IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWCC 29

WCC No. 9405-7079

PAULA MOORE

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent.

Affirmed on appeal in nonciteable opinion,
***Moore v. State Compensation Insurance Fund*, No. 95-218**

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: The parties dispute whether the insurer, which accepted liability for claimant's lumbar and cervical strain following a January 8, 1993, industrial accident, remains liable for medical expenses after claimant allegedly suffered two subsequent injuries.

Held: Where insurer is unable to point to any specific injury occurring when claimant's house cleaning aggravated her back condition, it has not proven a subsequent non work-related injury relieving it from liability for ongoing medical care under section 39-71-407, MCA (1991).

Topics:

> **Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-407, MCA (1991).** Where insurer is unable to point to any specific injury occurring when claimant's house cleaning aggravated her back condition, it has not proven a subsequent non work-related injury relieving it from liability for ongoing medical care under section 39-71-407, MCA (1991).

Causation: Medical Condition. Where claimant seeks continued medical benefits denied by an insurer, she must prove by a preponderance of the evidence that a causal connection exists between her injury and her current condition. However, if the insurer contends that injuries subsequent to the industrial accident permanently damaged her condition and relieve it of liability for continued medical treatment, it has the burden of proof. *See, Lee v. Group Cable TCI of Montana*, 245 Mont. 292; *Walker v. United Parcel Service*, 262 Mont. 450 (1993).

Proof: Burden of Proof: Aggravations. Where claimant seeks continued medical benefits denied by an insurer, she must prove by a preponderance of the evidence that a causal connection exists between her injury and her current condition. However, if the insurer contends that injuries subsequent to the industrial accident permanently damaged her condition and relieve it of liability for continued medical treatment, it has the burden of proof. *See, Lee v. Group Cable TCI of Montana*, 245 Mont. 292; *Walker v. United Parcel Service*, 262 Mont. 450 (1993).

Proof: Burden of Proof: Aggravations. Where insurer is unable to point to any specific injury occurring when claimant's house cleaning aggravated her back condition, it has not proven a subsequent non work-related injury relieving it from liability for ongoing medical care under section 39-71-407, MCA (1991).

Causation: Medical Condition. The claimant has a duty to follow reasonable medical instructions with regard to treatment of her condition, including prescribed physical therapy and exercise. In light of her physician's determination that her condition should resolve with appropriate treatment, she is cautioned that her failure to do so in the future may relieve the insurer of further liability for her condition.

Claimants: Duties: Medical Advice. The claimant has a duty to follow reasonable medical instructions with regard to treatment of her condition, including prescribed physical therapy and exercise. In light of her physician's determination that her condition should resolve with appropriate treatment, she is cautioned that her failure to do so in the future may relieve the insurer of further liability for her condition.

Injury and Accident: Aggravation. Where insurer is unable to point to any specific injury occurring when claimant's house cleaning aggravated her back condition, it has not proven a subsequent non work-related injury relieving it from liability for ongoing medical care under section 39-71-407, MCA (1991).

Injury and Accident: Non-Work-Related. Where insurer is unable to point to any specific injury occurring when claimant's house cleaning aggravated her back condition, it has not proven a subsequent non work-related injury relieving it from liability for ongoing medical care under section 39-71-407, MCA (1991).

The trial in this matter was held on December 1, 1994, in Helena, Montana. Petitioner, Paula Moore (claimant), was present and represented by Mr. Thomas A. Budewitz. Respondent, State Compensation Insurance Fund (State Fund), was represented by Mr. Charles G. Adams. Claimant, Wade Green, Flora Green and Pat Hunt testified. Exhibits 1 through 32 were admitted by agreement of the parties. The depositions of claimant and Allen M. Weinert, Jr., M.D. were submitted for the Court's consideration.

Issues: Claimant suffered lumbar and cervical strain in an industrial accident which occurred on January 8, 1993. The State Fund does not dispute the occurrence of the accident or that claimant was injured. However, it asserts that claimant suffered two subsequent injuries and that those injuries relieve it from further liability. It has refused to pay medical expenses incurred by claimant after August 25, 1993. Thus, the primary issue in this case is whether the State Fund is liable for further medical treatment for claimant's back condition. Claimant also seeks attorney fees and a penalty.

Having considered the Pretrial Order, the testimony presented at trial, the demeanor and credibility of the witnesses, the depositions and exhibits, the Court makes the following:

FINDINGS OF FACT

1. Claimant is presently 30 years old. (Ex. 2.) Since the filing of her worker's compensation claim she has married and has adopted her husband's name. She is now known as Paula Green.

2. On January 8, 1993, the claimant injured her low-back and cervical area at work while throwing bags of garbage into a garbage bin.

3. At the time of her injury, claimant was working as a janitor for Lonnie Davis Maintenance (Davis), a janitorial service.

4. Davis was insured by the State Fund, which accepted liability and paid wage loss benefits to the claimant from February 3, 1993 through July 20, 1993.

5. At trial the parties stipulated that the claimant did not return to work for Davis after February 3, 1993.

6. Claimant was initially treated by Dr. William Batey, a family physician. On January 26, 1993, he diagnosed her condition as lumbar strain and cervical strain. Dr. Batey prescribed physical therapy, Relafen (an anti-inflammatory drug), and no work for "the next week." (Ex. 2.)

7. Claimant began physical therapy and continued to see Dr. Batey throughout February 1993. She remained off work. When her condition did not improve, Dr. Batey referred the claimant to Dr. Allen Weinert, a physiatrist, for a further evaluation. (Ex. 4 at 2, Ex. 8.)

8. Dr. Weinert first saw the claimant on April 9, 1993. At that time his medical impressions were:

1. Lumbar strain (musculo-ligamentous low back pain). No evidence of radiculopathy.
2. Musculoskeletal deconditioning.
3. Poor posture.
4. Myofascial neck and shoulder pain.
5. Tension headaches.

(Ex. 8 at 3.) He recommended continued physical therapy "to progress through stabilization and postural education as well as work on some stretching and modality techniques . . . ." He prescribed Naprosyn (an anti-inflammatory drug) and Flexeril (a muscle relaxant). He also approved her return to work in a "modified janitorial position." (*Id.*)

9. Claimant began physical therapy with John Harrington on April 19, 1993. The physical therapy plan called for her to attend physical therapy sessions three times weekly for four weeks. She only appeared for two appointments. (Ex. 10.) During this time period she drove to Oregon and back on personal business.

10. A modified position with Davis was arranged. The plan for return to work called for claimant to work three hours per day during the first week, four hours a day the second, and five hours the third. Before she could return to work she suffered a flare-up of her condition. Dr. Weinert was notified of the flare-up on approximately April 12, 1993. On April 13, 1993, Dr. Weinert determined that claimant's return to work should be postponed for one week. At the same time he concluded that a job as a bartender, which was a second job that claimant had held before she was injured, was within her capabilities.

However, he also concluded that it would be best for her to work only one job "for the time being." (Ex. 9.)

11. On May 11, 1993, claimant was again examined by Dr. Weinert. He noted that her symptoms were essentially unchanged. (Ex. 11.) He emphasized to claimant the importance of her following through with physical therapy and renewed her prescriptions of Naprosyn and Flexeril. (*Id.*) Noting that Davis had now "decided to not take her back", he released claimant to return to work as a waitress for four hours per day. (*Id.*)

12. As of May 13, 1993, Dr. Weinert did not feel that the claimant had reached maximum medical improvement. (Ex. 12.)

13. Claimant returned to waitressing at Ginger's in East Helena, where she worked two hours per day, two or three days a week, for approximately a month. Her employment ended sometime in May or June of 1993 when she went on a trip and was replaced by her employer. She has not been employed since then.

14. Claimant testified that even while employed as a waitress she continued to suffer pain in her back.

15. Claimant next saw Dr. Weinert on July 26, 1993, at which time she reported that her low- back pain was "much improved although she still gets some occasional low back pain with athletics such as jumping on the trampoline." (Ex. 13.) Dr. Weinert concluded that she had reached maximum medical improvement and that there was "no basis for a rating of a permanent impairment." He recommended claimant continue stretching and released her to return to her former employments as a janitor and as a bartender.

16. On August 26, 1993, the claimant returned to Dr. Weinert with complaints of increased right low-back pain and some pain and stiffness in the neck region. (Ex. 14.) Dr. Weinert prescribed Relafen, physical therapy and lumbar stabilization exercises.

17. In his office note for August 26, 1993, Dr. Weinert noted that claimant had attempted to return to work in a janitorial position. (*Id.*) Claimant denied that she had done so and denied telling Dr. Weinert that she had attempted to return to work as a janitor. After listening to the claimant testify and reviewing the depositions, I find that it is likely that the discrepancy in the doctor's report is simply a miscommunication between the parties. There is no evidence that the claimant has worked as a janitor for any business since her injury.

18. By letter dated September 13, 1993, the claimant was advised by the State Fund that her "current medical bills on this file" would not be paid until Dr. Weinert responded to

a letter which requested information about the relationship between claimant's injury and her current condition. (Ex. 25.)

19. Claimant returned to Dr. Weinert on September 20, 1993, for a follow-up appointment. She had not followed through with physical therapy as suggested. She also reported an acute flare-up in her condition following a day spent cleaning a trailer home prior to moving into it. Dr. Weinert's impression at this appointment was "Chronic musculoligamentous low back pain (right posterosuperior iliac spine)." (Ex. 15.) He refilled the Relafen prescription and emphasized the importance of following through with the physical therapy he had prescribed. (*Id.*)

20. The claimant testified that at this time she did not return to physical therapy because workers' compensation had denied payment for the treatment.

21. Dr. Weinert wrote to the State Fund on September 20, 1993. Responding to questions raised by the State Fund, he said:

> Ms. Moore re-exacerbated her musculoligamentous low back pain in early August after she returned to work as a janitor. . . . I do feel that her condition is temporary, however, she has not received the treatment that was recommended at this time and has re-aggravated her back one week ago when moving into her trailer. Prognostically I feel Ms. Moore's condition should resolve with appropriate treatment, although she will be predisposed to recurrent injury.

(Ex. 16.)

22. Dr. Weinert was questioned extensively regarding his opinions about the claimant's condition and whether it was related to the initial injury or due to a second injury. Referring to his examination on August 26, 1992, wherein he recorded that claimant had returned to work as a janitor, he testified:

> Q. In any event, did she describe to you, whatever it it [sic] she described to you, did she describe any separate or discrete event or accident that occurred that resulted in this flare-up?
> A. No.
> Q. What she apparently told you simply was she had an increase in right low-back pain?
> A. Right.

> Q. Did you have an impression as to whether this was some discrete new injury or whether it was as a result of a continual effort of the [sic] some sort?
> A. Well, the impression was recurrent musculoligamentous low-pack [sic] pain, and that would be consistent with a flare-up of her condition.
> Q. Meaning that you didn't consider it to be a new injury?
> A. No, I think it was a re-aggravation.
> Q. No matter how it happened, it was a re-aggravation of the old condition?
> A. Yes, the physical examination was nearly synonymous, very similar.
> Q. Did you have an understanding other than the fact that you referred to it as happening while working in a janitorial position, did you have an understanding as to the actual mechanics of how she began to experience this new pain or this additional pain or re-experience the pain? In other words, was it while she was doing a particular exercise or activity?
> A. No, she didn't relate that. It was just more of an insideous [sic] type of event.
> Q. Insideous [sic] meaning that it slowly --
> A. Progressive.

(Weinert Dep. at 25-26.) Later in his deposition he testified:

> Q. In fact, is it your opinion that the conditions described in your notes of August 26 and September 20 of '93 and again on March 24 of '94 are a recurrence or aggravation of the original pre-July 26, '93 condition?
> A. That would be correct.
> Q. So we are talking about the same condition and not a new injury?
> A. That would be my impression.

(*Id.* at 41.) The doctor was testifying to a reasonable degree of medical certainty. (*Id.*)

23. There is no evidence that the claimant suffered from a specific, discrete injury or incident while working in her trailer. The claimant's testimony, which I find to be credible, was that she was performing routine housecleaning chores and was not deep cleaning or moving heavy items. More specifically, she testified:

Q. You heard the Court earlier ask what it was you did during the trailer cleaning. Would you describe for him what you did?
A. Just trying to clean the cupboards, vacuum, dust.
Q. This wasn't the actual move into the trailer? It was just cleaning before you moved?
A. Yes.
Q. Did you lift any heavy boxes?
A. No.
Q. Did you help move a couch or a bed or a dresser into the trailer?
A. No.
Q. Again, while you were doing this cleaning, was there any specific moment in time when you noticed that the pain suddenly got worse?
A. Just as I was cleaning, vacuuming.
Q. Was there anything unusual at all about the trailer cleaning that caused you to notice, again, anything unusual that caused you to notice, any unusual activity that caused you to notice more pain?
A. No.

(Tr. at 45.)

24. Claimant's upper back complaints have not recurred. (Weinert Dep. at 27.)

25. The State Fund's refusal to pay medical benefits was not unreasonable. Its denial of further medical benefits was based on doctor's notes indicating that claimant had attempted to return to work as a janitor and that she had had a flare-up following cleaning a trailer home. His letter of September 20, 1993 referred to a re-aggravation. Even in his deposition Dr. Weinert referred to "aggravations" claimant sustained subsequent to her May 1992 release to return to work. "Aggravation" often connotes a new injury which permanently worsens a preexisting injury. While the evidence in this case ultimately failed to show that claimant suffered subsequent injuries within the meaning of the Workers' Compensation Act, Dr. Weinert's reports constituted a colorable basis for disputing further liability.

26. Claimant has not diligently pursued physical therapy and her exercises. While she has plausible explanations for some of her failures, the Court had the distinct impression that claimant is not motivated to seek treatment or return to work. Dr. Weinert's prognosis

for the claimant is that her "condition should resolve with appropriate treatment, although she will be predisposed to recurrent injury." (Weinert Dep. at 31.)

CONCLUSIONS OF LAW

1. This case is governed by sections 39-71-407(5), MCA (1991) and 39-71-119(1), MCA (1991). Those sections provide:

> **39-71-407. Liability of insurers - limitations.**
> (5) If a claimant who has reached maximum healing suffers a subsequent non work-related injury to the same part of the body, the workers' compensation insurer is not liable for any compensation or medical benefits caused by the subsequent non work-related injury.
>
> **39-71-119. Injury and accident defined.** (1) "Injury" or "injured" means:
> (a) internal or external physical harm to the body;
> (b) damage to prosthetic devices or appliances, except for damage to eyeglasses, contact lenses, dentures, or hearing aids; or
> (c) death.
> (2) An injury is caused by an accident. An accident is:
> (a) an unexpected traumatic incident or unusual strain;
> (b) identifiable by time and place of occurrence;
> (c) identifiable by member or part of the body affected; and
> (d) caused by a specific event on a single day or during a single work shift.

The State Fund argues that after reaching maximum medical improvement the claimant suffered one or more new "injuries", thereby relieving it of liability pursuant to section 39-71-407(5).

The claimant initially has the burden of proving that she sustained an injury and that the injury occurred in the course and scope of her employment. ***Gerlach v. Champion International,*** *254 Mont. 137, 836 P.2d 35 (1992).* However, there is no dispute in this regard.

The claimant must also prove by a preponderance of the evidence that a causal connection exists between her injury and her current condition. ***Brown v. Ament,*** *231 Mont. 158, 752 P.2d 171 (1988).* The medical evidence supports claimant's contentions that her current condition is causally related to the January injury. Dr. Weinert testified that

claimant's current condition was a "flare-up" of her preexisting condition and a recurrence or aggravation of her 1993 injury. (Finding No. 19.) He characterized her condition following the cleaning of her trailer as "nearly synonymous" with her condition following her 1993 injury. (Finding No. 22.) When asked whether it was "the same condition and not a new injury," he replied: "That would be my impression." (*Id*.)

Since Dr. Weinert's testimony was sufficient to establish a causal connection between claimant's current condition and her 1993 industrial accident, the burden shifts to the insurer.

> Because we determine that the claimant has met his burden of proof that his injuries sprang from a 1985 accident, the burden of proof concerning any post-1985 accidents which permanently damaged claimant's back must fall upon the carrier. ***Lee v. Group W Cable TCI of Montana*** (1990), 245 Mont. 292, 800 P.2d 702. . . .

Walker v. United Parcel Service, *262 Mont. 450, 456, 865 P.2d 1113 (1993).*

The State Fund contends that claimant suffered two subsequent injuries. Its contention with regard to the first arises out of Dr. Weinert's office note indicating that claimant experienced increased low-back pain after returning to work as a janitor. Claimant denied ever returning to work as a janitor and no corroboration of such a return to work was offered by the State Fund. Conceding that claimant did not actually return to work as a janitor, the State Fund nonetheless argues that she was involved in her husband's cleaning business and insinuates that she may have aggravated her condition in that work. Claimant, however, testified that she did not do any janitorial work for her husband, and that the only assistance she provided him was in answering the telephone. Her testimony was credible and no other evidence was presented to refute it.

Second, the State Fund argues that claimant's day of cleaning her trailer aggravated her back condition and that the aggravation satisfies the definition of an injury in that it occurred on a single day. The State Fund is unable to point to any specific incident occurring on that day but argues that claimant's increased pain nonetheless satisfies the injury definition. It cites ***Hutchison v. General Host Corp.,*** *178 Mont. 81, 582 P.2d 1203 (1978)* and ***Welch v. American Mine Services, Inc.,*** *253 Mont. 76, 831 P.2d 580 (1992)* as supporting its position. Neither case is apposite.

In ***Hutchison,*** the claimant reached up while dumping pans of buns and pulling racks and pallets at a bakery. She slipped but did not fall. At that time she felt a twinge of pain in her back and experienced an onset of back and leg pain the next day. The insurer argued that claimant had failed to satisfy the injury definition because she "did not relate

the strain to any particular task or function she was required to perform, and could not relate the strain to any particular time period with the working day." ***Hutchinson,*** *178 Mont. at 85.* The Supreme Court rejected the argument, holding:

> It is true claimant was unable to state exactly what time during the day she suffered the twinge in her back, but we do not feel one is compelled to punch a time clock at the time of injury in order to qualify for coverage under the Act. **It is enough that she suffered the twinge in her back while working and testified what she was doing at the time.**

Hutchinson, *178 Mont. at 85* (emphasis added.) It is clear from the facts in ***Hutchinson*** and the holding of the Court that the unusual strain definition of the old law was met where the strain arose from a single, identifiable incident. In this case, claimant's complaints did not arise from a single, identifiable incident.

The 1987 amendments to the Workers' Compensation Act expressly adopted requirements that an injury be "identifiable by time and place of occurrence" **and** be "caused by a **specific event** on a single day or during a single work shift." In ***Welch,*** the Supreme Court held that the rubbing of claimant's ill fitting boots over his work shift constituted trauma meeting the injury definition. While the rubbing occurred over an entire work shift, the case should not be read as abrogating the requirement of a **specific event**. The rubbing of shoes in ***Welch*** constituted <u>one</u> <u>continuous</u> <u>traumatic</u> <u>event</u>. In this case the State Fund has not identified *any* trauma suffered by claimant while cleaning her trailer. It has similarly failed to identify any specific event which might constitute a strain or explain claimant's onset of pain. The claimant testified that she did not do any unusual tasks while cleaning the trailer. It was a matter of "trying to clean the cupboards, vacuum, dust." Thus, while her pain may have arisen as a consequence of a day of cleaning, it did not arise from trauma or any specific event or incident.

The State Fund has failed to prove that while cleaning her trailer claimant suffered a traumatic incident or unusual strain. Thus, it has failed to prove that claimant suffered a non work-related injury after reaching maximum healing. Therefore, claimant is entitled to continuing medical benefits for her back condition.

2. As found in Finding No. 24, the State Fund's refusal to pay medical benefits was not unreasonable. Since a finding of unreasonableness is a prerequisite to any award of attorney fees and a penalty, sections 39-71-611, -612 and -2907, MCA (1991), the claimant is not entitled to either. She is entitled to costs.

3. The claimant has a duty to follow reasonable medical instructions with regard to the treatment of her condition, including prescribed physical therapy and exercises. In light of

her physician's determination that her condition "should resolve with appropriate treatment" (Weinert Dep. at 31), claimant is cautioned that her failure to do so in the future may relieve the insurer of further liability for her condition.

JUDGMENT

1. The State Fund shall pay claimant's medical expenses for low-back treatment provided since August 25, 1993. It shall continue to pay claimant's reasonable and necessary medical expenses for the treatment of her low-back condition until and unless otherwise relieved of liability pursuant to the provisions of the Workers' Compensation Act.

2. The claimant is not entitled to attorney fees or a penalty.

3. The claimant is entitled to costs in an amount to be determined by the Court. Within twenty (20) days of this judgment claimant shall submit an affidavit of costs. The State Fund shall then have ten (10) days in which to file its objections.

4. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.

5. Any party to this dispute may have twenty (20) days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 17th day of April, 1995.

(SEAL)

/S/ Mike McCarter
JUDGE

c: Mr. Thomas A. Budewitz
Mr. Charles G. Adams