IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2019 MTWCC 10

WCC No. 2015-3652

TERESA L. LEYS

Petitioner

vs.

LIBERTY MUTUAL INSURANCE

Respondent/Insurer.

MONTANA SUPREME COURT APPEAL No. DA-0507 – 09/03/2019
ORDER OF DISMISSAL WITH PREJUDICE - 11/26/2019

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Summary: Petitioner claims she suffered carpal tunnel and postconcussive syndromes following a 2008 industrial motor vehicle accident. Respondent accepted liability for the accident and paid TTD benefits until June 23, 2015, at which time it denied that Petitioner had postconcussive syndrome as a result of her motor vehicle accident. Petitioner's carpal tunnel syndrome recurred in late 2015, but Respondent refused to reinstate TTD benefits. Petitioner argues that Respondent remains liable for her carpal tunnel syndrome and that she is entitled to PTD and/or TTD benefits because her accident-related conditions have rendered her unable to work. Respondent disputes its continued liability for Petitioner's carpal tunnel syndrome and denies she is entitled to any further wage loss benefits.

Held: Respondent is no longer liable for Petitioner's carpal tunnel syndrome because the medical opinions tying the recurrence to her 2008 industrial motor vehicle accident were based on misinformation and Respondent's initial acceptance of liability for that condition was based on a mutual mistake of fact. Petitioner is not entitled to TTD or PTD benefits for postconcussive syndrome because her treating physician's opinions were unreliable and, therefore, she did not meet her burden of proving that she suffered from

postconcussive syndrome from 2015-present as a result of her 2008 industrial motor vehicle accident.

¶ 1 The trial in this matter was held on October 27 and 28, and December 9, 2016, in Helena, Montana. Petitioner Teresa L. Leys was present and represented by James G. Hunt and Norman H. Grosfield. Leo S. Ward represented Respondent Liberty Mutual Insurance (Liberty).

¶ 2 Exhibits: The Court admitted Exhibits 1 through 59 without objection.

¶ 3 Witnesses and Depositions: This Court admitted the depositions of Leys, Stuart Hall, PhD, Lennard S. Wilson, MD, and Sherry Reid, MD, into evidence. Leys, Kristi Wilson, Aaron Leys, William David Stratford, MD, and Joseph K. McElhinny, PsyD, were sworn and testified at trial.

¶ 4 Issues Presented: This Court recasts the issues from the Pretrial Order as follows:

Issue One: Does Liberty remain liable for Leys' carpal tunnel syndrome?[1]

Issue Two: With regard to her alleged postconcussive syndrome, is Leys either temporarily totally or permanently totally disabled as a result of her June 9, 2008, industrial injury?

Issue Three: If, with regard to her alleged postconcussive syndrome, this Court determines that Leys is either temporarily totally or permanently totally disabled, for what period of time are such benefits due?

FINDINGS OF FACT

¶ 5 This Court finds the following facts by a preponderance of the evidence.[2]

[1] In Leys' Trial Brief, she requests "the Court order full coverage for the medical costs incurred in relation to the recurrent carpal tunnel condition." Both because this issue was not raised in the Petition for Hearing or Pretrial Order, and because of the way this Court resolves the question of continued liability, this issue is moot.

[2] Ordinarily, the claimant bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks. *Dumont v. Wickens Bros. Constr. Co.*, 183 Mont. 190, 201, 598 P.2d 1099, 1105-06 (1979) (citations omitted). However, "where the dispute is whether the claimant has the right to permanent total disability (PTD) benefits under § 39-71-702, MCA, the insurer bears the initial burden of proving that the claimant is not permanently totally disabled. . . . The insurer meets its burden by showing that a physician has: determined that the claimant is at maximum medical improvement, set the claimant's physical limitations, and approved a job analysis. If the insurer meets its initial burden, the burden shifts to the claimant to prove that he is entitled to PTD benefits notwithstanding the approved job analysis." *See Davis v. Liberty Ins. Corp.*, 2017 MTWCC 21, ¶ 43 & n.9 (collecting cases). In this case, there are approved job analyses. Thus, the burden shifted to Leys.

Pre-Accident

¶ 6 Prior to the 2008 motor vehicle accident (2008 MVA) giving rise to this claim, Leys had a significant medical history. In 1997, she suffered a whiplash injury that required physical therapy to resolve. In 1998, she began taking Zoloft to get through depression stemming from her divorce. In 2005, when she gradually discontinued Zoloft, she had substantial problems with depression, anxiety, attention, concentration, motivation, irritability, panic attacks, and sleep. That same year, after documenting a history of worry and panic attacks, neck and low-back pain, and numbness in Leys' arms, a physician assistant recommended she get counseling and mention the numbness to her neurologist to see whether a brain MRI was indicated. Around this time, she was also treated for a migraine headache. In 2006, Leys suffered a displaced fracture of her left wrist, which required closed reduction with conscious sedation. And in 2007, she suffered chest pains and palpitations.

¶ 7 Around November of 2007, Leys started working full-time as the Administrator at Edgewood Vista Management (Edgewood) in Belgrade. About six months into her tenure, she and her manager signed a 90-day action plan, designed to address some long-standing problems at the facility. The plan documented a number of performance issues on Leys' part, including problems with trust, communication, training, scheduling, time- and supply-management, follow-up, documentation, and interaction.

¶ 8 During this period, Leys had several stressors in her life, including: working up to 60 hours a week with limited time off, a sick father living on the Hi-Line, and problems with her former boyfriend/common-law spouse.

Industrial Accident

¶ 9 On June 9, 2008, Leys was in the course of her employment with Edgewood, driving a company car, when she noted a vehicle in her rear-view mirror. Leys was traveling approximately 15 miles an hour. The other driver got very close to her and waved at her to get out of the way. He then backed off substantially before zooming up behind her again, rear-ending her at an excessive speed for the zone, pushing her approximately 250 feet forward, and fleeing the scene.

¶ 10 Leys told her medical providers that, just before impact, she had both hands on the steering wheel. However, it is now known that statement was false as Leys was holding her cell phone with her right hand and talking to her co-worker and friend, Coreen Rooney.

¶ 11 The first things Leys recalled after impact were finding everything from her passenger seat on the floor, looking for her phone, and seeing a man at her driver's-side window. The man, Matthew L. Garson, DDS, was a witness to the accident. He stated:

> I was at the side of Ms. Leys' vehicle within 20-30 seconds of the impact. Ms. Leys was visibly upset and appeared dazed and confused when I arrived. Although I was able to speak with Ms. Leys, I don't know if she understood me because she didn't seem focused during our conversation.
>
> She told me her neck hurt and it appeared to me that her neck was injured.
> . . .
>
> I remained at the scene . . . approximately 10-15 minutes from the time of impact. During this time, she continued to appear dazed and confused.

Leys called 9-1-1 but was confused by the operator's directions.

¶ 12 Leys was transported from the scene of the accident to Bozeman Deaconess Hospital by ambulance. When medical personnel arrived, they documented that Leys was "A+Ox4," meaning that she was alert and oriented to person, place, time, and situation. Leys denied hitting her head and losing consciousness. The ambulance record indicates that she denied "SOB, numb/tingling extrem[i]ties, head/neck pain, blurred vision, dizziness, [and] nausea," but did complain of "mid back pain in spine, lower right abd pain, [and] right temporal pain."

¶ 13 Rooney met Leys at the Emergency Room and said that Leys looked "dazed and confused." Rooney reported that Leys started to cry, which "shocked" Rooney. Leys kept saying, "I can't believe this happened," but when Rooney asked her what had happened to her, Leys could not say.

¶ 14 However, a nurse recorded that Leys scored 15 on the Glasgow Coma Scale, the highest score possible, indicating that her neurologic status was normal.

¶ 15 Leys told hospital personnel that she had a left-side headache and right upper quadrant abdominal pain, and that she had had chest pain right after the accident. She underwent cervical, thoracic, and lumbar spine x-rays, which were negative, and was medicated for pain and discharged with a diagnosis of low-back pain due to myofascial strain.

Post-Accident

¶ 16 Leys returned to work the following day with just a headache but felt worse over the following days. She continued to work, though for fewer hours than before.

¶ 17 At some point shortly after the accident, Liberty accepted liability and started paying benefits.

¶ 18 Over the next eight-and-a-half years, Leys received a variety of care, including: medical, neurological, surgical, and chiropractic treatments; physical, occupational, and speech therapies; and counseling.

2008

¶ 19 On June 13, 2008, four days after the accident, Leys went to see Jonathan M. Wilhelm, DC, CCEP, at Pro Chiropractic. She complained of neck pain, left-shoulder pain, occipital pain, mid-back pain, muscle spasms, tingling into her arms, and poor concentration. Among Dr. Wilhelm's initial impressions were whiplash associated disorder, and postconcussive syndrome or mild traumatic brain injury. He gave her a "fair" prognosis and recommended ice, natural anti-inflammatories, and over-the-counter pain relievers. However, on August 4, 2008, noting that Leys continued to suffer from persistent symptoms, Dr. Wilhelm referred her for postconcussive syndrome rehabilitation with Cathy Fisher, MS, CCC-SLP, at Neuro Rehab Associates, Inc.

¶ 20 On August 14, 2008, Leys established care with Timothy J. Adams, MD, at Bridger Internal Medicine. Dr. Adams indicated she was experiencing pain in the back of her neck and on both sides of her head, as well as bilateral tingling in her hands. He further noted that she had noticed some memory problems, forgetfulness, inattention, irritability, frustration, and impatience since her accident. Dr. Adams assessed Leys as having cervicalgia, prescribed a trial of Xanax, ordered an MRI, and referred her for physical therapy.

¶ 21 Leys had the MRI at Bozeman Deaconess Hospital on August 21, 2008, which was "[u]nremarkable." Dr. Adams referred Leys to neurologist Sherry Reid, MD, at Intermountain Neurology.

¶ 22 On August 26, 2008, Leys saw Steve Anderson, PT, MPT, a physical therapist. Anderson noted that Leys complained of bilateral arm numbness and waking several times a night as a result. Anderson indicated that Leys presented with "signs and symptoms of soft tissue tightness and cervical spine dysfunction as well as upper thoracic dysfunction related to motor vehicle accident of 06/09/08." He thought that she was "an excellent candidate for conservative care to reduce soft tissue complaints and improve musculoskeletal dysfunction and impairments," as well as "an excellent candidate for further followup with a specialist assessment for neurologic involvement of the head injury." Leys treated with Anderson until September 20, 2010.

¶ 23 At the end of August, Edgewood granted Leys a 30-day leave of absence to deal with her medical issues; the leave period began the first week of September 2008. Her manager contacted her near the end of the 30 days, inquiring as to whether she was coming back to work the following Monday. Leys indicated that she had not been given a medical release and had restrictions, to which he replied, in essence, "be there if you want to keep your job." When Leys said that she would require accommodations, she received a reply thanking her for her "voluntary" resignation.

¶ 24 On September 24, 2008, Leys returned to see Dr. Adams for a complete physical. She reported that she "fe[lt] fine except her neck pain." On exam, Dr. Adams noted "[n]o unusual anxiety or evidence of depression."

¶ 25 On September 25, 2008, Leys saw Fisher, a speech-language pathologist, for a cognitive linguistic assessment. Fisher's note states, "Initially, she denied that she lost consciousness but with time realized that there was a lapse in her memory. The first thing she remembers after the accident was two witnesses coming to her door." Leys denied having any past concussions or head injuries. Fisher administered several standardized tests and reported that Leys' scores fell in the average range overall. Fisher recommended speech-language therapy with the goals of improving attention, memory, and executive functioning. Leys treated with Fisher through February of 2010.

¶ 26 In a letter dated October 2, 2008, Edgewood formalized the end of its employment relationship with Leys, writing: "This letter is to notify you that we are accepting your voluntary resignation with Edgewood Vista, Belgrade effective October 7, 2008." Among the reasons given included that Leys had been placed on a performance improvement plan in April 2008 for serious concerns regarding her performance and conduct as Administrator, Leys had indicated that she was still unable to perform the duties for which she was hired, and Edgewood could not accommodate a part-time or other modified job for Leys' position as Administrator given that it was essential to the company's business operations.

¶ 27 On October 6, 2008, Leys saw Michelle Rosen, OTR/L, for occupational therapy. Leys' chief complaints included struggling with concentration, difficulty with reading, pain in her neck, back, and shoulder muscles, difficulty with peripheral vision, and "everything takes longer." Following evaluation, Rosen summarized Leys' impairments as follows: "Testing and results indicate impairments for upper extremity gross motor coordination, left hand fine motor coordination, visual perceptual skills, processing speed, gross ocular skills, and independence with activities of daily living." Rosen felt that Leys demonstrated excellent rehab potential and worked with her through May 4, 2009.

¶ 28 On October 16, 2008, Leys saw Dr. Reid, a neurologist. Dr. Reid has served as Leys' treating physician. Dr. Reid had no pre-accident medical records, but Leys denied any prior head injuries or headaches, or arm or neck problems. She further told Dr. Reid that, at the time of the accident, her hands were on the steering wheel, and she sustained a brief loss of consciousness and confusion. After cognitive and physical examination of Leys, Dr. Reid assessed her as having postconcussive syndrome following a concussion/mild traumatic brain injury, as well as secondary mood disruption, sleep disruption, cognitive dysfunction, headache, dizziness and visual disturbance, neck and back pain, and possible underlying entrapment neuropathy. Leys declined an EMG of her arms at that time. Dr. Reid counseled her to continue her current therapeutic modalities, including physical therapy, speech therapy, and occupational therapy, increased her Zoloft and put her on a trial of Ambien, and, for her neck pain, referred her to Bradley Lewis Aylor, MD, PT, at Bozeman Sport and Spine.

¶ 29 In the fall of 2008, Leys had a neuropsychological evaluation, at Dr. Reid's and Leys' attorney's referral, with David E. Nilsson, PhD, ABPP-CN.

¶ 30 Dr. Nilsson first met with Leys to take a history. Leys reported to Dr. Nilsson that she had a "momentary loss of consciousness" in the accident. She recalled the impact, but not the immediate subsequent events; her first memory was bystanders coming to her window. Leys told Dr. Nilsson that immediately after the accident she experienced blurred vision, nausea, tingling in her hands, and head, neck, and back pain. She reported that she continued to have nausea, vomiting, blurred vision, daily headache, decreased sex drive, memory problems, depression, anxiety, problems with concentration, insomnia, easy fatigability, neck pain, and tingling in her hands. Leys reported that she returned to work but, due to the sequalae from her injuries, "started multiple tasks and finished few." She reported that she had to rely on her assistant but that when her assistant left in August 2008, she "could not function." She informed Dr. Nilsson that she was "dismissed and blamed for previous problems." Leys reported that she had problems with simple tasks, such as paying her bills. She reported that she got lost while driving to familiar places.

¶ 31 Dr. Nilsson documented that, prior to her accident, Leys had had no serious medical or physical injury or disease, that she had experienced occasional migraines through early adulthood, and that she had a family history of depression and was taking Zoloft. Although Leys did "not describe depression as being her most prominent symptom," Dr. Nilsson noted that she reported experiencing "reactive irritability, low stress and frustration tolerance, more anxiety-based symptoms commonly associated with the traumatic brain injury."

¶ 32 Dr. Nilsson then administered several neuropsychological tests on November 14, 2008. Dr. Nilsson concluded that Leys' test results showed a brain injury:

> Results of neuropsychological testing suggest that Ms. Leys was, and continues to be, a bright woman, obtaining a WAIS-III Full Scale I.Q. score of 121 (92nd percentile). However, consistent with her medical history of acquired brain injury, subtest scaled scores varied dramatically. No preinjury testing was available at the time of the evaluation. Her overall test profile reflected dramatic variability of functional capacity, subtest scaled scores ranging from the 99th percentile (i.e., Similarities, Comprehension) down to the 25th percentile (i.e., Digit Span). Most prominently displayed was her difficulty for memory, consistent with anecdotal report. Language memory, particularly structured (i.e., story), tended to be a relative strength, but below the projected level of her intellectual and cognitive ability. Ms. Leys struggled most dramatically for less structured tasks and for tasks requiring language association learning, reflecting her relative difficulty conceptually organizing information. The structured format for recognition memory (i.e., multiple choice), benefitted her recall, in star[k] contrast to the less structured testing format. Her lowest scores were for an unstructured visual-spatial perceptual task, scoring only at the 16th percentile. Similarly, as would be expected given such an injury, Ms. Leys struggled rather

> impressively for higher order executive function, scoring within an "average" range or below, struggling for sequencing and the cognitive flexibility required of alternating response.

¶ 33 Thereafter, in the cover letter to Leys' attorney, to which he attached his report, Dr. Nilsson noted:

> She now is currently roughly eight months post-injury and continues to display the physical, neurocognitive, and neurobehavioral sequelae commonly expected for such a medical history. I find no indication of any effort to exaggerate or distort symptoms. Ms. Leys displays prominent weakness for grip strength bilaterally, as well as difficulty for fine motor control and dexterity, a particularly prominent difficulty for nursing. She continues to experience numbness and tingling as well in both hands, more prominently for the right. She displays a variety of other physical symptoms, including disruption of sleep, easy fatigability, and persistent headache, all of which are significantly disruptive to her day-to-day routine.
>
> . . . .
>
> Cognitively, Ms. Leys exhibits prominent memory deficits across a variety of areas in significant contrast to her current levels of estimated intellectual and cognitive ability. She is a very bright woman, but consistent with her report, her functional capacity is significantly impaired and disrupted.

Dr. Nilsson recommended, *inter alia*, changing Leys' antidepressant/antianxiety medication, continuing speech and occupational therapy, and getting a sleep study. Dr. Nilsson thought that Leys "will continue to recover but has likely achieved a majority of recovery expected." However, Dr. Nilsson stated, "Follow-up neuropsychological testing may be of benefit in roughly 12 months to monitor recovery and to better understand specific long-term consequences."

2009

¶ 34 After conducting an initial evaluation and EMG testing on March 20, 2009, at Dr. Reid's request, John A. Vallin, MD, diagnosed Leys with bilateral carpal and cubital tunnel syndromes. He noted however,

> I would be unable to explain how her MVA could have caused these findings given the absence of any fracture or dislocation of the wrist. She does have a history of an old left wrist fracture with slight deformity involving the ulnar aspect of the wrist. She has no preexisting history other than some reported intermittent numbness of the arms with sleeping which had not previously been evaluated. It is possible that the MVA may have exacerbated her ongoing symptoms though this is unclear as well.

¶ 35 On March 26, 2009, Leys underwent an initial evaluation with Dr. Aylor. He noted that her primary complaints were neck pain, right- and left-shoulder girdle pain, and daily headaches. Her secondary complaints included bilateral arm pain, bilateral hand pain, left greater than right, and aching in upper arms with tingling and numbness in forearm and hands bilaterally. Dr. Aylor diagnosed her with Cervical Spondylosis, Cervicalgia, and Headache, and treated her over the next six months with mixed results.

¶ 36 In April 2009, Dr. Aylor gave Leys joint injections under fluoroscopic guidance in her neck, followed by trigger point injections a week later. Both provided immediate, though only temporary, relief.

¶ 37 On April 23, 2009, Amy Keefer, LCSW, in Bozeman, saw Leys for an initial intake. She met with Leys for two hours and administered the Beck Depression Inventory II, which showed Leys was suffering from "moderate depression." Keefer continued seeing Leys for therapy until March 25, 2010.

¶ 38 On April 28, 2009, at Dr. Reid's referral, Leys had an overnight polysomnography study "to determine if there may be a sleep disorder contributing to her symptoms of excessive daytime somnolence as well as her memory decline." Virginia Pascual, MD, the attending physician, diagnosed her with "Mild REM related obstructive sleep apnea." Although she noted, "It does not appear that this degree of apnea would account for her symptomatology," due to the fact that Leys had symptoms consistent with ADHD and also excessive daytime somnolence, Dr. Pascual prescribed her a stimulant.

¶ 39 By May 4, 2009, having worked with Leys for over six months, Rosen told Dr. Reid Leys had improved in some ways, but her "remaining impairments . . . continued to impact her participation in life roles and performance of activities of daily living." Rosen recommended "continued Occupational Therapy" and rated her rehab potential as excellent "due to her motivation and follow through." Leys continued OT with Stacie Erfle, OTR/L through January 6, 2010.

¶ 40 Later in May, Dr. Aylor gave Leys more joint injections, followed by more trigger point injections. Aside from her right arm, Leys reported some improvements.

¶ 41 On June 1, 2009, Leys saw Dr. Reid. In a letter to Dr. Adams the same date, Dr. Reid indicated:

> Her left arm symptoms have resolved. She continues to have right arm tingling and pain. . . . She continues to have depth perception problems, although this is improving. . . . She . . . does not trust her judgment and has difficulty multitasking. She is forgetful and has been lost. She continues to have word-finding problems. She has difficulty cooking and actually left the stove on. She still feels depressed but feels that her emotions and animation is improving . . . . Her dizziness has resolved. Her headaches are better, as her neck gets better. She is eager to get back to work and

> thinks she could do it about four hours per day at most in a quiet environment. She does not feel that she could do her previous job.

Dr. Reid opined that Leys might be able to try a couple of jobs with significant limitations.

¶ 42 At his June 10, 2009, re-evaluation with Leys, Dr. Aylor recommended "medial branch radiofrequency ablation for C2-3 and C3-4 with the goal of alleviating the upper cervical symptoms and improving her functional capabilities." He performed the procedure on June 23, 2009. Three weeks later, Dr. Aylor noted, "There has been significant improvement of symptoms following the radiofrequency ablation in terms of improvement of headache. She no longer has radiating symptoms into the arms." However, he did document that Leys had some "neuritis associated with radiofrequency ablation," for which he prescribed Neurontin.

¶ 43 On June 29, 2009, Fisher updated Leys' progress with respect to her neurocognitive treatment to date. She indicated, "Terry [sic] has made excellent progress yet still notices deficits in the areas of attention, memory, executive functioning and word retrieval. She has excellent metacognitive skills yet still needs some assistance to develop compensatory strategies for daily tasks." Fisher recommended continued "[s]peech-language therapy."

¶ 44 At her July 20, 2009, appointment with Anderson, Leys expressed her readiness to "begin progression of overhead strengthening." Where, in the past, these exercises had resulted in headaches, Leys was now able to tolerate them. I.e., she continued to have burning symptoms in her neck and headaches, but she did not feel these symptoms were aggravated by the exercises.

¶ 45 In the summer of 2009, Leys drove by herself to and from Salt Lake City, Utah, to see a friend.

¶ 46 At her August 10, 2009, re-evaluation with Dr. Aylor, Leys complained of neck pain, which radiated into the left side of the skull, as well as intermittent numbness in her hands and wrists, left greater than right. Leys reported that her headaches returned the previous week, beginning in the afternoon, but resolved with 1-2 Tramadol. Dr. Aylor recommended that she consider repeating the radiofrequency ablation if her headaches returned down the road.

¶ 47 In late summer 2009, Leys drove by herself to and from San Diego, California, to see her son.

¶ 48 At his October 7, 2009, re-evaluation with Leys, Dr. Aylor indicated that she continued to have "decreased sensation at the base of the skull and upper neck as well as what she describes as a burning sensation," which he related to the radiofrequency ablation. He suggested that Leys continue using the "Neurontin with the expectation that

with time the irritation to the nerve will resolve," and, given that he had no other treatment recommendations, placed her at maximum medical improvement (MMI).

¶ 49 In the fall of 2009, Leys twice drove to Havre to visit her family.

2010

¶ 50 Starting in January of 2010, Leys became entitled to Social Security Disability benefits, against which Liberty took an offset.

¶ 51 On January 6, 2010, Fisher indicated improvements to Leys' mood, insight, and functioning, but deficits in her ability to initiate tasks and acceptance. Fisher recommended continued speech therapy to "target executive functioning skills including helping her to modify tasks and the environment, anticipating difficulties so she can develop strategies to compensate for them and self-assess performance so that she can make modifications for the future," as well as asking her neurologist about "Craniosacral therapy as a modality to reduce her headaches and possibly other pain."

¶ 52 On January 20, 2010, Leys saw Dr. Reid, who wrote a letter to Dr. Adams stating that Leys' "depression is worse and she has oftentimes stayed in bed for 2-3 days at a time. She is unable to cope." Dr. Reid also told Dr. Adams that Leys had daily headaches. Dr. Reid noted that Leys "continues to have persistent cognitive problems especially with forgetfulness and multitasking." Dr. Reid recommended that Leys continue with her physical, occupational, and speech therapy. Dr. Reid also increased Leys' Zoloft dose.

¶ 53 On February 9, 2010, Leys saw Richard N. Vinglas, MD, a hand surgeon at Bridger Orthopedic. He documented that she complained of bilateral hand numbness, tingling, and pain that started after her motor vehicle accident; Leys denied any symptoms before that. Dr. Vinglas recommended she undergo cubital and carpal tunnel release surgeries.

¶ 54 On February 25, 2010, Leys told Fisher that Dr. Reid had referred her to vocational rehabilitation and that she had been volunteering but having difficulty. Nonetheless, Fisher noted that Leys was "excited to start the return to work process by working with a Vocational counselor."

¶ 55 In follow-up letters to Dr. Adams in the spring of 2010, Dr. Reid noted that Leys' depression had improved and that she was looking to wrap up counseling soon. She further noted that Leys had completed speech therapy and her functional ability had improved, although she was still having problems with judgment, initiation, and execution, and her vision was still impaired. Finally, Dr. Reid indicated that Leys was continuing with physical therapy but had "yet to hear from work comp regarding surgery by Dr. Vinglas or vocational rehabilitation."

¶ 56 At her May 13, 2010, appointment with Anderson, Leys indicated she was "[s]till having intermittent headache issues and still having intermittent hand numbness and tingling issues." The issues with her hands continued into June and July.

¶ 57 On September 20, 2010, Anderson wrote to Dr. Reid, reporting that Leys' cervical spine, headache, and right-elbow/-forearm/-hand symptoms had worsened. Anderson noted that Leys had yet to have an orthopedic consult regarding her upper-extremity symptoms, and that she needed to follow-up with a doctor. He further recommended that she continue with strength and stability but did not see her again after this appointment.

¶ 58 After Leys' September 27, 2010, appointment with Dr. Reid, Dr. Reid wrote a letter to Dr. Adams stating that Leys continued to suffer from cognitive dysfunction but that her depression was "somewhat better."

¶ 59 On October 4, 2010, counsel for Leys wrote to Dr. Reid and Dr. Vinglas, posing a series of questions concerning her arms and hands. Both opined that Leys' 2008 MVA materially and substantially aggravated or caused Leys' bilateral carpal tunnel syndrome and cubital tunnel syndrome.

¶ 60 In the fall of 2010, Dr. Reid wrote a report to be used as an expert witness disclosure in Leys' civil case she brought against the insurer of the vehicle she was driving. Based upon Leys' subjective reports, the medical records in her file, and Dr. Nilsson's neuropsychological evaluation, Dr. Reid opined as follows:

> Teri sustained multiple injuries on June 9, 2008 when the vehicle she was driving was hit from behind by another vehicle. A brief loss of consciousness was reported as well as a short-term memory loss. Teri reported a lapse of memory of events around the time of the accident. After the accident, Teri was confused and had difficulty understanding and could not follow instructions given her from the 911 operator.
>
> . . . .
>
> Teri suffered a mild traumatic brain injury with post concussive syndrome with secondary mood disruption (depression), sleep disruption, cognitive dysfunction (processing, judgment, initiation and task execution), headache, dizziness, visual disturbance, disturbance of skin sensation, bilateral carpal and cubital tunnel syndrome (arm pain), and chronic neck and back pain. To my knowledge, she had no history of these conditions prior to the motor vehicle accident. Therefore, it is my opinion that these symptoms are related to the motor vehicle accident.

Dr. Reid stated that Leys' "cognitive dysfunction remains about the same as it was when I began treating her." Dr. Reid explained that Leys continued to struggle with memory, concentration, judgment, initiating and execution, processing, and conceptually

organizing information. Dr. Reid noted that Leys' vision was impaired. Dr. Reid further explained that Leys "becomes overwhelmed in high stimulation environments such as crowds and finds it difficult to function effectively in those environments." Dr. Reid concluded that due to Leys' brain injury and its sequalae, Leys was unable to work and that her "brain injury and deficits are likely to be permanent and will require ongoing supportive treatment." Dr. Reid also opined that Leys suffered bilateral carpal tunnel syndrome and left cubital tunnel syndrome caused by the accident.

¶ 61 As part of Leys' civil case, her attorneys obtained a life care plan. In a medical management questionnaire, dated October 21, 2010, Dr. Reid indicated it was doubtful that Leys would return to work, and that Leys should do "No driving [secondary to] safety issues unless symptoms change."

¶ 62 On November 29, 2010 — approximately two-and-a-half years after the accident — Leys underwent a neuropsychological independent medical examination (IME) with Stuart Hall, PhD. Dr. Hall is a psychology professor at the University of Montana. He focuses on clinical neuropsychology, which he described as a focus on human neurological disorders and their relationships with cognitive, behavioral, and emotional problems. At that time, Dr. Hall performed three or four forensic neuropsychological evaluations per year.

¶ 63 As part of Leys' evaluation, Dr. Hall reviewed her medical records spanning April 22, 2005, through April 28, 2009, noting a history of depression. When Dr. Hall took a history from Leys, she reported that she drove, but not without difficulty, and that she had problems with memory, concentration, and word finding. She further reported that she had tried volunteer work, but that it did not go well because she found it hard to initiate tasks, manage money, and handle scheduling.

¶ 64 Dr. Hall administered 21 neuropsychological tests and interpreted their results as "represent[ing] an essentially normal examination." He noted that her "Processing Speed Index score, which is extremely sensitive to neurological dysfunction, was at the 97th percentile," and that her scores on executive function tests were well within normal limits. He did, however, acknowledge that some of Leys' tests were in the impaired range, but explained that her results "do not indicate cognitive deficits secondary to traumatic brain injury and the most likely explanation for Ms. Leys' complaints are depression, medication effects, chronic p[]ain, sleep disturbance or some combination of these factors." Dr. Hall described her subjective complaints, as a whole, as "severely out of line with the results of cognitive testing as well as the severity of her head injury." Of these factors, Dr. Hall thought depression was the main cause: "Her level of depression is substantial and is very likely to have a significant impact on her cognitive function as well as day-to-day activities."

¶ 65 In his testimony in Leys' civil case, Dr. Hall testified that the tests he administered revealed that Leys' depression was at least in the moderate range, pushing into the severe range. He explained that most people with Leys' level of depression would not be

able to work. Dr. Hall testified that a person does not need to have loss of consciousness to suffer a brain injury and that it is possible to suffer a brain injury from a whiplash injury. However, Dr. Hall did not think that was what occurred with Leys. Dr. Hall acknowledged that it can sometimes be difficult to differentiate neurologic injury from depression. However, he explained that with Leys, it was not difficult "because her cognitive scores – her scores on cognitive tests are extremely strong, including areas that are very sensitive to the effects of neurological injury."

¶ 66 Leys underwent an IME with Lennard S. Wilson, MD, a neurologist, on November 30, 2010. As part of the evaluation, Dr. Wilson reviewed her medical records spanning August 19, 1981, through October 4, 2010. He noted a strong family history of migraines, that Leys' father had used Zoloft late in life, and that Leys' mother had "demonstrated major mood difficulties." As for Leys' own medical history, Dr. Wilson noted, *inter alia*, depression, a "history of numbness and tingling" in her hands/arms, and problems with migraines from her youth, worsening in the 1990s.

¶ 67 Dr. Wilson relied on a number of articles and studies to conclude that whatever symptoms Leys did suffer, including impairments in cognitive processing and verbal memory, and functional deficits, should have resolved long ago.[3] His report notes that Leys was able to recall remote events from the 1980s and 90s, and evidenced no confusion, which was in contradistinction to her complaints with functioning throughout the day. To the extent her symptoms have continued, Dr. Wilson cited additional studies from which he concluded that Leys' pre-existing depression and somatization have likely played a role.[4] Dr. Wilson also cited the DSM-IV-TR, which, according to Dr. Wilson, states that a diagnosis of postconcussive syndrome requires, "a history of head trauma that has caused significant cerebral concussion, including manifestations of a concussion i.e.: loss of consciousness, post-traumatic amnesia, less commonly traumatic onset of seizures." Applying these standards, Dr. Wilson opined that Leys did not suffer a brain injury in the motor vehicle accident:

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[3] *See* "Quebec WAD Cohort Study," *Spine*, 1995; 20: 1S through 73S (indicating that "the return to activity curve was 80% at one hundred fifty days"); McCrae, M., et al., "Acute Effects and Recovery Time Following Concussion in Collegiate Football Players, the NCAA Concussion Study," *J.A.M.A.*, 2003: 290: 2556-2563 (indicating that "mild impairments in cognitive processing and verbal memory were noted two days after concussion, resolved by Day 7, with no significant differences in symptoms or functional impairments in concussion versus control group ninety days after concussion").

[4] *See* Kivioja, J., et al., "Psychiatric Morbidity in Patients with Chronic Whiplash-Associated Disorder," *Spine*, 2004; 29:1235-1239 (a study of motor vehicle accidents with whiplash type complaints demonstrating that a history of psychiatric disease is more common in individuals with chronic whiplash-like symptoms both pre- and post-accident); Quebec WAD Cohort Study," *Spine*, 1995; 20: 1S through 73S (individuals not returning to work had a high incidence of underlying psychiatric issues); *Oxford Workshop Series*, McCrae, M., "Mild Traumatic Brain Injury and Post-Concussion Syndrome," 2008 (describing that persistent somatic and mood-related symptomatologies in the postconcussive state are largely indistinguishable from those of depression and anxiety); Hoge, C., et al., "Mild Traumatic Brain Injury in U.S. Soldiers Returning from Iraq," *New England Journal of Medicine*, 2008; 358: 453-463 (discussing the findings that depression, PTSD were important mediators in the relationship between brain trauma and physical health problems); McCrea, M., et al., "Preinjury Somatization Symptoms Contribute to the Clinical Recovery After Sports-Related Concussion," *Neurology*, 2016; 86: 1856 (analyzing the relationship of preinjury somatization symptoms to reported postconcussive symptom recovery).

> The patient, from review of the records and history information, at most suffered a very mild or probably no concussion. The vast number of symptoms that occurred subsequently would be highly unusual for rear-end motor vehicle accident. The well-documented history and examination provided in the records in great detail would obviate a major traumatic brain injury. The initial reports post-accident, particularly in the ambulance narrative and in the Bozeman ER, suggest no retrograde or anterograde amnesia, with Glasgow Coma Scale of 15 within minutes of the accident.
>
> . . . .
>
> On a historical basis, the patient certainly did not suffer credible head injury from a rear-end motor vehicle accident by all reasonable criteria. . . . From the history obtained, the patient would not fulfill the criteria for post-concussive syndrome, and certainly there has been evidence of prior depression, ongoing depression, even noted by Dr. Nilsson's report despite being on Zoloft.

¶ 68 In his testimony in Leys' civil case, Dr. Wilson agreed that Leys was "worse off" than she was before the accident but opined that the reason was that she had inadequately-treated depression. Dr. Wilson testified,

> There's no traumatic brain injury here. This is the sequalae of someone who's had depression before, has had chronic pain, has had migraine, these are the people who unfortunately I see all day as a neurologist who are asking, why can't they find anything wrong with me when I feel so terrible? I see this all day long.

Dr. Wilson relied upon Dr. Hall's finding that Leys' cognitive functioning was normal and testified that his interpretation of Dr. Nilsson's test results was that they "weren't very abnormal." Dr. Wilson testified that the symptoms of depression are "exactly the same" as those of a mild traumatic brain injury. Dr. Wilson thought one reason Leys was not doing well was that she had been told that she had a brain injury, which made her feel that she could not improve. Dr. Wilson testified that Leys is not malingering; instead, "there are just some people, you know, who, for medical and maybe psychological reasons, you know, do badly after these injuries and, you know, we have great evidence for that." He further explained:

> Yes, there was an acute worsening with the accident. Yes, there were headaches and there was worsening depression. But again, she did not suffer traumatic brain injury, she suffered what would be a typical spinal cervical whiplash injury with headaches and often feeling badly.

> She's unfortunately in the group that did not return to work, she did not do well, and the accident may have precipitated this cascade, but where she stands now is no longer directly related to the accident.

2011

¶ 69 On January 24, 2011, Dr. Reid was deposed in Leys' civil case. Dr. Reid opined that Leys suffered a mild traumatic brain injury in the accident and that she was continuing to suffer from cognitive dysfunction as a result. Dr. Reid thought that Leys sustained either a Grade I or III concussion, noting that Leys suffered confusion immediately after the accident. Relying on criteria from the American Academy of Neurology, Dr. Reid explained that if Leys did not suffer a loss of consciousness, she suffered a Grade I concussion, but that if she suffered a momentary loss of consciousness, she suffered a Grade III concussion. Dr. Reid explained that a person does not need to suffer a blow to the head to get a concussion and that a person can get a concussion in coup-countercoup injury, such as a whiplash.

¶ 70 Dr. Reid also opined that Leys had postconcussive syndrome, which is a syndrome that can arise after a concussion that results in a "constellation of any number of symptoms, [including] headaches, sleep disruption, cognitive dysfunction, sometimes visual disturbance and dizziness, irritability and mood problems." Dr. Reid explained that Leys suffered headaches, mood disorder, depression, sleep problems, cognitive dysfunction, visual disturbance, and dizziness.

¶ 71 Dr. Reid based her diagnosis on Leys' subjective reports about her function; upon a positive tandem Romberg, which tests the cranial nerve aid or the dizzy nerve, and some decreased serial finger tapping on the right arm, indicating a delayed motor response; and upon Dr. Nilsson's report. Dr. Reid explained that Dr. Nilsson's report showed "that she's having difficulty with memory and higher executive functions, which in turn affects her overall cognitive performance, and that would be consistent with cognitive issues related to a head injury." Dr. Reid further explained that the fact that Leys tested in the normal range on some tests did not undercut her opinion that Leys suffered a brain injury because "it's not necessarily what the score is, but it's where someone's fallen or how far have they fallen, and individuals who are bright who sustain a brain injury are aware of those cognitive deficits."

¶ 72 Although Dr. Reid acknowledged that Leys had pre-existing depression, and that depression can cause concentration and memory problems, as well as fatigue, she testified that she did not agree that that was the case for Leys since, to her knowledge, Leys did not have cognitive problems before the accident, and post-accident, her cognitive problems did not change with the fluctuations in Leys' depression.

¶ 73 Dr. Reid testified that Leys should not drive because she did not have the "ability to sustain her concentration and attention enough to drive safely."

¶ 74 When she began treating Leys, Dr. Reid had no knowledge of any pre-accident employment or relationship problems other than her divorce, and she relied on Leys' subjective description of her condition prior to the accident.

¶ 75 Leys returned to Dr. Reid on January 27, 2011. In a letter to Dr. Adams, Dr. Reid stated that Leys' "memory continues to be the same and she has difficulty with processing, judgment, initiation and execution." Dr. Reid noted that Leys' depression had remained the same, but Dr. Reid recommended that after a scheduled deposition Leys change from Zoloft to Effexor XR to "try and possibly treat her depression more effectively."

¶ 76 On January 31, 2011, Leys was deposed in her civil case. She testified, consistent with what she told her medical providers, that she was grasping the wheel with both hands at the time of the accident.

¶ 77 However, in the same case, Rooney surprised the attorneys when she testified on February 24, 2011, that she knew of Leys' accident the moment it occurred because she was on the phone with Leys at the time, meaning that Leys was not holding the steering wheel with both hands, as she was holding her cell phone to her ear with her right hand.

¶ 78 Leys saw Dr. Reid on April 1, 2011. Dr. Reid noted that Leys continued to have trouble sleeping and that she had an increase in the frequency of her headaches. Dr. Reid noted, "This is a 47-year-old woman with a history of traumatic brain injury and secondary cognitive dysfunction, depression, sleep disruption, visual disturbance, headaches, neck pain and upper extremity pain. Overall things are stable at this point in time with the exception of her depression." Because Leys' depression was not stable, Dr. Reid increased Leys' dose of Effexor XR and stated she was going to refer Leys to a psychiatrist. However, Dr. Reid did not make the referral.

¶ 79 In mid-June 2011, Leys' attorneys sent a letter to Dr. Reid asking whether Leys' arm and hand problems were caused by the 2008 MVA. Leys' attorneys provided a description of the accident and a history of Leys' subjective complaints regarding her arms and hands. The letter did not mention that Rooney had testified she was speaking to Leys on the phone at the time of the accident. Instead, the letter recounted only Leys' testimony that she "had both hands on the wheel when she was struck from behind by the other vehicle."

¶ 80 In the early summer of 2011, Leys settled her civil case.

¶ 81 On July 27, 2011, Leys was rear-ended at a stoplight by an inattentive teenage driver. The impact sent her into the car in front of her. She was wearing a seatbelt. She did not lose consciousness or hit her head, but she did suffer neck and head pain. She was taken to the hospital by ambulance. She had an x-ray and either an MRI or CT scan and took analgesics or anti-inflammatory medications as needed for a few days, but after that, she was back to her pre-accident self with no ongoing symptoms from that accident.

¶ 82 In 2011, Leys purchased a Ford truck and a fifth wheel camper.

¶ 83 The Social Security Administration issued its Notice of Award on August 13, 2011, finding that Leys became totally disabled as of May 31, 2009. Liberty began taking an additional offset against her monthly payments to recover an overpayment of benefits.

¶ 84 In a letter to Dr. Adams dated August 15, 2011, Dr. Reid indicated that Leys felt her depression was adequately treated. She further noted that Leys was having daily headaches, but they were not as intense. Dr. Reid stated that Leys felt her vision and cognition were impaired but stable, and her neck pain was stable. Leys' main complaint was that she continued to have tingling and aching in her arms, right greater than left, and weakened grip. Dr. Reid anticipated that Leys would be at MMI once her upper-extremity symptoms were addressed.

¶ 85 On December 13, 2011, Mary Jo Glockner, adjuster for Liberty, approved a request for authorization for a right carpal tunnel and cubital tunnel release. Surgery was completed on December 23, 2011.

2012

¶ 86 On January 9, 2012, Glockner approved a request for authorization for a left carpal tunnel and cubital tunnel release. Surgery was completed on February 1, 2012.

¶ 87 At the time it approved these surgeries, Liberty did not know about Rooney's testimony that she was speaking to Leys on the phone at the time of the accident.

¶ 88 Following both surgeries, Leys saw Dr. Reid on February 22, 2012. Leys' arm pain had resolved. However, her wrists were achy, and her right third finger and medial hand were still numb. In addition, she had some decrease of sensation on her left elbow. Dr. Reid determined:

> She is at MMI. She will continue her current medications. I will see her in follow-up in 6 months, and if she is stable at that time[,] then on an annual basis.

Although Leys testified that Dr. Reid was finding her at MMI for only her carpal tunnel and cubital tunnel conditions, nothing in her report indicates that. Dr. Reid testified at her deposition that she was placing Leys at MMI for all her conditions because "she really was just static at that point."

¶ 89 On February 23, 2012, Leys saw Michael M. Monson, OD, for an optometric evaluation. He assessed her as having "occasional TBI related motion sensitivity that comes and goes," "mild left hyperphoria and mild convergence insufficiency." He indicated that Leys was doing some "home-based maintenance therapy to help her eyes,"

but that "[she] has mostly leveled off and . . . [won't] have any significant improvements with more vision therapy."

¶ 90 On August 28, 2012, Dr. Reid saw Leys and determined that she was stable.

2013

¶ 91 On January 21, 2013, Leys underwent a neuropsychological IME with Joseph K. McElhinny, PsyD. Leys reported that she was treated for depression after her first divorce, that she had a history of migraines, and that she suffered from a mild concussion in 2001. She complained of 33 symptoms following her 2008 accident, bringing Dr. McElhinny a typewritten list. Dr. McElhinny documented that, "[o]n interview, her recent and remote memory were seemingly unimpaired" and that "she was mildly to moderately anxious," "but her level of organization was unimpaired."

¶ 92 The evaluation included neuropsychological and psychological tests. Of her scores, Dr. McElhinny noted:

> It was difficult for this examiner to clarify any pattern of performance consistent with organically based brain dysfunctions.
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> . . . .
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> On four different procedures sensitive to executive functioning, Ms. Leys was in the average to above average range. . . . The fact is, she performed quite well on executive skill functions that required planning, organization, and problem-solving, as well as sustained attention and adequate speed of processing.

¶ 93 Dr. McElhinny concluded that "there is no evidence of alteration in mental status, cognition, or highest integrative function . . . . There is no evidence of rateable psychiatric impairments. Ms. Leys has 0% whole person impairment."

¶ 94 However, he found:

> She did endorse a higher than expected rate of symptomatology for neurologic impairment as well as amnestic disorders. This high frequency of symptoms in these two categories is consistent with symptoms that are highly atypical in patients with genuine neurologic impairment or amnestic disorder. There was no evidence, overall, suggesting malingering in this woman, but symptom magnification is suggested.

Dr. McElhinny also stated that the MMPI-2 test results indicated:

> Although the client complains excessively of pain and somatic problems and organizes her life around what she perceives to be a physical illness, her complaints probably cannot be explained by actual physical findings. She appears to be very dissatisfied with life and pessimistic about the future. She tends to react to even minor stress with vague physical complaints. Because of this somatic preoccupation, she probably receives much secondary gain from the attention of others or from services she receives.

¶ 95 Dr. McElhinny diagnosed Leys with "Depressive disorder, not otherwise specified" and "Undifferentiated somatoform disorder" and opined that each existed prior to her June 2008 accident and was related to nonindustrial conditions, rooted in her longstanding personality style. Further, he did not believe that her medication regimen contributed to her cognitive condition. Finally, he had no neuropsychological or psychological restrictions for Ms. Leys in returning to work.

¶ 96 On September 16, 2013, Dr. Reid again saw Leys and again determined that she was stable.

¶ 97 On December 6, 2013, Liberty sent a copy of Dr. McElhinny's testing data to Dr. Reid for comment as to whether it changed her opinion.

2014

¶ 98 On January 10, 2014, Dr. Reid responded to Liberty that she was not versed in the interpretation of such test scores, but that they did not change her opinion.

¶ 99 Liberty retained Lisa Kozeluh, MRC, CRC, of Vocational Solutions, PLLC, to prepare alternative job analyses, and asked Dr. Reid to review and either approve or disapprove the six proposed jobs.

¶ 100 On June 2, 2014, Dr. Reid disapproved four jobs, including Client Service Technician ("I think this job would be more than she could handle given her difficulty [with] executive functioning and multitasking."), Collector ("Due to TBI - I don't think her interpersonal skills would be good in stressful situations."), Hotel Clerk ("Interpersonal skills would be taxed in stressful situation."), and Night Auditor ("I don't think she could work nights as it would exacerbate fatigue.").

¶ 101 The same date, however, Dr. Reid approved two jobs with significant modifications, including Switchboard/Registration and Medical Records Clerk. For both of these jobs, Dr. Reid commented that she was concerned about Leys' difficulty with executive function and multitasking. However, in her words, "trying to be optimistic" and give Leys' hope, Dr. Reid approved them anyway, imposing modifications requiring a trial run with limited hours and/or duties. She did not expect that Leys would be successful in either job. She did not think she could do either with just her carpal tunnel symptoms, nor with just her postconcussive symptoms.

¶ 102 On September 18, 2014, Dr. Reid saw Leys and determined that she was stable.

¶ 103 On October 13 and 14, 2014, Leys underwent a psychiatric IME with William D. Stratford, MD. Dr. Stratford reviewed her medical records spanning June 9, 2008, through April 29, 2014, including Dr. Nilsson's, Dr. Hall's, and Dr. McElhinny's reports.

¶ 104 Leys reported that she had had an abnormal sleep study, a history of migraines, and that she had started taking Zoloft around the time of her divorce, but denied any past psychotherapy, motor vehicle accidents, or loss of consciousness. Of the 2008 accident, Leys told Dr. Stratford that "She saw the pickup back off and then swing up behind her. She saw two people in scrubs coming out of an office building, and the next thing she knew, someone in scrubs was knocking on her window."

¶ 105 Dr. Stratford gave Leys a number of tests and inventories, and diagnosed her with the following: (1) major depression, recurrent, mild; (2) substantial disability conviction; (3) mild concussion from 2008 industrial injury, resolved within days or a few weeks; (4) prior history of panic attack, pre-existing; (5) prior history of generalized anxiety disorder, pre-existing; (6) normal neuropsychological evaluation; (7) high level of functional complaints and pain complaints and prior history of abuse; (8) workers' compensation and possibility of third-party litigation; (9) somatic symptom disorder with hypochondriasis; (10) mixed personality disorder; and (11) sleep apnea.

¶ 106 Although he found no evidence that Leys was malingering or exaggerating her symptoms, Dr. Stratford opined that all of her current complaints were caused by pre-existing conditions and not her 2008 industrial injury. Dr. Stratford also attributed Leys' condition to "primary and secondary gain," and the belief that she suffered a traumatic brain injury. As to her "illness benefits," he explained:

> [T]here is primary and secondary gain. There is significant disability conviction with an emotional belief that she is suffering from a traumatic brain injury as a result of her industrial injury of 6/9/08. She is not working. There are significant somatic complaints and neuropsychological complaints . . . that provide substantial currency in her interaction with the world. These are non-negotiable and serve as a pivot point to interact with and influence individuals around her.

¶ 107 Although Dr. Stratford did not believe that Leys was at MMI when he saw her, because her depression "could be much more aggressively managed," he nevertheless stated that "[Leys] has no psychiatric condition that would prevent her from engaging in gainful employment on a reasonably continuous basis," and concluded she was capable of working.

2015

¶ 108 On June 10, 2015, Liberty sent Leys a 14-day letter, advising that her temporary total disability (TTD) benefits would be terminated on June 23, 2015, and demanding that she reimburse Liberty $16,489.76 in overpayments in light of her receipt of Social Security Disability benefits. It relied on Dr. McElhinny's and Dr. Stratford's opinions that Leys had reached MMI, could return to gainful employment, and had no ratable impairment.

¶ 109 Eight months after his IME of Leys, on June 16, 2015, Dr. Stratford signed job approvals, from a psychiatric standpoint, for Switchboard/Registration, Night Auditor, Collector, Medical Records Clerk, Hotel Clerk, and Client Service Coordinator.

¶ 110 On June 22, 2015, counsel for Leys responded to Liberty's letter, objecting to the termination and demanding reinstatement of TTD, arguing that the doctors' opinions were old, biased, and failed to address Leys' physical injuries.

¶ 111 After several years of stability, on September 17, 2015, Leys saw Dr. Reid. She reported that she had a slight increase in hand numbness and loss of dexterity. Dr. Reid recommended that Leys start wearing her wrist splints again, and if those did not lead to improvement within several months, she suggested Leys have a repeat EMG.

2016

¶ 112 On January 6, 2016, Dr. Reid performed an EMG nerve conduction study on Leys, which revealed recurrent mild carpal tunnel syndrome, right worse than left, and mild bilateral ulnar sensory neuropathy. She referred Leys to orthopedics for possible surgical intervention.

¶ 113 On January 21, 2016, Leys gave a deposition in this case. Leys testified that she had at least her left hand on the wheel and acknowledged that she was talking to Rooney on her cell phone at the time of the accident. However, she could not remember if she dropped her phone before the impact or whether it was knocked out of her hand by the impact. This was when Liberty first discovered that Leys was not grasping the steering wheel with both hands.

¶ 114 Leys also testified during her deposition that she did not know whether she lost consciousness; she testified that she remembered seeing the truck closing in on her and knowing it was going to hit her and that her next memory was looking for her phone. She explained, "So after I was thinking more clearly, I think I probably did lose consciousness. But how would I know if I did or did not?"

¶ 115 Leys testified during her 2016 deposition that the truck she bought in 2011 had approximately 97,000 miles on it, an average of approximately 19,000 miles per year. While her son has driven the truck, she has driven throughout central and western Montana to visit family, friends, and medical providers.

¶ 116 In early 2016, Leys saw Dr. Vinglas, who advised her that she would need repeat carpal tunnel release surgeries on both hands. Both he and Dr. Reid, still under the impression that Leys was holding the steering wheel with both hands at the time of the accident, opined that her need for the additional surgeries was related to the 2008 MVA.

¶ 117 On March 18, 2016, counsel for Leys forwarded Dr. Vinglas' opinion, requesting that Liberty immediately authorize the additional surgeries.

¶ 118 Counsel for Liberty responded, "I do not see where Dr. Vinglas has ever addressed the mechanism of injury for bilateral carpal tunnel syndrome under the circumstances of the injury described by Ms. Leys in her deposition." Counsel for Leys replied that "Any further delay in such authorization will be considered bad faith on the part of Liberty" in light of the fact that Liberty relied on Dr. Vinglas' initial opinion in paying for Leys' previous surgeries and this opinion was "simply a follow up to the prior opinion."

¶ 119 Thereafter, counsel for Liberty reached out to Dr. Vinglas, seeking an opinion in which Dr. Vinglas would address the mechanism of Leys' arm and hand injuries. Dr. Vinglas continued to base his opinions on the incorrect "fact" that Leys had both hands on the steering wheel at the time of the accident. He began his letter, dated May 13, 2016, "As you know I originally started treating Ms. Leys on 2/9/10. At that point she was almost two years out from a motor vehicle accident where she had been holding onto a steering wheel while involved in a motor vehicle accident[.]" He went on to opine that Leys had "recurrent bilateral carpal tunnel syndrome," and that "Given her original mechanism of injury, which was significant contusion to the nerve I do feel her recurrence is more likely than not related to her original injury."

¶ 120 Liberty denied liability for the surgeries and payment of claimed disability benefits in relation to the carpal tunnel condition.

¶ 121 Medicare paid for the surgeries, which Leys underwent on her right hand on May 12, 2016, and her left hand on June 16, 2016.

Leys' Present Status

¶ 122 Leys has not worked for income since August 2008. She does not believe she could work due to overstimulation, cognitive and visual impairments, lifting restrictions, lack of dexterity, and pain.

¶ 123 Following her second set of surgeries, Leys has not yet reached MMI. She still has some pain and occasional tingling, and three of the fingers on her right hand tend to lock up. Each of these worsens with use to the point where her hand becomes dysfunctional. She has difficulty using her hands with most daily activities and hobbies and does not feel she could do many of the activities associated with nursing, such as assisting with bathing and dressing, managing medications, filling syringes, giving injections, starting IVs, changing dressings, or taking blood pressures.

¶ 124 Leys also continues to suffer from sleep problems, daily headaches, and trouble with her eyes, including motion sensitivity, blurring of vision and double vision, convergence insufficiencies, and difficulty with depth and distance perception. She still has trouble with "short-term memory, word finding, recognition, decision making and follow-through, initiation, [and] poor judgment." And her emotions are not always appropriate. However, Leys has been able to watch her toddler grandchildren for days at a time. She cooks for herself and cleans, although she states that she has difficulty completing the work; her children help her with housework. She takes care of her flowers and some of her lawn care, and her children help her with the rest. She uses the Internet some and manages her own finances.

Expert Testimony in this Case

Stuart Hall, PhD

¶ 125 Liberty took Dr. Hall's deposition in this case on June 9, 2016. Dr. Hall had not seen Leys since his 2010 evaluation.

¶ 126 Dr. Hall explained that Leys may have suffered a concussion in the 2008 MVA, and that "concussion" and "mild traumatic brain injury" are "fairly synonymous." Dr. Hall did not have an opinion as to whether Leys had postconcussive syndrome. Dr. Hall testified that if Leys' depression could be controlled, Leys was capable of going back to work "[i]n terms of her cognitive function." He further testified that, after reviewing their reports, Dr. Wilson's, Dr. McElhinny's, and Dr. Stratford's were basically consistent with his own.

Lennard S. Wilson, MD

¶ 127 Liberty took Dr. Wilson's deposition in this case on June 9, 2016. Dr. Wilson had not seen Leys since 2010.

¶ 128 Dr. Wilson reiterated his opinion that Leys did not suffer a mild traumatic brain injury in the accident. He explained that by Leys' initial account, and by the bystanders' account, she was "frazzled," but did not lose consciousness. Dr. Wilson testified that Leys' neurological examination was normal. He further testified that the neuropsychological reports of Dr. Hall and Dr. McElhinny, and the psychiatric report of Dr. Stratford, are largely confirmatory.

¶ 129 Regarding the relationship between Leys' carpal and cubital tunnel syndromes and the accident, Dr. Wilson agreed with Dr. Vallin, but disagreed with Drs. Vinglas and Reid. He opined that relating those conditions to the accident is "just not what we see in the medical literature or in experience"; and holding a cell phone, rather than grasping the wheel, would make it even "less likely" that the carpal tunnel syndrome was related to the accident.

Sherry Reid, MD

¶ 130 Dr. Reid testified at her deposition in this case on September 7, 2016.[5]

¶ 131 Dr. Reid explained that she still thought Leys suffered a concussion in the accident. Dr. Reid also reiterated that Leys has postconcussive syndrome, the symptoms of which are: (1) cognitive dysfunction, including short-term memory impairment, dysfunction in her higher executive skills, such as attention, concentration, and multitasking; (2) depression; (3) post-traumatic migraine; and (4) fatigue. Dr. Reid testified that she did not think "depression is the reason for [Leys'] symptoms."

¶ 132 Dr. Reid relied upon Leys' history for her determination that Leys' depression was worse after the accident. Dr. Reid explained that the fact that Leys' MRI scan was normal was of no consequence, as those with brain injuries can have normal scans. Likewise, Dr. Reid testified that Leys' Glasgow Coma Scale score of 15 in the Emergency Room was of no consequence because "[l]ots of people can pass that test even with a mild concussion."

¶ 133 Dr. Reid had read Dr. Nilsson's report and Dr. McElhinny's report, but not Dr. Hall's report or deposition.

¶ 134 Dr. Reid explained that the majority of people who suffer mild traumatic brain injury get better in one week to six months, "[b]ut there are about 10 to 15 percent of people who can take longer, up to 18 months and then there is this subset of patients, an even smaller subset, who don't make a full recovery." She testified that the percentage of people who do not make a full recovery is around 5%, and that Leys is part of that subset. Dr. Reid agreed with Dr. Wilson's testimony that "some people . . . for medical and maybe psychological reasons . . . do badly after these injuries and . . . we have great evidence for that." She testified that, from her read of the literature, some of the factors that can slow or prevent a person's recovery are if the case is in litigation, or if the person is malingering or there are secondary gain issues. She testified that she does not think Leys is malingering.

[5] During Dr. Reid's deposition, Liberty objected to her giving opinion testimony on the grounds that Leys had not disclosed her as an expert witness. However, in *Norris v. Fritz*, 2012 MT 27, ¶¶ 19-24, 364 Mont. 63, 270 P.3d 79, the Montana Supreme Court explained that because treating physicians are hybrid witnesses — i.e., a witness who has personal knowledge of factual events relevant to the case *and* specialized training that allows him to formulate expert opinions regarding those factual events — and because the opinions of a treating physician can be discovered early in litigation, the rules regarding expert disclosures to not apply to a treating physician who is a non-retained expert. Thus, this Court overrules Liberty's objections.

¶ 135 Dr. Reid described Leys as staying mostly static over her course of treatment, although she made some mild improvement, including being able to drive again. Dr. Reid thought that while Leys initially had difficulty driving, she was doing it again, but not at night and not for long distances. Dr. Reid did not know that Leys was driving long distances nor that she pulled a fifth wheel. Dr. Reid was not aware that Leys was on an action plan at work at the time of the accident.

¶ 136 With respect to the carpal tunnel syndrome, Dr. Reid specifically opined that the 2008 MVA caused Leys' initial arm and hand problems, as well as their recurrence in late 2015. She did, however, go back and forth several times before coming to these conclusions. At first, she stated that Leys "had her arms extended in front of her, probably in a flexed position and then sustained that trauma, it probably just aggravated those nerves." Dr. Reid retreated, however, after reading Dr. Vallin's conclusion that he would be "unable to explain how her MVA could have caused these findings given the absence of any fracture or dislocation of the wrist." Later, Dr. Reid returned to her original position, explaining that holding the steering wheel at impact would have caused "flexion of [Leys'] wrist, which could contuse the nerve there and result in carpal tunnel." Nevertheless, when asked at her deposition, Dr. Reid testified that the only way Leys would have carpal tunnel or cubital tunnel without bracing on the wheel was if she hit her hand on something else and hyperextended it while bracing during impact.

¶ 137 During the course of her treatment of Leys, Dr. Reid concluded that Leys was not able to do her job after the 2008 MVA due to her carpal tunnel symptoms and her postconcussive symptoms. As of September 7, 2016, Dr. Reid further testified that she still did not think that Leys could work.

Joseph K. McElhinny, PsyD

¶ 138 Dr. McElhinny's testified in this case on October 28, 2016. He had not seen Leys since 2013.

¶ 139 Dr. McElhinny testified that "There's no measurable medical evidence of a traumatic brain injury in Miss Leys" and that "the descriptions by medical care providers . . . were based on . . . her own reports of her behavior."

¶ 140 In reviewing Dr. Nilsson's neuropsychological test results, Dr. McElhinny did not see any impairments in cognitive functioning. Indeed, he testified that it requires executive function, i.e., attention, concentration, planning, and problem-solving, to drive a vehicle, which Leys returned to doing years ago. He did not think that cognitive issues were the reason Leys was not working.

¶ 141 Rather, to him, Dr. Nilsson's results pointed toward a mood disorder, like depression or anxiety, and a personality disorder. However, while Dr. McElhinny acknowledged that pain from the accident could contribute to Leys' pre-existing

depression, and that having a significant depressive episode could have a limiting effect on her ability to work, he did not think that Leys' depression was currently disabling.

¶ 142 Dr. McElhinny agreed with Dr. Wilson that Leys was not malingering and that there are some people who, for medical and psychological reasons, do poorly after being injured. Dr. McElhinny opined that Leys has struggled to get better because of her long-standing somatoform disorder, or tendency to react to stress with physical and cognitive complaints. And he identified a number of stressful events in Leys' life as potentially significant from a neuropsychological standpoint, including Leys' 90-day work plan that could have resulted in her termination in 2008, the ending of a long-term relationship in 2009/2010, her father's death in 2010, and her sister's death in 2011. Dr. McElhinny thought Leys could return to vocational activity.

William D. Stratford, MD

¶ 143 Dr. Stratford testified at trial on October 28, 2016, and resumed his testimony on December 9, 2016. Dr. Stratford opined that Leys suffered a mild concussion in the accident, also known as "mild traumatic brain injury," but did not believe Leys suffered postconcussive syndrome as a result. Dr. Stratford testified that in 90% of concussion cases, a person has to lose consciousness to have postconcussive syndrome. Dr. Stratford stressed that, pursuant to the Emergency Room record from the date of the accident, Leys never lost consciousness. Moreover, when a person does have postconcussive syndrome, Dr. Stratford testified it almost universally resolves within three months of the concussion.

¶ 144 Dr. Stratford explained that a person can have the same symptoms as typically appear with postconcussive syndrome without having sustained a concussion at all; these symptoms can be found in those who have had whiplash, depression, anxiety, and headache, and can be elicited in 50% of normal college kids. Thus, according to Dr. Stratford, if postconcussive symptoms persist beyond three months of a concussion, as have Leys', they are caused by something else.

¶ 145 As for what did cause or is causing Leys' current complaints, Dr. Stratford opined that while the accident, and her physical injuries therefrom, probably aggravated her pre-existing psychological conditions for a short time, her current subjective complaints "are more likely tied to the course modifiers of somatic symptom disorder, which [are] anxiety, depression, prior victimization, and illness benefits that are keeping it going."

Resolution

¶ 146 Leys argued that Dr. Reid's opinion is entitled to greater weight because she is the treating physician. Although not conclusive, the opinion of a treating physician is generally afforded greater weight than the opinion of a competing expert.[6] She also

[6] *Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶ 27, 365 Mont. 405, 282 P.3d 687 (citation omitted).

argued that this Court should disregard Dr. Stratford's, Dr. Wilson's, and Dr. McElhinny's opinions because they are biased.

¶ 147 Liberty argued that this Court should give Dr. Wilson's and Dr. McElhinny's opinions greater weight because Dr. Wilson has practiced neurology for twice as long as Dr. Reid and cited supportive literature, and Dr. McElhinny is a specialist in the examination, testing, and evaluation of cognitive deficits related to head injuries.

¶ 148 "Expert testimony is opinion evidence which the finder of fact is entitled to disregard if it finds the testimony unpersuasive."[7] Thus, while this Court usually compares such factors as the relative credentials of the physicians and the quality of evidence upon which they base their respective opinions, it need not do so in this case because, although this Court finds that Leys suffered a concussion in the motor vehicle accident, for the following four reasons, it is not persuaded by Dr. Reid's opinion that Leys suffered from postconcussive syndrome from 2015-present.

¶ 149 First, the neuropsychological testing does not support Dr. Reid's opinion that Leys had postconcussive syndrome in 2015, and that it is causing her current symptoms, rather than depression. The only neuropsychological testing Dr. Reid relied upon is Dr. Nilsson's.[8] However, when Dr. Reid opined that Leys had postconcussive syndrome, Dr. Nilsson's test results were stale. Dr. Nilsson tested Leys on November 14, 2008, only five months after the motor vehicle accident. While Dr. Nilsson opined that the variability in Leys' test scores was consistent with a brain injury, he stated that he recommended additional testing a year later to assess Leys' improvement. Dr. Reid gave her opinion without the benefit of reviewing Dr. Hall's neuropsychological testing in 2010 that was "essentially normal." Unlike Dr. Wilson, who construed factual disputes against Leys,[9] thereby indicating bias, this Court is persuaded that Dr. Hall was an unbiased witness and, therefore, gives his opinions significant weight. Given Dr. Reid's testimony that there is a subset of brain injury patients who recover within 18 months, which is larger than the subset of patients who do not make a full recovery, Dr. Hall's test results and opinions undercut Dr. Reid's opinion that Leys is in the subset who never make a full recovery and support the conclusion that Leys is actually in the subset of patients who make a full recovery from a concussion within 18 months.

¶ 150 Second, Dr. Reid did not have evidence to rule out the possibility that Leys' current symptoms are caused by depression. In 2011, Dr. Reid stated she was going to refer Leys to a psychiatrist, but she did not ever follow through. Given that no impartial

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[7] *Stave v. Estate of Rutledge*, 2005 MT 332, ¶ 21,330 Mont. 28, 127 P.3d 365 (citations omitted).

[8] She completely dismissed Dr. McElhinny's 2013 report, which concluded that Leys had no cognitive impairment, on the grounds that she is "not . . . an expert in neuropsychology," nor "an expert in interpreting [that type of] data." While this Court was not entirely persuaded by Dr. McElhinny's opinions, his report was not difficult to understand.

[9] As examples, Dr. Wilson gave no credence to the dentist's observations that Leys' was dazed and confused immediately after the accident and minimized Dr. Nilsson's test results.

psychiatrist has opined as to whether Leys' current problems are caused by depression,[10] and given that Dr. Hall's testing in 2010 was "essentially normal," Dr. Reid did not have evidence from which to determine that Leys' current problems are caused by postconcussive syndrome rather than by depression.

¶ 151 Third, Dr. Reid relied upon Leys' reports of her pre-accident health history and post-accident symptoms, but Dr. Reid did not know that these reports were not always complete or accurate. For example, Leys never mentioned that, prior to the 2008 MVA, she was having performance issues at work and relationship issues at home. And she denied that she had suffered from pre-accident headaches even though she did. Moreover, Dr. Reid had trouble consistently recalling the accurate pre-accident health history she did have, such as the fact that Leys had pre-existing depression, throughout her treatment of Leys. As a final example, it was Leys' subjective complaints that led Dr. Reid to conclude in 2010 that Leys could not safely drive due to her inability to concentrate. However, Dr. Reid did not know that Lays was driving and that in 2009 Leys had driven to Salt Lake City, Utah, and to San Diego, California, and to Havre. Moreover, Leys has continued to drive far more than Dr. Reid knew. Since every physician agreed that driving requires executive functioning, Leys was and is cognitively functioning at a higher level than Dr. Reid knew.

¶ 152 Fourth, Dr. Reid largely relied on the fact that Leys first experienced cognitive dysfunction, among other postconcussive symptoms, after the 2008 MVA. However, a temporal relationship, standing alone, is insufficient to establish causation.[11]

¶ 153 In sum, Dr. Reid did not have sufficient foundation or basis for her opinion. Thus, this Court is **not** persuaded by a preponderance of the evidence that Leys suffered from postconcussive syndrome from 2015-present.

CONCLUSIONS OF LAW

¶ 154 This case is governed by the 2007 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Leys' industrial accident.[12]

Issue One: Does Liberty remain liable for Leys' carpal tunnel syndrome?

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[10] Dr. Stratford did testify that depression is one of the most common causes of the same symptoms of postconcussive syndrome. However, this Court gives no weight to his opinions because he was not a credible witness (e.g., at least exaggerating how often he conducts examinations for plaintiff's personal injury attorneys and stumbling over questions as to whether he had found that every client of Leys' attorneys had problems that were caused by pre-existing conditions).

[11] *See Pasha v. Nat'l Union Fire of Pittsburgh*, 1997 MTWCC 5, ¶¶ 56-63.

[12] *Ford*, ¶ 32 (citation omitted); § 1-2-201, MCA.

¶ 155 Leys argues that Liberty remains liable for her carpal tunnel syndrome because it accepted liability for it and because Drs. Reid and Vinglas opined that the recurrence is related to her original industrial accident.

¶ 156 Liberty argues that the opinions of Drs. Reid and Vinglas were based on misinformation and cites *Warburton v. Liberty Northwest Ins. Corp.*[13] and *Guymon v. Montana State Fund*[14] for the proposition that this Court should give them no weight.

¶ 157 Although Leys is correct that the opinions of Drs. Reid and Vinglas support her claim as to the cause of her carpal tunnel syndrome, Liberty is correct that it is this Court's practice to give less or no weight to medical opinions that are based on misinformation. For example, in *Warburton*, claimant suffered a fall that satisfied the definition of "accident," and offered medical evidence demonstrating that she had problems with her head, neck, and shoulders.[15] However, after finding that claimant gave her doctors inaccurate medical histories and descriptions of the accident, this Court gave no weight to their causation opinions and ultimately ruled that claimant failed to satisfy her burden of proving that she sustained an industrial injury.[16] And in *Guymon*, claimant alleged he was body blocked by his employer while in the course of his employment and offered medical evidence demonstrating that he suffered from adhesive capsulitis of the left shoulder.[17] Although he also offered a statement from his doctor that the condition was consistent with a body block, this Court gave it no weight for two reasons. First, this Court found that claimant gave the doctor a false description of the incident. Second, this Court found that claimant either gave the doctor inaccurate information concerning the onset of his symptoms or that the doctor misunderstood him.[18] This Court went on to rule that claimant did not suffer a compensable injury in the course of his employment.[19]

¶ 158 Here, Drs. Reid and Vinglas were never informed that only one of Leys' hands was grasping the steering wheel at the time of the accident. Thus, Dr. Vinglas did not address how she could have developed bilateral carpal tunnel syndrome as a result. And, although Dr. Reid was asked this question at her deposition, she answered, "This is just speculation on my part. But if you're getting hit, even if you're not holding the steering wheel, your hand is going to hit something to try to brace yourself. So whatever, whether it's the window, door, the wheel or the dash, it still would be a hyperextension injury." However, there is no evidence that Leys braced or hit the hand holding the phone on anything at impact. Thus, as in *Warburton* and *Guymon*, this Court gives no weight to

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[13] 2016 MTWCC 1.

[14] 2016 MTWCC 7.

[15] *Warburton*, ¶¶ 67, 68.

[16] *Warburton*, ¶¶ 68, 69.

[17] *Guymon*, ¶¶ 39, 40.

[18] *Guymon*, ¶ 45.

[19] *Guymon*, ¶ 47.

Dr. Vinglas' opinion, and, because the relevant opinion Dr. Reid offered is both speculative and unsupported by any claim or evidence, it, too, is insufficient to establish causation.[20] Moreover, although he, too, erroneously believed that both of Leys' hands were grasping the steering wheel at the time of impact, Dr. Vallin determined it was very unlikely she suffered carpal tunnel as a result of her accident without actual evidence of significant trauma to her wrists and arms.

¶ 159 In support of her argument that Liberty remains liable for her carpal tunnel syndrome despite the fact that she has insufficient evidence to prove causation, Leys cites *Barnhart v. Liberty Northwest Ins. Corp.*,[21] for the proposition that once an insurer accepts liability, it cannot "un-accept" it.

¶ 160 In response, Liberty argues that it should be relieved of its acceptance of liability under *Bouldin v. Liberty Northwest Ins. Corp.*[22] In particular, Liberty contends that, at the time it initially accepted liability for Leys' carpal tunnel syndrome, both parties mistakenly believed that Leys was grasping the steering wheel with both hands at the time of her industrial accident. By her 2016 deposition and trial, however, Leys had come to believe — although she did not have a personal recollection — that just before impact, she was talking on her cell phone and thus only one of her hands was on the steering wheel.

¶ 161 In *Bouldin*, this Court summarized the common law regarding rescission of and relief from acceptance of liability. It cited the general rule that "once an insurer accepts liability it may not thereafter argue that the injury or condition for which liability has been accepted was not caused by the industrial accident or disease."[23]

¶ 162 This Court applied that general rule in *Barnhart* and *Narum v. Liberty Northwest Ins. Corp.*,[24] both of which involved an insurance company attempting to un-accept liability in a case it had already settled. In *Barnhart*, claimant suffered from a symptomatic neck condition. He then had an industrial accident that caused a permanent aggravation. Liberty accepted liability for the accident claim, settling indemnity and reserving medical benefits. Thereafter, Liberty solicited a contrary medical opinion that claimant's neck condition was the same as if the industrial accident had not occurred. When Liberty tried to un-accept liability,[25] this Court ruled that Liberty remained liable; claimant's medical

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[20] *See Ford*, ¶ 43 (The "correct standard in determining whether there was an accident in the course of employment, whether the claimant suffered an injury or an aggravation of a preexisting condition, and whether there is a causal connection between the accident and the injury/aggravation" is "more probable than not.").

[21] 2016 MTWCC 12.

[22] 1996 MTWCC 61; *see also Beaulieu v. Uninsured Employers' Fund* 1998 MTWCC 17, ¶ 3 (recognizing mistake as a reason to set aside an acceptance of liability).

[23] *Bouldin*, citing *Chaney v. U.S. Fidelity & Guar.*, 276 Mont. 513, 917 P.2d 912 (1996).

[24] 2008 MTWCC 30, *aff'd* 2009 MT 127, 350 Mont. 252, 206 P.3d 964.

[25] *Barnhart*, ¶¶ 43, 50.

evidence was sufficient to prove that the industrial accident permanently aggravated his pre-existing condition.[26]

¶ 163 In *Narum*, claimant developed hip pain after an industrial accident. Thereafter, he discovered that he had had a pre-existing asymptomatic degenerative condition. Liberty accepted liability for the accident and the parties settled the claim, reserving medical benefits with the knowledge that claimant would likely need hip replacement surgery at some point. Liberty then solicited a contrary medical opinion and determined that claimant's need for additional treatment was due to a natural progression of his pre-existing condition. When Liberty tried to un-accept liability, this Court ruled that it remained liable under the language of the settlement agreement: "Respondent cannot accept liability for a claim, settle the claim, and then un-accept the claim at a later date because it has changed its mind about whether it should have accepted liability in the first place."[27] On appeal, the Supreme Court affirmed on the ground that ample evidence existed for claimant to meet his burden of proving that his industrial accident aggravated his pre-existing condition.[28]

¶ 164 Notwithstanding this general rule prohibiting the un-acceptance of liability, however, this Court explained in *Bouldin* that there is precedent relieving an insurer of accepted liability under some circumstances, including subsequent injury or aggravation, fraud, and mutual mistake of fact.[29]

¶ 165 The Legislature sets forth what constitutes a mistake of fact at § 28-2-409, MCA:

> Mistake of fact is a mistake not caused by the neglect of a legal duty on the part of the person making the mistake and consisting in:
>
> (1) an unconscious ignorance or forgetfulness of a fact, past or present, material to the contract; or
>
> (2) belief in the present existence of a thing material to the contract which does not exist or in the past existence of such a thing which has not existed.

The Montana Supreme Court has defined a "material fact" as a "vital fact upon which [the parties] based their bargain."[30]

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[26] *Barnhart*, ¶ 53.

[27] *Narum*, 2008 MTWCC 30, ¶ 42.

[28] *Narum*, 2009 MT 127, ¶ 31.

[29] *Bouldin*, citing *Belton v. Hartford Accident & Indem. Co.*, 202 Mont. 384, 387-89, 658 P.2d 405, 408-09 (1983) (subsequent injury or aggravation); *Taylor v. State Comp. Ins. Fund*, 275 Mont. 432, 913 P.2d 1242 (199[6]) (fraud); and *Kienas v. Peterson*, 191 Mont. 325, 624 P.2d 1 (1980) (mutual mistake of fact).

[30] *South v. Transp. Ins. Co.*, 275 Mont. 397, 401, 913 P.2d 233, 235 (1996) (holding that both parties mistakenly believed that a massage therapist position, which is the position the claimant chose to pursue, was an appropriate job for someone with a back injury).

¶ 166 Here, this Court concludes that Liberty is relieved of its initial acceptance of liability for Leys' carpal tunnel syndrome due to a mutual mistake of fact. At the time Liberty accepted liability and started paying benefits, and authorized Leys' carpal tunnel and cubital tunnel surgeries in 2011 and 2012, both parties were laboring under "an unconscious ignorance" of a material fact, i.e., they thought that Leys was grasping the steering wheel with both hands. Indeed, Leys had told her medical providers early on, and believed, that she was grasping the steering wheel with both hands at the time of impact. However, it is now known that Leys was not grasping the wheel with both hands, as she had her cell phone in her hand. Thus, the parties had a mutual mistake of fact about the mechanism of injury. In these circumstances, Liberty had a basis to rescind its acceptance of liability for Leys' carpal tunnel syndrome and to refuse authorization for Leys' surgery in 2016.

¶ 167 For all of the above reasons, Liberty is no longer liable for Leys' carpal tunnel syndrome.

Issue Two: With regard to her alleged postconcussive syndrome, is Leys either temporarily totally or permanently totally disabled as a result of her June 9, 2008, industrial injury?

¶ 168 Pursuant to § 39-71-701(1)(a) and -116(35), MCA, a worker is only eligible for TTD benefits if the worker suffers "a physical condition resulting from an injury . . . that results in total loss of wages . . . ." And, pursuant to § 39-71-702(1) and -116(25), MCA, a worker is only eligible for PTD benefits if the worker suffers "a physical condition resulting from injury . . . in which a worker does not have a reasonable prospect of physically performing regular employment." Section 39-71-119(1)(a), MCA, defines an "injury" as "internal or external physical harm to the body . . . ." Thus, to be eligible for either type of benefits, Leys must demonstrate that her physical condition from 2015-present was caused by the concussion she sustained in her 2008 MVA. The only physical condition Leys alleges she suffered as a result of her concussion is postconcussive syndrome.[31] However, this Court was not persuaded by Dr. Reid's opinion that Leys had postconcussive syndrome from 2015-present. Because Leys failed to meet her burden of proof, this Court concludes that she is not entitled to PTD or TTD benefits.

¶ 169 This Court's disposition of Issue Two makes consideration of Issue Three unnecessary.

[31] To the extent that Leys might have argued that her preexisting depression worsened after the 2008 MVA, there is insufficient evidence that such aggravation was caused by her concussion. *See generally Yarborough v. Mont. Mun. Ins. Auth.*, 282 Mont. 475, 483, 938 P.2d 679, 684 (1997) (citations omitted) (holding that firefighter did not suffer a compensable injury because the medical testimony linked his PTSD to the house-fire explosion itself, rather than to his burns).

JUDGMENT

¶ 170 Liberty is no longer liable for Leys' carpal tunnel syndrome.

¶ 171 With respect to her alleged postconcussive syndrome, Leys is neither temporarily totally nor permanently totally disabled as a result of her June 9, 2008, industrial injury.

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

DATED this 7th day of August, 2019.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: James G. Hunt/Norman H. Grosfield
Leo S. Ward

Submitted: December 9, 2016