IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2007 MTWCC 45

WCC No. 2006-1567

ANN UFFALUSSY

Petitioner

vs.

ST. PATRICK HOSPITAL AND HEALTH SCIENCES CENTER

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Petitioner suffered a work-related low-back injury on November 5, 1997. After the injury, Petitioner suffered balance difficulties that caused an unsteady gait. Additionally, Petitioner began to experience depressive episodes. In January 1998, Petitioner was involved in a motor vehicle accident (MVA) and suffered a whiplash-type injury with a possible closed head trauma. Petitioner later developed cognitive impairment. Several doctors related the cognitive impairment to the head traumas Petitioner suffered as a result of several falls due to her balance difficulties, Petitioner's depression, chronic pain, fibromyalgia, and the possible head trauma sustained in the MVA. Petitioner argued that her inability to work because of her cognitive impairment was related back to her 1997 low-back injury. Respondent argued that Petitioner's cognitive impairment was not caused by the industrial injury but was caused by the 1998 MVA.

Held: Petitioner's cognitive impairment is causally related to her industrial injury. Three physicians who treated Petitioner related her cognitive impairment to various factors including Petitioner's several head injuries suffered as a result of falls, depression, chronic pain, fibromyalgia, and the possible head injury suffered in the 1998 MVA. The physicians were unable to apportion the different factors and the evidence established that the falls subsequent to the MVA, the depression, and the chronic pain were all related to the industrial injury. To the extent that Respondent attributes Petitioner's cognitive impairment to the subsequent MVA, the evidence is not persuasive that Petitioner even sustained a head injury of any consequence as a result of the MVA. The MVA was a low-impact collision after which Petitioner reported to emergency room personnel that she "thinks" she hit the back of her head on the vehicle's headrest in the accident. Petitioner reported no

loss of consciousness. No bumps or lacerations on her head were observed and the ER physical examination of Petitioner's head revealed it to be "normocephalic, atraumatic." The evidence establishes that Petitioner is unable to work because of her cognitive impairment. Therefore, Petitioner is entitled to TTD benefits for the periods of time she was unable to work due to her cognitive impairment.

Topics:

Evidence: Expert Testimony. Where Petitioner's expert disclosure in accordance with the Scheduling Order was broad, nothing prevented Respondent from contacting Petitioner to request additional information and to cure any perceived inadequacies. Therefore, Respondent's objection to the expert opinion proffered at trial is overruled.

Proof: Burden of Proof: Affirmative Defenses. "Once the claimant has proven a work-related injury and produced evidence that that injury is a cause of a present disability, an insurer who alleges that subsequent events are the actual cause of the claimant's current disability has the burden of proving that allegation, which is in the nature of an affirmative defense, by a preponderance of the evidence." *Briney v. Pacific Employers Ins. Co.,* 283 Mont. 346, 351, 942 P.2d 81, 84 (1997), *citing Walker v. United Parcel Serv.,* 262 Mont. 450, 456, 865 P.2d 1113, 1117 (1993).

Proof: Burden of Proof: Generally. "Once the claimant has proven a work-related injury and produced evidence that that injury is a cause of a present disability, an insurer who alleges that subsequent events are the actual cause of the claimant's current disability has the burden of proving that allegation, which is in the nature of an affirmative defense, by a preponderance of the evidence." *Briney v. Pacific Employers Ins. Co.,* 283 Mont. 346, 351, 942 P.2d 81, 84 (1997), *citing Walker v. United Parcel Serv.,* 262 Mont. 450, 456, 865 P.2d 1113, 1117 (1993).

Proof: Burden of Proof: Affirmative Defenses. Where three physicians expressed opinions that Petitioner's cognitive impairment was related to her 1997 industrial injury based on their opinions that Petitioner's head injuries, depression, and chronic pain contributed to the collective cause of her cognitive impairment, the burden of proof shifted to Respondent. Although Petitioner reported to emergency room personnel that she "thinks" she hit the back of her head at the time of the MVA, she reported no loss of consciousness, no bumps or lacerations on her head were observed, and the physical examination of Petitioner's head revealed it to be "normocephalic, atraumatic." Therefore, Respondent failed to meet its burden of proof.

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Causation: Impact of Non-Work Related Incident. "Once the claimant has proven a work-related injury and produced evidence that that injury is a cause of a present disability, an insurer who alleges that subsequent events are the actual cause of the claimant's current disability has the burden of proving that allegation, which is in the nature of an affirmative defense, by a preponderance of the evidence." *Briney v. Pacific Employers Ins. Co.,* 283 Mont. 346, 351, 942 P.2d 81, 84 (1997) *citing Walker v. United Parcel Serv.,* 262 Mont. 450, 456, 865 P.2d 1113, 1117 (1993).

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Medical Conditions (By Specific Condition): Cognitive Impairment. Where three physicians expressed opinions that Petitioner's cognitive impairment was related to her 1997 industrial injury based on their opinions that Petitioner's head injuries, depression, and chronic pain contributed to the collective cause of her cognitive impairment, the burden of proof shifted to Respondent. Although Petitioner reported to emergency room personnel that she "thinks" she hit the back of her head at the time of the MVA, she reported no loss of consciousness, no bumps or lacerations on her head were observed, and the physical examination of Petitioner's head revealed it to be "normocephalic, atraumatic." Therefore, Respondent failed to meet its burden of proof.

¶ 1 The trial in this matter was held on September 27, 2006, in Missoula, Montana. Petitioner Ann Uffalussy was present and represented by Rex Palmer. Respondent St. Patrick Hospital and Health Sciences Center was represented by Matthew J. Cuffe and W. Carl Mendenhall.

¶ 2 Exhibits: Exhibits 1-6, 8, 10-13, 15-17, 19, 21-23, 25-28, 30-34, 36-39, 41-43, 48, 62, and 72-78 were admitted without objection. Exhibits 7, 9, 14, 18, 20, 24, 29, 35, 40, 44-47, 49-61, and 63-71 were admitted over Respondent's relevancy objections.

¶ 3 Witnesses and Depositions: The depositions of Petitioner, Richard R. Felix, M.D., Robert A. Velin, Ph.D., and Anne Arrington were taken and submitted to the Court. Petitioner, Terry Lanes, M.D., and Ms. Arrington were sworn and testified at trial.

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

> ¶ 4a Petitioner's entitlement to temporary total, temporary partial, permanent total and permanent partial disability benefits through the date of hearing.
>
> ¶ 4b Petitioner's entitlement to a penalty, reasonable attorney fees and costs. The determination of attorney fees and penalty will be held in abeyance by the Court pursuant to the terms of paragraph E.3. above, under the heading stipulations.[1]

FINDINGS OF FACT

¶ 5 Petitioner was a credible witness and I find her testimony at trial credible. I recognize and have taken into account that Petitioner's cognitive impairment affects her memory and ability to correctly recall certain facts and dates, and at times she was confused by questions posed to her at trial.

¶ 6 Dr. Lanes was a credible witness and I find his testimony at trial credible.

¶ 7 Ms. Arrington was a credible witness and I find her testimony at trial credible.

[1] Pretrial Order at 3. In paragraph E.3 of the Pretrial Order, the parties agreed to bifurcate the issue of Petitioner's benefit entitlement from the determination of entitlement to attorney fees and a penalty.

¶ 8 On November 5, 1997, Petitioner suffered an injury to her low back in the course and scope of her employment with Respondent.[2]

¶ 9 At the time of Petitioner's injury, Respondent was enrolled under Compensation Plan I of the Workers' Compensation Act and was self-insured.[3]

¶ 10 Petitioner received a two-year nursing degree in 1973 or 1974. She worked as a nurse in the intensive care unit of St. Patrick Hospital in Missoula, Montana, for approximately 20 years.[4] Following her industrial injury, Petitioner was unable to maintain paid employment. Instead, she worked as a volunteer parish nurse for her church for several years, visiting the sick and elderly and providing counseling and other simple nursing duties to parishioners.[5]

¶ 11 Petitioner injured her low back while assisting with a move of a 250-pound patient from his bed. Petitioner felt an immediate intense burning pain in the lower lumbar region of her back.[6]

¶ 12 Petitioner began to attend physical therapy sessions five days after her injury. She reported to her physical therapist that she was experiencing low-back pain which continued into her left buttock, causing some numbness in that region. At her first visit, Petitioner informed physical therapist Jennifer Brooke that she felt her legs would not support her and that she easily lost her balance.[7] Petitioner continued to seek physical therapy for her injury and attended sessions with physical therapist Chris Newman or one of his associates 33 times between November 10, 1997, and February 17, 1998.[8]

¶ 13 In a visit to Mr. Newman on November 12, 1997, Petitioner stated that she had experienced a sharp pain in her right buttock, down into her leg, while she was running

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[2] Pretrial Order, Facts Admitted by Stipulation at 1, ¶ 1; Trial Test.

[3] Pretrial Order, Facts Admitted by Stipulation at 1, ¶ 2.

[4] Trial Test.

[5] *Id*.

[6] Ex. 4 at 1; Trial Test.

[7] Ex. 31 at 1.

[8] Ex. 31 at 28.

errands in the community. She described this pain as causing her to feel somewhat "contorted."[9]

¶ 14 Petitioner was upset and felt depressed following her back injury.[10] In a November 24, 1997, progress note, Mr. Newman stated that Petitioner continued to suffer quite a bit of emotional outbreak with respect to her condition. He noted that she seemed "mostly sad . . . as though she has no control over her situation."[11]

¶ 15 J. M. Bruckner, M.D., examined Petitioner on November 10 and 17, 1997. Petitioner reported that she was experiencing a significant amount of discomfort in her left lower lumbar area and the discomfort disrupted her sleep and impaired her daily activity of walking.[12] Dr. Bruckner prescribed Trazodone to treat Petitioner's sleep problems.[13]

¶ 16 Dr. Bruckner also diagnosed Petitioner with recurrent fibromyalgia, a condition for which he had successfully treated Petitioner in 1993.[14]

¶ 17 Petitioner's balance issues continued to cause problems. On November 26, 1997, she reported to Dr. Bruckner that she was having a sensation of weakness and slight instability in her walking gait.[15]

¶ 18 Lumbosacral x-rays taken on November 26, 1997, revealed minimal disk space narrowing at the L5-S1 level, but the results were otherwise unremarkable.[16]

¶ 19 Dr. Bruckner again noted Petitioner's unsteady gait during his examination of November 28, 1997. During this same visit, Dr. Bruckner prescribed Amitriptyline to help with Petitioner's non-restorative sleep patterns.[17]

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[9] Ex. 31 at 3.

[10] Trial Test.

[11] Ex. 31 at 6.

[12] Ex. 4 at 2, 3.

[13] Ex. 4 at 2.

[14] Ex. 4 at 3

[15] Ex. 4 at 6.

[16] Ex. 4 at 8.

[17] Ex. 4 at 9.

¶ 20 Lennard S. Wilson, M.D., performed a neurological consultation at Dr. Bruckner's request on December 3, 1997. Dr. Wilson believed Petitioner had a history of prior low-back injury in 1993 with recovery and a more recent onset of back pain with dysesthesias involving the right leg. Dr. Wilson suggested that Petitioner take a low dose of Klonopin for her back pain.[18]

¶ 21 An MRI taken on December 4, 1997, revealed a small left paracentral disk protrusion at the L4-L5 level, moderate facet hypertrophy at the L4-L5 and L5-S1 levels, and an annular bulge at the L5-S1 level.[19]

¶ 22 On December 18, 1997, Petitioner attended a neurosurgical consultation with Chriss A. Mack, M.D. Under the "Mental Status" portion of his report Dr. Mack noted, "Affect is appropriate. The patient has normal language fluency and higher cortical functions."[20]

¶ 23 On January 19, 1998, Petitioner was a seat-belted passenger involved in a motor vehicle accident (MVA). A van hit the vehicle she was riding in from behind. Petitioner suffered a whiplash-type injury to her neck. Petitioner told emergency room personnel that she thought she hit the back of her head on the vehicle's headrest in the accident. She reported no loss of consciousness. No bumps or lacerations on her head were observed and the physical examination of Petitioner's head revealed it to be "normocephalic, atraumatic."[21]

¶ 24 Petitioner received an epidural steroid injection from S. C. Kemple, D.O., for her low-back pain on January 21, 1998. During his examination, Dr. Kemple noted that Petitioner wallowed back and forth as she walked.[22]

¶ 25 On January 21, 1998, Dr. Mack recommended that Petitioner discontinue working in employment that required her to do heavy lifting and noted that Petitioner should consider vocational rehabilitation.[23]

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[18] Ex. 39 at 3, 8.

[19] Ex. 11 at 1.

[20] Ex 21 at 2.

[21] Ex. 28 at 6.5.

[22] Ex. 11 at 1.

[23] Ex. 21 at 5, 6.

¶ 26 Dr. Mack released Petitioner to work the position of Infection Control Assistant, five days per week, eight hours per day, on February 4, 1998.[24]

¶ 27 On February 13, 1998, Petitioner was examined by Michael D. Lahey, M.D., at the request of Western Montana Managed Care Network. Petitioner reported to Dr. Lahey that she had developed a "floppy gait" and had difficulty balancing over a four- to five-week period following her 1997 industrial injury.[25] Dr. Lahey recommended a referral to Martin D. Cheatle, Ph.D., of the St. Patrick Hospital Pain Treatment Center (PTC) for more aggressive treatment of Petitioner's "evolving chronic pain condition."[26]

¶ 28 Dr. Cheatle examined Petitioner on March 5, 1998.[27] Petitioner presented to Dr. Cheatle with constant low-back pain with numbness and aching in both legs, along with neck pain and associated muscle contraction headaches.[28] Dr. Cheatle's impression of Petitioner's medical condition was that she suffered from persistent musculoskeletal back pain with a strong myofascial component related to the November 5, 1997, industrial accident, and depression. He also noted myofascial neck pain from the MVA.[29]

¶ 29 On March 9, 1998, Petitioner reported to her physical therapist that she had fallen down a flight of steps three days earlier. Petitioner recalled that she misstepped, stumbled, and fell down eight steps, striking the right posterior aspect of her head on a bannister.[30]

¶ 30 Petitioner was admitted to the outpatient pain management program at the PTC on March 30, 1998. On the same date, it was noted that Petitioner continued to have significant low-back pain and perceived weakness and pain in her bilateral lower extremities with an altered gait.[31]

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[24] Ex. 21 at 9.

[25] Ex. 12 at 3.

[26] Ex. 5 at 3.

[27] Ex. 5 at 1.

[28] Ex. 5 at 5.

[29] *Id*.

[30] Ex. 34 at 9.

[31] Ex. 5 at 17.

¶ 31 On April 1, 1998, Dr. Cheatle noted, "Ann has continued to display a great deal of effort in all aspects of the pain program. The patient's gait remains quite dysfunctional and she is actively working on gait training and balance in [physical therapy]."[32]

¶ 32 Petitioner participated in daily individual and group physical and behavioral therapy sessions at the PTC between March 30, 1998, and April 17, 1998.[33] At the end of the treatment, Dr. Cheatle declared Petitioner fit to return to work in a light-duty position.[34] Petitioner continued to complain of low-back pain which extended into the buttocks at the time of her discharge from the PTC.[35]

¶ 33 Petitioner unsuccessfully tried to return to work at St. Patrick Hospital from April 20, 1998, to May 22, 1998.[36] Petitioner was terminated because she was unable to perform even the most basic clerical tasks.[37]

¶ 34 On May 13, 1998, Petitioner returned to Dr. Cheatle with complaints of increased difficulties with balance. Petitioner informed Dr. Cheatle that she had fallen on several occasions and had a sensation of lower extremity weakness.[38] Additionally, Dr. Cheatle recorded that Petitioner was suffering "new symptoms of difficulty with word finding and memory along with some visual changes."[39] This is the first time in the record before me that Petitioner's cognitive impairment surfaces.

¶ 35 Also on May 13, 1998, E. B. Russo, M.D., examined Petitioner on referral by Dr. Cheatle.[40] Petitioner informed Dr. Russo that she had been limping and having balance problems since her 1997 industrial injury. Petitioner also informed Dr. Russo that her speech sometimes "gets drawn."[41] Dr. Russo was concerned because Petitioner's

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[32] Ex. 5 at 19.

[33] Ex. 5 at 42.

[34] Ex. 5 at 45, 46.

[35] Ex. 5 at 49.

[36] Ex. 75 at 17.

[37] Ex. 42 at 26.

[38] Ex. 5 at 54.

[39] *Id*.

[40] Ex. 37 at 54.

[41] Ex. 37 at 55.

complaints did not match up with her injuries. Dr. Russo ordered an MRI of Petitioner's brain to rule out any demyelinating disease, and he found Petitioner's MRI results to be within normal limits.[42]

¶ 36 Dr. Cheatle examined Petitioner again on December 16, 1998, and noted that Petitioner continued to experience significant low-back pain and pain in her buttocks, with her back pain being far more intense.[43]

¶ 37 On March 2, 1999, Jerome W. Freeman, M.D., noted that Petitioner was having extremely difficult pain problems, primarily in her low back. He also stated that she was having significant ongoing cervical discomfort and associated headaches. Dr. Freeman noted that Petitioner was taking Trazodone to help with her sleep problems, but commented that the Trazodone can cause memory disturbance and difficulty concentrating. Dr. Freeman opined that Petitioner's ongoing pain and limitation were contributing to her clumsiness and falling episodes.[44]

¶ 38 Dr. Freeman wrote to Dr. Russo on March 9, 1999, stating, "It is my opinion that Ms. Uffalussy is unusually sensitive to medications, and that a variety of the treatments she has been on have caused her side effects. Particularly when she was on Klonopin she had difficulty with memory and ataxia, which improved after it was stopped. I suspect that [T]razodone is also causing her some cognitive impairment."[45]

¶ 39 Dr. Mack, assisted by Louis Kattine, M.D., performed an L4-L5, L5-S1 anterior lumbar interbody fusion on Petitioner on March 16, 1999.[46]

¶ 40 On November 19, 1999, Dr. Mack placed Petitioner at maximum medical improvement (MMI) for her low-back injury and gave Petitioner a 13% whole person impairment rating.[47]

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[42] Ex. 37 at 56, 64.

[43] Ex. 5 at 71.

[44] Ex. 22 at 5.

[45] Ex. 22 at 7.

[46] Ex. 10 at 2, 4.

[47] Ex. 17 at 24.

¶ 41 Catherine C. Capps, M.D., performed an independent medical examination of Petitioner on February 10, 2000.[48] Dr. Capps agreed with Dr. Mack that Petitioner was at MMI for her back injury and also agreed with his 13% impairment rating.[49] Dr. Capps opined that Petitioner's cognitive impairment was not related to her industrial injury.[50] Dr. Capps then suggested that Petitioner be sent to Robert A. Velin, Ph.D., for neuropsychological testing "[t]o try to determine whether or not [Petitioner] truly has a cognitive and memory disorder."[51]

¶ 42 Dr. Capps reviewed seven job analyses and commented on whether Petitioner could perform these jobs at that time. Dr. Capps disapproved Petitioner's time-of-injury ICU nurse position. Orthopedically, Dr. Capps approved the positions of nurse case manager, office nurse, registered nurse, per diem nurse, utilization reviewer, and field case manager. However, Dr. Capps had reservations about Petitioner's mental ability to perform each of these jobs.[52]

¶ 43 Petitioner testified that sometime after her back surgery she was using an exercise ball to perform stretching exercises to improve her back problems. The ball was placed against a door that became unlatched and Petitioner fell to the floor and struck her head on the hard floor.[53] Petitioner also testified that she fell down the stairs on numerous occasions.[54]

¶ 44 In May 2000, Petitioner underwent cognitive function testing with Patricia Webber, Ph.D. Intellectual testing revealed that Petitioner's rote memory, mental control, and mental manipulation of information were below average.[55]

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[48] Ex. 17 at 9-22.

[49] Ex. 17 at 20.

[50] Ex. 17 at 19.

[51] *Id*.

[52] Ex. 17 at 21, 22.

[53] Trial Test.

[54] *Id*.

[55] Ex. 19 at 25.

¶ 45 Terry Lanes, M.D., is a board certified psychiatrist.[56] Dr. Lanes first examined Petitioner on June 14, 2000. Petitioner presented to Dr. Lanes with a history of depression and cognitive impairment. [57]

¶ 46 Petitioner reported to Dr. Lanes that she had fallen several times since her back injury, even losing consciousness on at least one occasion. At the time of the initial visit, Dr. Lanes' impression was that Petitioner was suffering from a major depressive episode, periodic leg movement, and chronic pain related to her back injury. Dr. Lanes also considered that Petitioner may have irreversible cognitive impairment from traumatic brain injury.[58]

¶ 47 In a September 12, 2000, letter to adjuster Kim Stevens at Putman and Associates, Dr. Lanes opined that Petitioner's depression was a direct result of her November 1997 injury.[59]

¶ 48 Dr. Lanes treated Petitioner for her depression for approximately three years.[60] On September 4, 2002, Dr. Lanes noted that Petitioner appeared depressed and was still having gait problems.[61]

¶ 49 At trial, Dr. Lanes testified to a reasonable degree of medical certainty that the source of Petitioner's depression was the 1997 industrial injury and the consequent limitations and developments that have taken place since that time.[62]

¶ 50 Dr. Lanes opined that Petitioner's cognitive impairment stems from her depression, along with her fibromyalgia, head traumas as a result of the MVA and various falls since her industrial injury, and Petitioner's chronic pain.[63]

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[56] Trial Test.

[57] Ex. 19 at 1.

[58] Trial Test.; Ex. 19 at 1, 3.

[59] Ex. 19 at 10.

[60] Ex. 19 at 4-30.11.

[61] Ex. 19 at 30.7.

[62] Trial Test.

[63] Trial Test.

¶ 51 Petitioner visited Dr. Velin on approximately four or five occasions. Petitioner presented to Dr. Velin with difficulty acquiring new material, difficulty with the retrieval of information that she previously learned, and general loss of information of details concerning past events.[64]

¶ 52 Dr. Velin performed a neuropsychological evaluation of Petitioner on February 23, 2001, at the request of Dr. Lanes.[65] Because of the complex nature of Petitioner's symptoms, Dr. Velin administered a comprehensive neuropsychological evaluation including the Wechsler Memory Scale-3rd Ed., the California Verbal Learning Test-2nd Ed., the core elements of the Halstead-Reitan Neuropsychological Battery, the Oral Controlled Word Association Test, the Boston Naming Test, the Conner's Continuous Performance Test, the Wisconsin Card Sorting Test, and the Beck Depression Inventory.[66] After administering the tests, Dr. Velin opined that Petitioner was experiencing clinically-significant cognitive impairment.[67] He further opined that the most probable cause for Petitioner's symptoms is the combination of a postconcussive syndrome from Petitioner's whiplash suffered as a result of the MVA, the subsequent mild head injuries, the depression, and ongoing pain. Additionally, Dr. Velin opined that Petitioner's fibromyalgia impacted her symptoms.[68]

¶ 53 Dr. Velin testified that the depression alone is not causing Petitioner's cognitive deficits but was likely exacerbating them.[69] Dr. Velin opined that the MVA and subsequent falls are more significant than Petitioner's chronic pain or depression as far as these impact Petitioner's cognitive deficits.[70]

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[64] Ex. 19 at 25.

[65] Ex. 19 at 24.

[66] Ex. 19 at 26.

[67] Ex. 19 at 27.

[68] Ex. 19 at 28.

[69] Velin Dep. 17:24 - 18:2.

[70] Velin Dep. 34:9-17.

¶ 54 Richard R. Felix, M.D., has been a clinical psychiatrist in private practice for 27 years.[71] Petitioner began seeing Dr. Felix after Dr. Lanes transferred a number of his patients to him.[72]

¶ 55 Dr. Felix examined Petitioner on December 11, 2003. Dr. Felix diagnosed Petitioner with organic mood disorder secondary to traumatic brain injury.[73] Dr. Felix opined that Petitioner's organic mood disorder occurred as a result of the MVA and subsequent falls following the MVA.[74]

¶ 56 Dr. Felix agreed with Dr. Velin's assessment that five contributing factors were causing Petitioner's cognitive impairment: postconcussive syndrome from the MVA, cumulative mild head injuries, depression, ongoing back and shoulder pain, and fibromyalgia.[75]

¶ 57 Dr. Felix testified that concentration and attention deficits commonly occur in people suffering from depression, fibromyalgia, and chronic pain, particularly if there is significant sleep disturbance.[76] Dr. Felix opined that it is very difficult to assess how much a given impact to the head is going to affect cognitive function.[77] Further, Dr. Felix opined that the vulnerability to the consequences of a head injury increases with each subsequent head injury and a loss of consciousness would be worth paying particular attention to in someone suffering cognitive impairment.[78]

¶ 58 Dr. Felix opined that he would be unable to apportion the various factors contributing to Petitioner's cognitive impairment because none of the various factors operate independently. Dr. Felix testified that not only does each of the factors affect the person, but they each affect the other factors as well.[79]

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[71] Felix Dep. 6:7-8.

[72] Felix Dep. 7:2-14.

[73] Ex. 19 at 29.1, 30.

[74] Felix Dep. 17:25 - 18:11.

[75] Felix Dep. 65:8 - 66:4.

[76] Felix Dep. 68:15-22

[77] Felix Dep. 59:9-14.

[78] Felix Dep 55:24 - 56:6, 56:8-10.

[79] Felix Dep. 64:8-19.

¶ 59 Dr. Felix opined that it was Petitioner's cognitive impairment that prevented her from returning to the nursing field, although he also felt her back limitations probably played a part in her not returning to nursing as well.[80]

¶ 60 In a letter to the attorney representing the defendant in the MVA lawsuit dated October 31, 2003, Stuart Hall, Ph.D., a licensed psychologist, opined that after thoroughly reviewing information such as an accident reconstruction/biomechanical analysis, Dr. Velin's neuropsychological evaluation, and Dr. Lanes' psychiatric evaluation, he concluded the MVA was not of sufficient force to cause a brain injury. In his report, Dr. Hall referenced the accident reconstruction/biomechanical analysis which concluded that "the body member accelerations in the subject collision to the Ufalussy [sic] vehicle are so low that they are well below those accelerations that both of the Uffalussy's [sic] would have experienced in their own every day life experiences." Dr. Hall opined that a number of factors other than the MVA could be impacting Petitioner's cognitive function, including her major depression, chronic pain, sleep problems, and the subsequent falls.[81]

¶ 61 Vocational rehabilitation counselor Anne Arrington testified at trial that Petitioner would orthopedically qualify for sedentary/light-duty work based on her low-back injury. Further Ms. Arrington testified that, in terms of Petitioner's chronic pain, Petitioner would still qualify for sedentary/light-duty work.[82] However, Ms. Arrington opined that Petitioner would be unable to perform any of the jobs that were orthopedically approved by Dr. Capps because of Petitioner's cognitive impairment.[83]

¶ 62 There is no dispute before me that Petitioner's cognitive impairment causes her to be totally disabled. The question is whether the cognitive impairment is causally related to Petitioner's industrial accident. If it is, Petitioner is entitled to workers' compensation benefits.

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[80] Felix Dep. 28:1-13.

[81] Ex. 43 at 1.

[82] Trial Test.

[83] *Id*.

CONCLUSIONS OF LAW

¶ 63 This case is governed by the 1997 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Petitioner's industrial accident.[84]

¶ 64 Petitioner bears the burden of proving by a preponderance of the evidence that she is entitled to the benefits she seeks.[85]

¶ 65 At trial, Respondent objected to Dr. Lanes providing any opinion outside the scope of his treatment notes or the letters Dr. Lanes authored in his treatment notes. Respondent argued that any expert opinion based on other medical information or the depositions in this case were outside the expert disclosure provided by Petitioner as to what Dr. Lanes' opinion would be at trial. Petitioner's expert witness disclosure as it pertains to Dr. Lanes reads as follows:

> We would expect the medical care providers and evaluators to testify based upon their personal observations as well as the cumulative medical records. We would expect them to testify consistent with their medical records and reports . . . .[86]

¶ 66 Petitioner's disclosure is certainly broad and, had Respondent objected to the adequacy of the disclosure in accordance with the Scheduling Order, the objection likely would have been well taken. The Scheduling Order specifically provides for an opposing party to contact an opponent if he feels the expert disclosure is inadequate in any way. There is no record that Respondent contacted Petitioner in this case to request additional information. Although the medical opinion disclosure was broad, nothing prevented Respondent from contacting Petitioner to request additional information and to cure any perceived inadequacies. The opinions offered by Dr. Lanes at trial fall within the broad parameters set forth in Petitioner's expert disclosure. Therefore, Respondent's objection is overruled and Dr. Lanes' opinions offered at trial are admitted.

¶ 67 Also at trial, Respondent objected to admitting Ms. Arrington's trial testimony regarding certain information about the requirements of a case manager position she retrieved following her deposition testimony. This information was done in follow-up to her

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

[85] *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).

[86] Petitioner's Witness and Exhibit Lists, Expert Disclosures and Grounds for Penalty and Attorney Fees at 3, Docket Item No. 17.

deposition testimony and to clarify the opinions she had offered in her deposition. Ms. Arrington's testimony at trial was entirely consistent with her deposition testimony. Additionally, her testimony ultimately had little, if any, bearing on the resolution of the issues presented to this Court. Accordingly, Respondent's objection is overruled.

¶ 68 Drs. Velin, Felix, and Lanes all found the following factors to be contributing to Petitioner's cognitive impairment:

¶ 68a a possible head injury sustained in the 1998 MVA;
¶ 68b head injuries caused by several falls following the industrial injury and MVA;
¶ 68c depression;
¶ 68d chronic pain; and
¶ 68e fibromyalgia.

¶ 69 Excluding the MVA, which obviously bears no relationship to Petitioner's industrial injury, I address the remaining factors which have been found to be contributing to Petitioner's cognitive impairment and their causal relationship, if any, to Petitioner's industrial injury, in turn.

I. Head injuries caused by several falls

¶ 70 On November 10, 1997, five days after her industrial injury, Petitioner reported to her physical therapist that she had numbness in her left buttock, she felt her legs would not support her, and she easily lost her balance.[87] Petitioner told Dr. Bruckner that the pain in her lower lumbar area was impairing her daily activity of walking.[88] On November 12, 1997, Petitioner reported that, while running errands, she felt somewhat "contorted."[89] Three weeks following her industrial injury, on November 26, 1997, Petitioner reported to Dr. Bruckner that she had a sensation of weakness and instability in her walking gait.[90] Dr. Bruckner again noted Petitioner's unsteady gait during his examination on November 28, 1997.[91] When Petitioner was examined by Dr. Lahey on February 13, 1998, after she was involved in the MVA, she informed Dr. Lahey that she had developed a

[87] Ex. 31 at 1.

[88] Ex. 4 at 3

[89] Ex. 31 at 3.

[90] Ex. 4 at 6.

[91] Ex. 4 at 9.

"floppy gait" and had difficulty keeping her balance over a four- to five-week period following her industrial injury.[92]

¶ 71 On March 9, 1998, approximately seven weeks after the MVA, Petitioner reported to her physical therapist that three days earlier she had fallen down eight steps, striking her head on a bannister.[93] Petitioner told Dr. Cheatle on May 13, 1998, that she had fallen on several occasions and continued to have lower extremity weakness.[94] At this same time, Petitioner complained to Dr. Cheatle of problems with word finding and memory.[95] Petitioner informed Dr. Lanes that she had fallen several times after her industrial injury, even losing consciousness on at least one occasion.[96]

¶ 72 The evidence in the record leads me to conclude that Petitioner has suffered from numerous falls as a result of her industrial injury. The falls were a result of Petitioner's balance and gait difficulties. Petitioner had balance problems and difficulty with her gait within five days of her injury, and several weeks before the MVA. She continued having problems with her balance over the next several months, falling on numerous occasions and striking her head on several of those occasions. Dr. Felix testified that the impact that each head trauma has on an individual increases with each subsequent fall. In Petitioner's case, she fell and struck her head on numerous occasions, the collective impact of which contributed to her cognitive impairment.

II. Depression

¶ 73 Mr. Newman noted that Petitioner continued to suffer from emotional outbreaks regarding her condition during her visit with him on November 24, 1997.[97] Dr. Lanes directly related Petitioner's depression to the industrial injury in both a letter to Putman and Associates[98] and in his testimony at trial. Respondent offered no medical opinion opposing Dr. Lanes' opinion regarding the causal relationship between Petitioner's depression and her industrial injury.

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[92] Ex. 12 at 3.

[93] Ex. 34 at 9.

[94] Ex. 5 at 54.

[95] *Id*.

[96] Ex. 19 at 1.

[97] Ex. 31 at 6.

[98] Ex. 19 at 10.

III. Chronic Pain

¶ 74 Petitioner suffered a low-back injury on November 5, 1997. The injury caused enough pain to disrupt her sleep.[99] Petitioner was eventually admitted to the PTC for more aggressive treatment of her "evolving chronic pain condition."[100] Petitioner continued to complain of low-back pain extending into her buttocks at the time of her discharge from the PTC. Petitioner eventually had to undergo surgery on her lower lumbar region in an effort to relieve her pain.

¶ 75 At trial, Petitioner testified that she continues to suffer from chronic pain related to her industrial injury. Specifically, Petitioner testified that, although her surgery improved her back pain, there has not been a single day since her industrial injury that she has been pain-free.[101] The evidence suggests that some of Petitioner's chronic pain may stem from the 1998 MVA. However, a significant amount of her chronic pain clearly relates back to her industrial injury.

IV. Fibromyalgia

¶ 76 Although Dr. Bruckner diagnosed Petitioner with recurrent fibromyalgia shortly after Petitioner's industrial injury, nothing in the record establishes a causal connection between the injury and the fibromyalgia. The mere temporality of the fibromyalgia diagnosis with the industrial injury is insufficient to establish a causal relationship. Therefore, I find insufficient evidence to establish a causal connection between Petitioner's injury and her fibromyalgia.

CONCLUSION

¶ 77 In *Briney v. Pacific Employers Ins. Co.*,[102] the Montana Supreme Court held:

> [O]nce the claimant has proven a work-related injury and produced evidence that that injury is a cause of a present disability, an insurer who alleges that subsequent events are the actual cause of the claimant's

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[99] Ex. 4 at 3.

[100] Ex. 5 at 3.

[101] Trial Test.

[102] *Briney*, 283 Mont. 346, 942 P.2d 81 (1997).

current disability has the burden of proving that allegation, which is in the nature of an affirmative defense, by a preponderance of the evidence.[103]

¶ 78 In the present case, Drs. Velin, Felix, and Lanes all expressed opinions that Petitioner's cognitive impairment related to her 1997 industrial injury based on their opinions that Petitioner's head injuries, depression, and chronic pain contributed to the collective cause of her cognitive impairment. Once Petitioner established a causal link between her cognitive impairment and her industrial injury, the burden of proof shifted to Respondent to prove by a preponderance of the evidence that events subsequent to the industrial injury are the actual cause of Petitioner's cognitive impairment.

¶ 79 Respondent presented Dr. Capps' February 10, 2000, opinion that Petitioner's cognitive impairment is unrelated to her 1997 injury. However, Dr. Capps suggested that Petitioner be sent to Dr. Velin for neuropsychological testing "[t]o try to determine whether or not [Petitioner] truly has a cognitive and memory disorder."[104] As noted above, Dr. Velin then administered a comprehensive neuropsychological evaluation including the Wechsler Memory Scale-3rd Ed., the California Verbal Learning Test- 2nd Ed., the core elements of the Halstead-Reitan Neuropsychological Battery, the Oral Controlled Word Association Test, the Boston Naming Test, the Conner's Continuous Performance Test, the Wisconsin Card Sorting Test, and the Beck Depression Inventory.[105] After administering these tests, Dr. Velin opined that Petitioner was experiencing clinically significant cognitive impairment.[106] He further opined that the most probable cause for Petitioner's symptoms is the combination of a postconcussive syndrome from Petitioner's whiplash suffered as a result of the MVA, the subsequent mild head injuries, the depression, and ongoing pain. Additionally, Dr. Velin opined that Petitioner's fibromyalgia impacted her symptoms.[107]

¶ 80 To the extent that Respondent argues that the MVA is the cause of Petitioner's cognitive impairment, I am not persuaded that Petitioner sustained a head injury of any consequence as a result of the MVA. Although Petitioner reported at the emergency room after the MVA that she "thinks" she hit the back of her head on the vehicle's headrest in the accident, she reported no loss of consciousness, no bumps or lacerations on her head

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[103] *Id.* at 351, 942 P.2d at 84 (*citing*, *Walker v. United Parcel Serv.*, 262 Mont. 450, 456, 865 P.2d 1113, 1117 (1993)).

[104] Ex. 17 at 19.

[105] Ex. 19 at 26.

[106] Ex. 19 at 27.

[107] Ex. 19 at 28.

were observed, and the physical examination of Petitioner's head revealed it to be "normocephalic, atraumatic." Furthermore, Petitioner described a fairly low impact event. Petitioner's description of the MVA was consistent with the accident reconstruction/biomechanical analysis referenced in Dr. Hall's report which concluded that "the body member accelerations in the subject collision to the Ufalussy [sic] vehicle are so low that they are well below those accelerations that both of the Uffalussy's [sic] would have experienced in their own every day life experiences."[108]

¶ 81 Having considered the totality of the evidence presented, I conclude that Respondent has not met its burden of proof that events subsequent to Petitioner's industrial injury are the actual cause of her cognitive impairment.

¶ 82 There was no evidence presented that Petitioner is at MMI with respect to her cognitive impairment. Therefore she is entitled to temporary total disability (TTD) benefits until such time as she is declared to be at MMI for the cognitive impairment.[109]

¶ 83 As the prevailing party, Petitioner is entitled to her costs.[110]

JUDGMENT

¶ 84 Petitioner's petition for TTD benefits through the date of hearing is **GRANTED.**

¶ 85 Petitioner is entitled to her costs.

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

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[108] Ex. 43 at 1.

[109] *See* § 39-71-116 (34), MCA.

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

¶ 87 Any party to this dispute may have twenty days in which to request reconsideration from these FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT.

DATED in Helena, Montana, this 6th day of November, 2007.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Rex Palmer
Matthew J. Cuffe
W. Carl Mendenhall
Submitted: October 30, 2006