latter incident caused a permanent detriment, the burden of proof does not shift to the second insurer. As noted in prior cases . . . the claimant continues to bear the initial burden of establishing that he suffered a compensable injury from an industrial accident.[199]

¶ 87 Petitioner points out that what distinguishes these cases from the present case, is that in the present case, it was the initial insurer and not the Claimant who filed the action. Petitioner argues that while this raises issues regarding Claimant's standing in the case, it does not affect the indemnification issue between the insurers. Petitioner argues that, since Claimant has not proven that she has a compensable claim, neither insurer bears the burden of proving that the other is liable. Therefore, neither insurer can be ordered to indemnify the other. I find Petitioner's argument persuasive and hold that, in the present case, since Claimant did not prove that her current back condition is compensable as a work-related injury, neither Petitioner nor Respondent has the burden to prove the other is liable for a condition which is not work related.

Indemnification

¶ 88 As set forth above, Petitioner argues that neither insurer can be ordered to indemnify the other since Claimant has not proven the compensability of her claim. I agree. While Claimant is not a party to the present action, I nonetheless had to make findings to determine whether her current condition was caused by her 1993 industrial injury or a 2006 occupational disease. Ultimately, the evidence led me to conclude that her current condition was caused by neither. Therefore, the compensability of her claim has not been proven.

¶ 89 In its post-trial brief, Respondent argues that Claimant **is** a party to this action by virtue of her participation in this case and further argues that it is therefore entitled to seek reimbursement for the TTD benefits it paid to Claimant under a reservation of rights. Respondent bases its argument on its interpretation of ARM 24.5.308(1), which states that the joinder of parties shall be governed where appropriate by the considerations set forth in Mont. R. Civ. P. 14, and 19-21. In particular, Respondent notes that Mont. R. Civ. P. 19(a) states:

> A person who is subject to service of process shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action

[199] Petitioner's Brief at 3. (Citations omitted.)

> in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. . . .

¶ 90 Ultimately, however, Claimant was **not** joined as a party. After the Petition was filed in this matter, the Court followed its usual practice in such cases and sent a Notice of Right to Appear and Participate to Claimant. The notice stated in pertinent part:

> You are notified that a Petition for Hearing has been filed in this Court by the Montana State Fund against Zurich American Insurance Company with respect to your industrial injury of November 12, 1993, to your low back. Since these proceedings may affect you, you are notified that you may appear and participate in the proceedings by causing your attorney to file an appearance and response to the petition . . . . [Y]ou may represent yourself in these proceedings by filing a written notice with the Court . . . stating your intention to do so.[200]

¶ 91 Claimant filed a written notice on March 29, 2007, informing the Court that she wished to be present for the proceedings and would appear pro sé.[201] Claimant's participation included having contentions in the Pretrial Order and signing the Pretrial Order along with counsel for Petitioner and Respondent.[202] Nevertheless, she was never made a third-party respondent. The action remained captioned *Montana State Fund vs. Zurich American Insurance Company, In Re: Mary Golt*. While ARM 24.5.308(1) allows for the joinder of parties via the procedure set forth in the Rules of Civil Procedure, in the present case, neither Petitioner nor Respondent moved to join Claimant as a party.

¶ 92 When the evidence in this matter put Respondent on notice that Claimant's condition might be related to her activities outside of her employment with both Petitioner's and Respondent's insureds, Respondent could have raised the issue and moved to have Claimant named as a third-party respondent. Respondent did not do so. This Court cannot now hold Claimant liable for reimbursement to Respondent as the case now stands because Claimant has the right to due process which was not afforded to her via her non-party status in the present case. Furthermore, it is not clear from the record before the Court whether the mandatory mediation requirements were met in this case as it pertains to a claim against Claimant.

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[200] Notice, Docket Item No. 3

[201] Notice of Right to Appear, Docket Item No. 6.

[202] Pretrial Order, Docket Item No. 33.

¶ 93 While it is true that Claimant signed the Pretrial Order, she did so in her capacity as the claimant whose claims were the subject of this action between insurers – not as a party to the action. In *Householder v. Republic Indem. Co. of California*,[203] this Court rejected a settlement agreement which sought to set the amount the parties would pay towards outstanding medical bills owed to a hospital which was not a party to the lawsuit. When the hospital's representative objected, the parties argued that the hospital had no standing to object to the settlement. The Court responded that since the hospital was not a party, the Court could not bind the hospital to the proposed settlement agreement. Similarly in the present case, this Court cannot order Claimant, who was not a party to the action, to reimburse one of the parties for benefits paid under a reservation of rights. Should Respondent wish to pursue reimbursement, it must file a petition naming Claimant as a party-respondent. At that time, Claimant will have been put on notice as to her potential exposure to liability and her due process rights will be satisfied.

## JUDGMENT

¶ 94 Based on the evidence presented to the Court:

¶ 94a Neither Petitioner nor Respondent are liable for Claimant's continuing low-back problems, including her need for surgery in September 2006.

¶ 94b Claimant's low-back condition is not the natural progression of her November 12, 1993, injury.

¶ 94c Claimant did not suffer a compensable injury or occupational disease in the course and scope of her employment at Montana Refining Company, relieving Petitioner of liability for her low-back condition.

¶ 94d Respondent is not entitled to indemnification from Petitioner or reimbursement from Claimant for the temporary total disability benefits it has paid Claimant under a reservation of rights retroactive to her date of surgery on September 26, 2006.

¶ 94e Petitioner is not entitled to indemnification for medical benefits paid to Claimant under a reservation of rights.

¶ 95 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.

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[203] *Householder,* 2001 MTWCC 41.

DATED in Helena, Montana, this 21st day of January, 2009.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Greg E. Overturf
Michael P. Heringer
Mary E. Golt
Submitted: September 26, 2008