IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2012 MTWCC 17

WCC No. 2011-2718

KELLY TAYLOR

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Petitioner fell at work on May 27, 2009. She did not formally seek medical treatment, but she discussed subsequent back pain with her primary care provider. Petitioner self-treated with medication and exercise. In July 2009, she discussed ongoing back pain with her healthcare provider during a regular check-up. On September 7, 2010, she suffered a significant increase in back pain symptoms while standing up after painting her toenails. Although Respondent initially accepted liability for her May 2009 industrial accident, it later denied certain benefits, contending that Petitioner's ongoing back problems were unrelated to her industrial accident. Petitioner contends that Respondent should be liable for additional workers' compensation benefits and that it has unreasonably denied these benefits, therefore entitling her to her attorney fees and a penalty. Petitioner moved to compel disclosure of expert witness testimony or, alternatively, to limit expert witness testimony.

Held: Respondent disclosed the relevant facts of expert witness testimony to Petitioner in advance of trial and Respondent did not surprise or take unfair advantage; therefore the Court will not compel expert witness disclosure or limit expert witness testimony. Petitioner has shown on a more probable than not basis that her ongoing back problems are related to her May 27, 2009, industrial accident, and she is entitled to workers' compensation coverage for her back condition. Petitioner is entitled to her costs. Respondent did not unreasonably deny workers' compensation benefits. Therefore, Petitioner is not entitled to attorney fees or a penalty.

Topics:

Evidence: Expert Testimony: Physicians. Despite not receiving official notice that Respondent's expert would testify about when Petitioner reached MMI, the expert's IME opinion was provided before the expert disclosure exchange and Petitioner possessed copies of his supporting documentation. The sanctions sought by Petitioner of limiting the expert's testimony about MMI would be extreme and inappropriate under these circumstances and is denied.

Discovery: Experts. Despite not receiving official notice that Respondent's expert would testify about when Petitioner reached MMI, the expert's IME opinion was provided before the expert disclosure exchange and Petitioner possessed copies of his supporting documentation. The sanctions sought by Petitioner of limiting the expert's testimony about MMI would be extreme and inappropriate under these circumstances and is denied.

Evidence: Expert Testimony: Physicians. Where Petitioner's treating physician saw her shortly after her initial injury and was able to observe and speak with Petitioner on an almost daily basis about her injury and pain levels, the Court places more weight on the treating physician's opinion than of the opinion of the IME physician with impressive credentials and years of experience who spent an hour with the Petitioner more than two years after her initial injury.

Proof: Conflicting Evidence: Medical. Where Petitioner's treating physician saw her shortly after her initial injury and was able to observe and speak with Petitioner on an almost daily basis about her injury and pain levels, the Court places more weight on the treating physician's opinion than of the opinion of the IME physician with impressive credentials and years of experience who spent an hour with the Petitioner more than two years after her initial injury.

Physicians: Treating Physician: Weight of Opinion. Where Petitioner's treating physician saw her shortly after her initial injury and was able to observe and speak with Petitioner on an almost daily basis about her injury and pain levels, the Court places more weight on the treating physician's opinion than of the opinion of the IME physician with impressive credentials and years of experience who spent an hour with the Petitioner more than two years after her initial injury.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-611. Petitioner had numerous, undocumented visits with her treating physician. Since the insurer had an incomplete picture of Petitioner's injury and treatment, it was not unreasonable for the insurer to believe a second incident was a new injury and to deny Petitioner's claim on that basis.

Attorney Fees: Reasonableness of Insurer. Petitioner had numerous, undocumented visits with her treating physician. Since the insurer had an incomplete picture of Petitioner's injury and treatment, it was not unreasonable for the insurer to believe a second incident was a new injury and to deny Petitioner's claim on that basis.

Penalties: Insurers. The Court concluded that a penalty was not warranted where it found that the insurer had a legitimate reason to believe that a new injury had occurred and therefore could deny liability for further benefits.

¶ 1 The trial in this matter occurred on August 30, 2011, at the Workers' Compensation Court in Helena, Montana. Petitioner Kelly Taylor was present and represented by Jory C. Ruggiero. Greg E. Overturf represented Respondent Montana State Fund (State Fund).

¶ 2 **Exhibits**: I overruled Taylor's objection to pages 11-13 of Exhibit 1, and admitted the entirety of Exhibit 1 into evidence. I admitted Exhibits 2 through 11 without objection.

¶ 3 **Witnesses and Depositions**: The parties agreed that the depositions of Kelly Taylor, Elaine Ruth Palmer, Bruce Raymond Belleville, M.D., Rebecca Hintze, PA-C (volumes I and II), and Mark Schulein, M.D., can be considered part of the record. The Court attended the depositions of Hintze and Dr. Belleville. Taylor, Sue M. Smith, Palmer, Amy Lorraine Dipentino, and Rebecca Hale were sworn and testified at trial.

¶ 4 **Issues Presented**: The Final Pretrial Order contains the following issues, restated by the Court for clarity:[1]

Issue 1: Whether the Court should compel disclosure of expert witness testimony or, in the alternative, limit expert witness testimony.

[1] Final Pretrial Order at 2-3, Docket Item No. 32.

Issue 2: Whether Respondent improperly denied workers' compensation coverage for Petitioner's back injuries and whether Petitioner is entitled to workers' compensation coverage for her back injuries.

Issue 3: Whether Petitioner is entitled to attorney fees and costs.

Issue 4: Whether Petitioner is entitled to a penalty.

FINDINGS OF FACT

¶ 5 Petitioner Kelly Taylor testified at trial. I found Taylor to be a credible witness.

¶ 6 Taylor has worked for Community Health Partners (CHP) in Livingston, Montana, for approximately ten years.[2] She has worked in a sedentary position as a staff accountant for the past seven years.[3]

¶ 7 On May 27, 2009, Taylor was leaving CHP for lunch when she fell on the stairs.[4] Taylor grabbed the handrail but fell and hit her tailbone.[5]

¶ 8 After falling, Taylor went home, let her dog out, and returned to CHP.[6] She completed the rest of her workday and worked the following day.[7] Taylor recalled being in pain the day after the fall and "hardly being able to sit that day."[8] Taylor did not go to a doctor right away because at the time, she thought that her back was just bruised and that the pain would resolve on its own.[9] Taylor had no history of back injuries or back pain prior to her May 27, 2009, fall at CHP.[10]

[2] Trial Test.

[3] Trial Test.

[4] Taylor Dep. 16:25 - 17:4; Trial Test.

[5] Taylor Dep. 16:25 - 17:7; 18:3-17.

[6] Taylor Dep. 19:20-23.

[7] Taylor Dep. 19:24 - 20:3.

[8] Taylor Dep. 25:1-2.

[9] Taylor Dep. 26:13-16.

[10] Trial Test.

¶ 9 Taylor testified that she told Hintze about her back in the hallway at CHP a few days after her fall.[11] Hintze told Taylor to take ibuprofen and to make an appointment to see her at a later date.[12]

¶ 10 After her industrial accident, Taylor had a bruise on her right buttock and felt a lump on her lower back.[13] Taylor regularly took 800 mg ibuprofen doses from the nurses' station and frequently applied ice to her lower back.[14] Approximately one month after the industrial accident, the inflammation went down and the bruise disappeared, but Taylor still regularly ingested ibuprofen.[15] Taylor testified that the pain was "really bad" for the first month, then bearable with ibuprofen afterward.[16]

¶ 11 On July 24, 2009, Taylor saw Hintze, her primary care provider, for her annual exam as well as her back concerns.[17] Taylor testified that she did not schedule an earlier appointment with Hintze because she frequently discussed her back problems with Hintze in the CHP hallway.[18] Hintze recommended that Taylor have an x-ray of her lumbar spine which came back negative.[19] Hintze recommended that Taylor continue taking ibuprofen, stretching, and exercising.[20] Taylor did not recall being referred to physical therapy.[21] Taylor testified that she did not think that she needed formal physical therapy because she could do the stretching and walking at home on her own.[22]

¶ 12 Taylor testified that she diligently performed stretches and other exercises twice a day at home after her industrial injury through September 7, 2010.[23] Taylor testified that pain in her back sometimes limited the duration of her walks, but that she walked regularly through September 7, 2010.[24] After her July 2009 examination, Taylor did not

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[11] Trial Test.

[12] Trial Test.

[13] Taylor Dep. 25:22 - 26:12.

[14] Trial Test.

[15] Trial Test.

[16] Taylor Dep. 29:6-9.

[17] Taylor Dep. 11:23-25; 29:21 - 30:4.

[18] Trial Test.

[19] Taylor Dep. 31:16-20; Ex. 3 at 2.

[20] Trial Test.

[21] Taylor Dep. 31:24 - 32:8.

[22] Trial Test.

[23] Trial Test.

[24] Trial Test.

schedule a formal office visit with Hintze until after September 2010 because of their frequent informal conversations at CHP.[25]

¶ 13 In a letter dated August 27, 2009, State Fund accepted liability for Taylor's claim for her May 27, 2009, industrial injury.[26]

¶ 14 In January or February 2010, Taylor took Mobic for pain and infrequently took Tramadol, Vicodin, and Flexeril, because she did not want to use narcotics.[27] Taylor did not recall ever submitting any drug or anti-inflammatory bills to State Fund before September 2010.[28]

¶ 15 On September 7, 2010, Taylor was at home, sitting on her couch when she put her foot on her coffee table and bent over to paint her toenails.[29] When she finished, she put her foot down and began to stand up.[30] At that point, Taylor had difficulty standing and felt extreme pain in her back and shooting pain down the front of her leg.[31] Taylor testified that she did not have pain radiate down her right leg until after the September 7, 2010, incident.[32] Taylor was surprised that Hintze's July 24, 2009, medical note referenced pain down her leg and insisted that some sort of transcription error must have occurred.[33]

¶ 16 After the September 7, 2010, incident, Taylor testified that she felt "a sharp pain go down the front of my leg and [my leg] just kind of drop[ped]" if she stood too long.[34] Taylor realized that her back issues would not improve on their own when she continued to experience pain in the same spot as her May 2009 injury.[35] Taylor then

[25] Trial Test.

[26] Ex. 9 at 8.

[27] Trial Test.; Taylor Dep. 46:5-25.

[28] Trial Test.

[29] Trial Test.

[30] Trial Test.

[31] Taylor Dep. 34:6-13.

[32] Trial Test.

[33] Trial Test.

[34] Taylor Dep. 37:14-16.

[35] Trial Test.

sought additional treatment for her back.[36] An MRI revealed a disk herniation and Taylor was referred to physical therapy.[37]

¶ 17 After the September 7, 2010, incident, Hintze wrote a note to CHP encouraging workstation modification "ASAP."[38] Taylor testified that she received a new ergonomic chair "soon after" her industrial injury.[39] Taylor testified that a new hydraulic workstation that would allow her to alternate between standing and sitting positions was discussed at that time, but was not implemented until approximately December 2010.[40]

¶ 18 Taylor testified about two additional incidents after the September 7, 2010, incident in which she has experienced low-back pain in the same spot as her May 2009 injury.[41] Taylor described an incident where she stubbed her toe on a rug at CHP and another when she experienced severe back pain when cleaning cat litter.[42]

¶ 19 Taylor could not specifically remember how many days she missed work on account of her back between May 27, 2009, and September 2010.[43] Taylor testified that some days she could not get out of bed because of back pain.[44] At other times, Taylor's back hurt from sitting for too long at her workstation and she would go home and apply ice to her back to reduce the inflammation.[45] Taylor indicated that her timesheets reflected when she missed work, but did not specifically note if she missed work because of her back.[46] Taylor testified that most, if not all, of her missed time was because of back pain.[47]

¶ 20 Taylor's timesheets reflect that she used 132 hours of sick leave from May 28, 2009, through September 27, 2010.[48]

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[36] Trial Test.

[37] Ex. 3; Ex. 4 at 1; Taylor Dep. 38:3-7.

[38] Ex. 11 at 13.

[39] Taylor Dep. 10:3-7.

[40] Trial Test.

[41] Trial Test.

[42] Trial Test.

[43] Trial Test.

[44] Trial Test.

[45] Trial Test.

[46] Trial Test.

[47] Trial Test.

[48] Ex. 7.

¶ 21 Taylor's timesheets reflect that she used 208 hours of sick leave between September 28, 2010, and June 24, 2011.[49]

¶ 22 Taylor testified that she did not tell State Fund that she missed work because she understood that an injured worker had to miss four consecutive days of work before workers' compensation would cover any claim.[50] Taylor testified that she never missed more than four consecutive days of work, so she believed her claim was not compensable.[51]

¶ 23 Between May 27, 2009, and September 7, 2010, neither Taylor nor CHP administrator Lara Salazar informed State Fund that Taylor was missing work due to her industrial injury.[52]

¶ 24 Rebecca Hintze, PA-C, is a Physician Assistant at CHP.[53] Hintze testified at a two-part deposition which I attended. I found Hintze to be a credible witness.

¶ 25 Hintze has been Taylor's primary care provider for at least five years.[54] Hintze was not aware of Taylor having any back injuries prior to May 2009.[55]

¶ 26 Hintze saw Taylor for an annual physical on July 24, 2009. Hintze listed "back pain" as one of the reasons for Taylor's visit.[56] Hintze devoted the majority of the office note to issues other than back pain. However, in the "Review of Systems" section of the record, Hintze notes that Taylor was positive for back pain in her lumbosacral spine. Hintze described the severity as moderate, with radiation to the right buttock, exacerbated by sitting. The "Physical exam" section reports muscle spasm, right tenderness at L1, normal flexion, and soft tissue swelling in Taylor's right lower back just above the iliac crest. Hintze recommended lumbosacral x-rays and referral to physical therapy for evaluation and treatment.[57] Hintze believed that her findings were consistent with Taylor's description of her May 27, 2009, industrial accident.[58]

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[49] *Id*.

[50] Trial Test.

[51] Trial Test.

[52] Trial Test.

[53] Hintze Dep. Vol. I. 4:13-18.

[54] Hintze Dep. Vol. I. 7:17-23.

[55] Hintze Dep. Vol. I. 10:14-24.

[56] Ex. 11 at 1; Hintze Dep. Vol. I. 9:3-6.

[57] Ex. 11 at 1-5.

[58] Hintze Dep. Vol. I. 11:25 - 12:4.

¶ 27 Hintze recalled Taylor reporting pain down her right leg at the July 24, 2009, office visit. Hintze did not note, and could not recall, how far down Taylor's leg the pain traveled.[59]

¶ 28 Hintze could not recall whether she ever took Taylor off work between May 27, 2009, and September 7, 2010. Hintze stated that a note would "usually" be part of the medical file if she had taken Taylor off work.[60] No such record is included in the exhibits offered for trial.

¶ 29 Hintze agreed that neither she nor Taylor ever set up an additional formal appointment to explore her back pain between July 24, 2009, and September 7, 2010.[61] However, Hintze reported seeing Taylor crying in her office and she knew that Taylor was missing work due to back pain.[62] Hintze gave Taylor shots of Toradol for her back pain, but she did not document these injections in her records.[63] Hintze acknowledged Taylor may have taken medications not documented in her chart between July 2009 and September 2010.[64] Despite her reports of seeing Taylor's suffering, Hintze never mandated physical therapy, prescribed any type of narcotic pain medication, set up an additional appointment, wrote a "formal" note about workstation modification, or ordered an MRI prior to September 7, 2010.

¶ 30 On September 7, 2010, Taylor saw Hintze for a formal appointment regarding increased back pain after the incident at her home.[65] Taylor reported weakness in her foot and pain radiating down her right leg to her foot.[66] Taylor could not sit comfortably and her pain level precluded a full examination.[67] Hintze prescribed Vicodin and Flexeril and ordered an MRI; Hintze sent a request for authorization to State Fund.[68] After examining the MRI report, Hintze prescribed physical therapy including electrical stimulation, biofeedback, and ultrasound.[69]

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[59] Ex. 11 at 1; Hintze Dep. Vol. II. 61:25 - 62:2.

[60] Hintze Dep. Vol. II. 74:18 - 75:8.

[61] Hintze Dep. Vol. II. 64:18-22.

[62] Hintze Dep. Vol. I. 24:23-25; Vol. II. 64:8-10.

[63] Hintze Dep. Vol. II. 64:10-17.

[64] Hintze Dep. Vol. II. 75:9-16.

[65] Ex. 11 at 6-8.

[66] Hintze Dep. Vol. II. 65:9-19; Ex. 11 at 6.

[67] Hintze Dep. Vol. I. 15:21 - 16:8.

[68] Ex. 2 at 9; Ex. 11 at 7; Hintze Dep. Vol. II. 70:22 - 71:1.

[69] Hintze Dep. Vol. II. 73:17 - 74:2.

¶ 31 Hintze opined that Taylor did not suffer a new injury in the September 7, 2010, incident.[70] Hintze opined that the September 7, 2010, incident was a flare-up of the May 2009 industrial injury.[71] Hintze testified that Taylor has had the same pain complaint in her right lower back area that is an exacerbation of the underlying May 2009 industrial injury.[72]

¶ 32 Dr. Mark Schulein is a family physician who has worked at CHP since 1991. He is board-certified in family medicine.[73]

¶ 33 Dr. Schulein examined Taylor on July 15, 2011, regarding her back condition for the purpose of a second opinion.[74] Dr. Schulein reviewed Hintze's notes and a note from Dr. Belleville, the independent medical examination (IME) examiner.[75]

¶ 34 Dr. Schulein opined that given Taylor's reported symptoms in July 2009, it was appropriate to order an x-ray, but not an MRI at that time because Taylor's symptoms and Hintze's July 2009 findings were not indicative of a herniated disk.[76] Dr. Schulein admitted that, while unlikely, painting toenails could possibly lead to a herniated disk.[77] Dr. Schulein opined that based on Hintze's records that Taylor was clearly in more pain and distress in September 2010 than she was in July 2009, it was reasonable to order an MRI at that time.[78]

¶ 35 Dr. Schulein noted that Taylor had the "same right-sided low-back pain with the same right-sided radiation noted on the initial visit, which got worse in 2010."[79] Dr. Schulein testified that painting toenails is "very unlikely" to herniate a disk, but could be the type of activity that would create a risk of reinjuring a disk.[80] Dr. Schulein further noted that the toe stubbing and cat litter incidents could be flare-ups and a natural progression of the initial injury.[81] Dr. Schulein recognized that he may not have been

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[70] Hintze Dep. Vol. II. 87:24 - 88:2.

[71] Hintze Dep. Vol. I. 17:25 - 18:3.

[72] Hintze Dep. Vol. I. 27:4-17.

[73] Schulein Dep. 4:12-13; 16:25 - 17:2.

[74] Ex. 2 at 25-26; Schulein Dep. 17:14-17.

[75] Schulein Dep. 7:1-7.

[76] Schulein Dep. 26:7-22.

[77] Schulein Dep. 14:14 - 15:2.

[78] Schulein Dep. 25:8 - 26:6.

[79] Schulein Dep. 8:3-5.

[80] Schulein Dep. 13:10-17; 15:14.

[81] Schulein Dep. 13:18 - 14:2.

made aware of all treatment as "there is a lot of hallway medicine that goes on and so undocumented medical care" is possible.[82]

¶ 36 Hintze agreed with Dr. Schulein's notes indicating that Taylor's current problems are flare-ups of the May 2009 industrial injury.[83] Hintze reaffirmed her belief that the September 7, 2010, incident, toe stubbing incident, and cat litter incidents are all continuations of Taylor's May 2009 industrial injury.[84]

¶ 37 Dr. Bruce Raymond Belleville performed an IME on Taylor at State Fund's request. Dr. Belleville testified via a deposition which I attended. I found his testimony credible.

¶ 38 Dr. Belleville has a bachelor's degree in chemistry and a medical degree from Ohio State University. He also has a master's degree in public health with an emphasis in epidemiology from the University of North Carolina at Chapel Hill.[85]

¶ 39 Dr. Belleville is board-certified in family medicine, occupational medicine, and pain medicine.[86] Dr. Belleville has approximately 31 years of experience in treating patients with back and other workplace injuries.[87]

¶ 40 Dr. Belleville performed an IME on Taylor on December 3, 2010.[88] Dr. Belleville reviewed Taylor's medical records, including Hintze's records from July 24, 2009, and September 7, 2010.[89] Dr. Belleville's understanding of Taylor's May 2009 industrial accident is consistent with the testimony of Taylor and Hintze.[90]

¶ 41 On reviewing Hintze's July 24, 2009, annual examination note, Dr. Belleville opined that Hintze's recommended treatment was appropriate and like Dr. Schulein, Dr. Belleville did not believe an MRI was appropriate at that time.[91]

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[82] Schulein Dep. 28:6-8.

[83] Hintze Dep. Vol. I. 29:9-18.

[84] Hintze Dep. Vol. II. 55:10-21.

[85] Belleville Dep. 8:21 - 9:11.

[86] Belleville Dep. 12:24 - 13:2; 13:9-11; 13:14-19.

[87] Belleville Dep. 12:9-13.

[88] Ex. 1.

[89] Belleville Dep. 19:15-22; 20:4-9; 20:18-22; Ex. 1.

[90] Belleville Dep. 23:4-21.

[91] Belleville Dep. 27:21-25.

¶ 42 Dr. Belleville indicated three findings that were not present in Hintze's initial July 24, 2009, report: pain radiating down the lower extremity to the foot, possible weakness in the foot, and right hip pain.[92] Dr. Belleville stated, "Those are all a bit different or substantially different" symptoms than what Taylor had originally reported.[93] Dr. Belleville further elaborated that Hintze's July 2009 report notes pain "into the leg" and the September 2010 report notes pain "down to the ankle."[94] Dr. Belleville described those descriptions as being not interchangeable terms.[95] He noted that the September 7, 2010, IME was abbreviated due to Taylor's pain.[96]

¶ 43 Dr. Belleville testified that the findings of pain radiating down to the foot and possible weakness of the foot on September 7, 2010, are symptoms which would cause "one's ears [to] be perked up."[97] He explained that these types of symptoms may indicate nerve involvement.[98] He agreed with Hintze's decision to order an MRI at that point because the pressing issue was whether Taylor had a ruptured disk on the right side.[99] Dr. Belleville testified that an MRI was appropriate due to Taylor's sensory and motor symptoms, her degree of pain, and her inability to move around at the IME.[100]

¶ 44 Dr. Belleville completed a "Work Capacity Form" as part of his IME indicating that Taylor had reached maximum medical improvement (MMI) "from the May 2009 incident."[101] Dr. Belleville opined that Taylor had reached MMI for her May 2009 industrial injury, but that at the time of the IME, Taylor was not yet at MMI for the September 7, 2010, incident.[102] Dr. Belleville testified that the treatment that Taylor needed at the time of the IME was not related to the May 2009 industrial injury.[103]

¶ 45 Dr. Belleville indicated in his IME report that: "Kelly is not at maximum medical improvement, as I believe she needs to work on stretching, abdominal strengthening,

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[92] Belleville Dep. 31:5-14.

[93] Belleville Dep. 31:13-14.

[94] Belleville Dep. 37:23-25.

[95] *Id*.

[96] Belleville Dep. 31:23 - 32:9.

[97] Belleville Dep. 35:25 - 36:2.

[98] Belleville Dep. 36:4-11.

[99] Belleville Dep. 39:15-21.

[100] Belleville Dep. 47:3-12.

[101] Belleville Dep. 48:17-21; 49:13-24.

[102] Belleville Dep. 49:13-24; 50:8-22.

[103] Belleville Dep. 53:14-19.

and core strengthening."[104] Dr. Belleville elaborated that the second incident appeared to cause a significant worsening of subjective and objective circumstances that warranted further attention.[105]

¶ 46 Dr. Belleville testified that Taylor suffered a new injury in September 2010 and that while it is not common to rupture a disk with activity such as that described by Taylor in the September 7, 2010, incident, one can herniate a disk with seemingly minor incidents such as coughing or sneezing.[106] In reaching his conclusion that Taylor suffered a second injury in September 2010, Dr. Belleville considered that Taylor was:

> complaining specifically, not peripherally, but specifically of back pain, seeking treatment specifically for back and leg pain, having sensory symptoms that went deeper into the leg, having motor symptoms, possibly motor findings, and had so much pain that she could not tolerate a careful physical exam; received orders for an MRI that had not previously been ordered; received orders for two, if not three prescription medications that had not been previously ordered; received encouragement or insistence she go back to physical therapy, which it was unclear whether it had even started relative to the first incident; described to me missing work for the first time after either of the two incidents, and specifically feeling more troubled by this.[107]

¶ 47 Hintze disagrees with Dr. Belleville's conclusion that Taylor's injury is mechanical low-back pain.[108] Hintze testified that she has had much more opportunity than Dr. Belleville to observe and interact with Taylor because she works with Taylor on a daily basis.[109] Hintze further testified that she had certain medical documents available to her that Dr. Belleville did not, including the medical records for the rug and cat litter incidents, Dr. Schulein's evaluation, and Dr. Jeffrey S. Rasch's evaluation.[110]

¶ 48 Elaine Ruth Palmer, State Fund claims adjuster, testified at trial. I found Palmer's testimony credible.

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[104] Ex. 1 at 7; Belleville Dep. 51:3-6.

[105] Belleville Dep. 51:18-23.

[106] Belleville Dep. 53:20 - 54:12.

[107] Belleville Dep. 52:17 - 53:8.

[108] Hintze Dep. Vol. I. 32:12-25.

[109] Hintze Dep. Vol. I. 37:1-17.

[110] Hintze Dep. Vol. I. 37:18 - 38:19.

¶ 49 Palmer has been a claims adjuster at State Fund for the past five years. Palmer began adjusting Taylor's claim after State Fund had accepted liability for Taylor's medical benefits stemming from her May 2009 accident.[111] Palmer agreed that Taylor sustained a low-back injury in May 2009 and that she felt pain in the same location after the September 7, 2010, incident.[112] Palmer testified that she was not aware that Taylor experienced continued pain from May 2009 through September 2010 and she did not know about Taylor's at-home physical therapy.[113]

¶ 50 Palmer denied coverage for Taylor's September 2010 claim because it was outside the course and scope of Taylor's employment and unrelated to the May 2009 workplace injury.[114] Palmer testified that Hintze's letter opining that the September 7, 2010, incident was a subsequent aggravation of a previously sustained and compensable workplace injury was not objective medical evidence sufficient to support Taylor's claim.[115]

¶ 51 Palmer testified that she did not tell Taylor that four consecutive missed work days were necessary to qualify for wage-loss benefits.[116] Palmer clarified that the four days do not need to be consecutive, but must be scheduled work shifts that a claimant's doctor has removed him or her from because of an industrial injury.[117] Palmer testified that she regularly discusses the missed work requirement with claimants and that she never tells them that they must miss four consecutive days of work to qualify for wage-loss benefits.[118]

¶ 52 Palmer testified that Taylor had new symptoms after the September 7, 2010, incident, including pain radiating down to the foot and additional services requested such as a TENS unit, biofeedback, physical therapy, and an MRI request that were not present after the initial May 2009 incident.[119] Palmer testified that Taylor's September 27, 2010, letter did not change her mind because the letter had described a new non-work-related injury.[120] Palmer testified that the physical tests and the MRI

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[111] Trial Test.

[112] Trial Test.

[113] Trial Test.

[114] Trial Test.

[115] Trial Test.

[116] Trial Test.

[117] Trial Test.

[118] Trial Test.

[119] Trial Test.

[120] Trial Test; Ex. 9 at 10.

indicating a herniated disk are the objective medical findings specifically supporting the theory of a new injury.[121]

¶ 53 Palmer stated in her deposition that she believed the September 2010 injury was a new occurrence because:

> it was diagnosed as a herniated disc, and there was an immediate onset that happened on a specific date, time, and place. It was clearly documented, and clearly explained. It was treated as such throughout the medical notes, the medical history of the claim. It appeared to be materially and substantially different from the prior sprain strain that received no attention.[122]

¶ 54 Palmer testified that Taylor never informed State Fund that she was missing work due to her back injury between May 2009 and September 2010.[123] Palmer added that after accepting the initial May 2009 claim, State Fund had "no indication that there was any medical treatment related to her back between July 24th, 2009 and September 2010."[124]

¶ 55 Palmer testified that she relied more heavily on Dr. Belleville's testimony because Hintze's notes described a different and new injury resulting from a very specific event that occurred outside the course and scope of employment.[125] Palmer added that Dr. Belleville has more training and experience, is board-certified, and specializes in occupational medicine.[126] Palmer testified that she knows the general rule in workers' compensation that opinions of treating doctors carry more weight than opinions of non-treating medical examiners.[127] Palmer stated that despite this general rule, Hintze "doesn't appear to be as familiar with workers compensation claims, with the terminology that we use, when it's applied."[128]

¶ 56 Palmer testified that her assessment of the September 2010 injury would not have been any different had Taylor reached MMI between the accepted May 2009 claim and September 2010 because the September 2010 incident resulted in a new and

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[121] Trial Test.

[122] Palmer Dep. 26:13-21.

[123] Trial Test.

[124] Palmer Dep. 41:7-9.

[125] Trial Test.

[126] Palmer Dep. 22:7-13.

[127] Trial Test.

[128] Palmer Dep. 22:23 - 23:1.

different injury.[129] Palmer further explained that if there had been no specific incident in September 2010, that Taylor would have likely suffered a natural progression of her preexisting condition and that the injury would have been covered.[130]

¶ 57 Sue M. Smith, Administrative Coordinator at CHP, testified at trial. I found Smith's testimony credible.

¶ 58 Smith is Taylor's co-worker, friend, and occasional walking partner.[131] Smith testified that she had never seen Taylor in pain before her May 2009 injury, but saw Taylor having difficulty with stairs and with standing for long periods of time after the May 2009 injury.[132] Smith observed Taylor exhibiting pain behaviors from May 2009 through September 2010 including wincing or holding her back, having to slow down, and having to stop and stretch.[133]

¶ 59 Amy Lorraine Dipentino, Medical Records Coordinator at CHP, testified at trial. I found Dipentino's testimony credible.

¶ 60 Dipentino observed Taylor's continued pain from May 2009 to September 2010.[134] Dipentino testified that Taylor sometimes stopped on the stairs and sat for a minute because of pain.[135]

¶ 61 Dipentino noticed when Taylor missed work because they talked daily when both were at CHP.[136] Dipentino testified that she texted or called Taylor to check up on her on the days when Taylor missed work.[137] Dipentino knew that Taylor did frequent walking and stretching exercises in an attempt to heal her back and to get better.[138]

¶ 62 Rebecca Hale, Chief Financial Officer at CHP, testified at trial. I found Hale's testimony credible.

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[129] Trial Test.

[130] Trial Test.

[131] Trial Test.

[132] Trial Test.

[133] Trial Test.

[134] Trial Test.

[135] Trial Test.

[136] Trial Test.

[137] Trial Test.

[138] Trial Test.

¶ 63 Hale testified that she did not recall Taylor suffering from any back pain prior to May 2009.[139] Hale testified that she was the contact person for purchasing the ergonomic chair and hydraulic workstation that CHP eventually provided Taylor.[140] Hale testified that CHP does not document a specific reason why a person misses work or takes sick leave.[141]

CONCLUSIONS OF LAW

¶ 64 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 Taylor's industrial injury.[142]

¶ 65 Taylor bears the burden of proving by a preponderance of the evidence that she is entitled to the benefits she seeks.[143] Taylor has met her burden.

Issue 1: Whether the Court should compel disclosure of expert witness testimony or, in the alternative, limit expert witness testimony.

¶ 66 Taylor asks this Court to preclude State Fund from offering allegedly undisclosed expert medical testimony regarding her MMI status. Dr. Belleville's opinion is the only expert medical testimony that State Fund offers in support of its position that Taylor reached MMI sometime between her May 2009 workplace injury and September 2010. Taylor argues that pages 11-13 of Exhibit 1 were not part of Dr. Belleville's IME report when expert reports were exchanged, but rather a separate State Fund form indicating Dr. Belleville's MMI opinion.

¶ 67 On July 12, 2011, State Fund first provided the contested documents containing Dr. Belleville's IME opinion to Taylor in response to a discovery request. On July 22, 2011, pursuant to this Court's scheduling order, the parties exchanged expert witness reports and identified the subject matter of expert testimony to be given at trial. State Fund produced an additional copy of Dr. Belleville's IME report, but not the form indicating Dr. Belleville's opinion regarding her MMI status.

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[139] Trial Test.

[140] Trial Test.

[141] Trial Test.

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

[143] *Ricks v. Teslow Consol.,* 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wickens Bros. Constr. Co*., 183 Mont. 190, 598 P.2d 1099 (1979).

¶ 68 The policy behind discovery and the disclosure of expert witness testimony is to prevent surprise and to promote the effective cross-examination of expert witnesses.[144] In the case at hand, Taylor was neither surprised at trial with Dr. Belleville's opinion regarding her MMI status nor did State Fund attempt to enter documents into the record after the close of discovery. Despite not receiving official notice that Dr. Belleville would testify about whether Taylor had reached MMI prior to September 2010, Taylor knew of Dr. Belleville's opinion and possessed copies of his supporting documentation.

¶ 69 As held in *Scott v. E. I. Dupont De Nemours & Co.,* refusing to allow an expert to testify *"*would have been an extreme sanction, given that defendant's offense was incompleteness in its answers to interrogatories, not failure to answer."[145] Similarly, here Dr. Belleville's IME opinion was provided before the expert disclosure exchange, and the sanctions sought by Petitioner would be extreme and inappropriate under these circumstances Accordingly, Taylor's motion to compel disclosure or limit Dr. Belleville's expert witness testimony is denied

Issue 2: Whether Montana State Fund improperly denied workers' compensation coverage for Petitioner's back injuries and whether Petitioner is entitled to workers' compensation coverage for her back injuries.

¶ 70 Causation is an essential element to an entitlement to benefits and the claimant has the burden of proving a causal connection by a preponderance of the evidence.[146] Under § 39-71-407(2), MCA, an insurer is liable for an injury if the injury is established by objective medical findings and if the claimant establishes that it is more probable than not that the claimed injury either occurred or aggravated a preexisting condition.

¶ 71 Hintze and her supervising physician Dr. Schulein opined that Taylor's continuing low-back problems are an aggravation of her May 2009 injury. Dr. Belleville opined that Taylor's back pain is the result of a new injury in September 2010. As a general rule, the opinion of a treating physician is accorded greater weight than the opinions of other expert witnesses. However, a treating physician's opinion is not conclusive. To presume otherwise would quash this Court's role as fact-finder in questions of an alleged injury.[147]

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[144] *Hawkins v. Harney*, 2003 MT 58, ¶ 26, 314 Mont. 384, 66 P.3d 305.

[145] *Scott v. E. I. Dupont De Nemours & Co.*, 240 Mont. 282, 287, 783 P. 2d 938, 941(1989).

[146] *Grenz v. Fire and Cas. of Conn.*, 250 Mont. 373, 380, 820 P.2d 742, 746 (1991). (Citation omitted.)

[147] *EBI/Orion Group v. Blythe*, 1998 MT 90, ¶¶ 12-13, 288 Mont. 356, 957 P.2d 1134. (Citation omitted.)

¶ 72 Dr. Belleville saw Taylor for an hour long IME in December 2010, more than two years after the initial injury. Hintze, on the other hand, has seen Taylor on an almost daily basis for the past ten years through their working relationship. Although the record only reflects formal office visits with Hintze on July 24, 2009, and September 7, 2010, both Hintze and Taylor testified to frequent "hallway" treatments that Hintze did not record in Taylor's medical file.

¶ 73 In evaluating conflicting medical opinions, this Court has considered such factors as the relative credentials of the physicians[148] and the quality of evidence upon which the physicians based their respective opinions.[149] Despite Dr. Belleville's impressive credentials and years of experience, Hintze has had substantially more opportunities to observe and talk with Taylor about her injury in both formal appointments and in informal workplace conversations. Where Hintze was able to observe and speak with Taylor on an almost daily basis about her injury and pain levels, I place more weight on Hintze's opinion and the opinion of her supervising physician Dr. Schulein than on Dr. Belleville's opinion.

¶ 74 Hintze spoke with Taylor about her back pain a few days after her initial May 27, 2009, fall at CHP. Hintze saw Taylor in a formal office visit shortly after the initial injury and had frequent discussions with Taylor over the last two and a half years about her pain levels and at-home treatment regimen. From these discussions and her personal observations of Taylor's difficulty performing her job duties, Hintze monitored and assessed, albeit without documenting, Taylor's lengthy healing process.

¶ 75 After the September 7, 2010, incident, Hintze changed her treatment recommendations. She ordered an MRI and prescribed physical therapy. Given her almost daily observations over the course of two and a half years, Hintze concluded on a more probable than not basis that Taylor's September 7, 2010, incident was not a new injury, but rather was a continuation or flare-up of her May 27, 2009, industrial injury.

¶ 76 Under § 39-71-704(1)(a), MCA, after a compensable injury has occurred, an insurer shall furnish reasonable primary medical services for conditions resulting from the injury for those periods as the nature of the injury or the process of recovery requires. Having considered the facts of the present case, I conclude that State Fund is liable for the medical treatment sought by Taylor directly relating to her low-back condition stemming from her initial May 2009 injury. This includes treatment for injuries, pain, or symptoms relating to the subsequent exacerbations of her initial injury, including but not limited to the incident of September 7, 2010.

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[148] *See Barnea v. Ace Am. Ins. Co.*, 2007 MTWCC 58, ¶ 43.

[149] *See Durham v. State Compen. Ins. Fund*, 1998 MTWCC 87, ¶¶ 19, 44.

Issue 3: Whether Petitioner is entitled to attorney fees and costs.

¶ 77 As the prevailing party, Taylor is entitled to her costs.[150]

¶ 78 On the issue of attorney fees, pursuant to § 39-71-611, MCA, an insurer shall pay reasonable attorney fees if the insurer denies liability for a claim for compensation, the claim is later adjudged compensable by this Court, and this Court determines the insurer's actions in denying liability were unreasonable.

¶ 79 I do not believe State Fund unreasonably adjusted this claim. Although I found Taylor and Hintze's testimony credible regarding the frequent undocumented medical treatment that occurred as a result of Taylor's employment at CHP, State Fund did not have a complete picture of Taylor's injury or subsequent treatment. Under these circumstances, it was not unreasonable for State Fund to conclude that the September 7, 2010, incident was a new injury and to deny Taylor's claim on that basis.

Issue 4: Whether Petitioner is entitled to a penalty.

¶ 80 Regarding Taylor's claim for a penalty, § 39-71-2907, MCA, provides that this Court may increase by 20% the full amount of benefits due a claimant during the period of delay or refusal to pay when an insurer agrees to pay benefits but unreasonably delays or refuses to make the agreed-upon payments, or when an insurer unreasonably delays or refuses to pay benefits prior to or subsequent to an order granting benefits from this Court.

¶ 81 Taylor argues that State Fund's denial of benefits was unreasonable given the facts of this case. However, as explained in *Marcott v. Louisiana Pacific Corp.*, the penalty statute "was never intended to eliminate the assertion of a legitimate defense to liability" and that "the existence of a genuine doubt, from a legal standpoint, that any liability exists constitutes a legitimate excuse for denial of a claim or delay in making payments."[151] As explained in ¶ 79 above, State Fund had a legitimate reason for denying further liability for benefits, believing a new injury occurred. Therefore, Taylor is not entitled to a penalty.

JUDGMENT

¶ 82 The Court will not compel expert witness disclosure or limit expert witness testimony.

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

[151] *Marcott v. Louisiana Pacific Corp.,* 275 Mont. 197, 205, 911 P.2d 1129, 1134 (1996) (citations omitted).

¶ 83 Petitioner is entitled to workers' compensation coverage for her back injuries.

¶ 84 Petitioner is entitled to her costs.

¶ 85 Petitioner is not entitled to attorney fees or a penalty.

DATED in Helena, Montana, this 23rd day of May, 2012.

(SEAL)

JAMES JEREMIAH SHEA
JUDGE

c: Jory C. Ruggiero
Greg E. Overturf
Submitted: August 30, 2011