

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2006 MTWCC 34

WCC No. 2002-0686

DENYCE ALBERTS

Petitioner

vs.

TRANSPORTATION INSURANCE COMPANY

Respondent/Insurer.

ORDER GRANTING PETITIONER'S MOTION TO ALLOW MEDICAL TREATMENT, GRANTING RESPONDENT'S MOTION TO PRESERVE EVIDENCE, AND DENYING PETITIONER'S MOTION FOR INTERIM BENEFITS PURSUANT TO § 39-71-610, MCA

Summary: Petitioner's treating physician diagnosed her with Thoracic Outlet Syndrome (TOS) and opined it is more likely than not a work-related condition. Respondent has refused to authorize surgery to alleviate the condition because three other doctors have disagreed with the diagnosis. Petitioner moved this Court for an order allowing her to obtain medical treatment for her TOS. Respondent objected, but requested that if the Court grants Petitioner's motion, that Respondent be allowed to have a physician observe the surgery. Petitioner further moved for interim benefits pursuant to § 39-71-610, MCA.

Held: Petitioner's motion to allow medical treatment is granted. The opinion of a treating physician is entitled to greater weight, and the diagnosis of TOS was reached with reasonable medical judgment on the part of Petitioner's treating physician. Respondent's motion to allow observation of the surgery is granted. Petitioner's motion for interim benefits pursuant to § 39-71-610, MCA, is denied because Petitioner has not demonstrated that she is entitled to them.

Topics:

Physicians: Treating Physician: Weight of Opinions. This Court has held that at a minimum, "the treating physician is the tie breaker where there is evenly balanced, conflicting medical testimony." *Wall v. National Union Fire*

Ins. Co., 1998 MTWCC 11, ¶ 67. In this case, there are four different doctors and four different diagnoses. Not only do these doctors not agree with her treating physician, they do not agree with each other. The treating physician's opinion is entitled to the greater evidentiary weight that this Court gives to the opinions of treating physicians.

Physicians: Treating Physician: Weight of Opinions. This Court has held that between equally qualified physicians, the one who has treated a claimant for a longer amount of time would generally be in a better position to understand the claimant's diagnosis, prognosis, and impairment more fully than a physician who had evaluated the claimant on only one occasion. *Kloepfer v. Lumbermens Mut. Cas. Co.*, 1994 MTWCC 5. Where two doctors saw Petitioner for one examination, and another doctor only reviewed her records, the Court gives greater weight to the opinion of Petitioner's treating physician.

Physicians: Diagnosis [Impression]. Where Respondent has not shown that the opinions of Petitioner's treating physician, although differing from other doctors who have examined Petitioner or reviewed her case, are beyond the pale of reasonable medical judgment, the Court finds the diagnosis of the treating physician to be reasonable under the circumstances.

Evidence: Preservation. Where Petitioner's treating physician has opined that the only way he can diagnose the cause of Petitioner's Thoracic Outlet Syndrome is by observing the area during surgery, Respondent may have a physician observe the procedure as this is the only opportunity for it to observe the preoperative physical condition of Petitioner's shoulder and its rights will be prejudiced if it is unable to obtain this evidence.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-610. This Court has held that a claimant must tender substantial evidence which, if believed, would entitle claimant to interim TTD benefits pursuant to this statute, and has articulated a four-factor test. *Montana Health Network v. Graham*, 2002 MTWCC 61, ¶¶ 5-6. Where Petitioner puts forth no argument in support of her motion and no facts into evidence to demonstrate that these factors have been met, her motion is denied.

Benefits: Interim (§ 39-71-610) Benefits. This Court has held that a claimant must tender substantial evidence which, if believed, would entitle

claimant to interim TTD benefits pursuant to this statute, and has articulated a four-factor test. *Montana Health Network v. Graham*, 2002 MTWCC 61, ¶¶ 5-6. Where Petitioner puts forth no argument in support of her motion and no facts into evidence to demonstrate that these factors have been met, her motion is denied.

¶ 1 Petitioner moves for an order allowing medical treatment recommended by her treating physician to proceed. Specifically, Petitioner requests that her treating physician be allowed to perform surgery to resolve the Thoracic Outlet Syndrome (TOS) which he has diagnosed. Petitioner further requests interim temporary total disability (TTD) benefits pursuant to § 39-71-610, MCA. Respondent objects to the medical treatment on the grounds that it does not believe Petitioner has TOS, and that the causation of Petitioner's alleged TOS cannot be determined prior to surgery. Respondent further argues that Petitioner is not entitled to TTD benefits. In the event that the Court grants Petitioner's motion, Respondent further moves this Court for an order to preserve evidence.

¶ 2 This case involves three separate incidents which occurred while Petitioner worked for Sysco Food Services (Sysco). Sysco was insured by Respondent Transportation Insurance Company at all times pertinent to this petition.

¶ 3 The first incident culminated in an occupational disease claim for a condition affecting Petitioner's neck, upper back, and right shoulder on March 26, 1997. Petitioner was found to be at maximum medical improvement (MMI) on October 23, 1997, and given a 5% impairment rating. Liability was accepted for this claim, which was resolved by way of a Petition for Settlement approved by the Department of Labor and Industry on May 21, 1998. Medical benefits were reserved under this settlement.

¶ 4 The second incident occurred on August 21, 1997, when Petitioner suffered an injury while lifting a heavy box. Because Petitioner was not yet at MMI from her occupational disease, there is a dispute between the parties as to whether this incident constitutes a separate injury or whether this was an aggravation of the occupational disease and included in the May 21, 1998, settlement. Since medical benefits were reserved in this settlement, this dispute need not be resolved for purposes of this Order.

¶ 5 The third incident occurred on November 25, 1997, when Petitioner slipped and fell on ice. Liability was accepted and medical and compensation benefits were paid.

¶ 6 At issue is whether Respondent must pay for a surgical procedure to treat Petitioner's diagnosed TOS. John I. Moseley, M.D., diagnosed Petitioner with this condition

and believes it is more probable than not that Petitioner's condition is work related. Other doctors have disagreed with Dr. Moseley's diagnosis.

¶ 7 Dr. Moseley has testified that prior to surgery, he cannot determine whether Petitioner's alleged TOS can be attributed to any particular one of the three work-related incidents. Regardless of which incident Petitioner's alleged TOS can be attributed to, though, medical benefits remain open on all three claims. The primary issue for the Court to decide at this point is whether to accept Dr. Moseley's diagnosis of TOS and order Respondent to pay the associated medical costs, with the remaining issues to be resolved after causation is determined.

¶ 8 Dr. Moseley was deposed in this case on October 30, 2003. Dr. Moseley first saw Petitioner on April 19, 2002, when she was referred to him by her internist.¹ Prior to that time, Petitioner had an EMG nerve conduction study performed and she was told that the study was abnormal for entrapment of the ulnar nerve at the elbow.² Upon physical examination, Dr. Moseley discovered abnormal areas related to Petitioner's shoulders and arms.³ He explained, "On the left, palpation above the left clavicle didn't cause any arm pain or – but elevating the left arm produced left shoulder pain. She also was sensitive at both elbows on palpation which is called the Tinel's sign. It usually means the ulnar nerves are compressed at the elbow. Her sensation and strength were normal, her gait was normal, and based on that I thought she might have thoracic outlet syndrome."⁴

¶ 9 Dr. Moseley reviewed an MRI of Petitioner's cervical spine and determined it was normal. He then ordered somatosensory evoked potentials (SERs) and a Doppler blood flow study. Dr. Moseley explained that in a Doppler study, sensing devices are placed in a patient's hands and forearms. The patient's arms are then put into different positions to discover if blood flow through the thoracic outlet triangle is occluded. The SERs involve placing stimulating electrodes on the skin over the ulnar and median nerve at the wrist, and recording electrodes on the head, neck, and shoulders. A patient's arms are then put into different positions to discover if nerve conduction changes through the thoracic outlet

¹ Moseley Dep. 3:16-20.

² Moseley Dep. 4:17-21.

³ Moseley Dep. 5:10-14.

⁴ Moseley Dep. 5:18-25.

triangle. By analyzing the results of those two tests along with a physical exam, a diagnosis concerning TOS can be made.⁵

¶ 10 Petitioner underwent the Doppler blood flow study on November 11, 2002. The studies were significantly abnormal in both arms. The SERs were also abnormal in both arms, consistent with TOS. With respect to these results, Dr. Moseley testified, “There’s nothing else in the anatomy structure between your neck and your hand that will produce those abnormal tests to that degree unless you have thoracic outlet abnormality.”⁶

¶ 11 Dr. Moseley opined that Petitioner’s history does not include any nonwork-related activities which would cause him to think she would be prone to TOS, and that he believes it is more probable than not that Petitioner’s TOS is work-related.⁷

¶ 12 On March 8, 2006, Petitioner’s counsel sent a letter to Dr. Moseley asking whether he still believed his diagnosis of TOS to be correct, whether he could attribute Petitioner’s TOS to her employment at Sysco, and whether he could attribute Petitioner’s TOS to any one of the three claims from 1997.⁸ Dr. Moseley responded on April 14, 2006,⁹ stating that, in his opinion, Petitioner has bilateral TOS and a right shoulder bone spur abnormality, and that he believes the TOS is a result of Petitioner’s injury on August 21, 1997, although as early as March 1997, she apparently had some thoracic outlet symptoms. Dr. Moseley reiterated that the cause of TOS may be identified at surgery.

¶ 13 Petitioner has undergone two independent medical examinations. The first was performed by Bill S. Rosen, M.D., at Respondent’s request, and the second was performed by Henry H. Gary, Jr., M.D., who was mutually agreed upon by the parties. Also, at Respondent’s request, a records review was conducted by Gregg L. Singer, M.D. Drs. Rosen, Gary, and Singer disagree with Dr. Moseley’s diagnosis.

¶ 14 When asked about the conclusions reached by Drs. Singer and Rosen, Dr. Moseley stated that he still believes to a reasonable degree of medical certainty that Petitioner has TOS, and that he does not know how Drs. Singer and Rosen would account for Petitioner’s

⁵ Moseley Dep. 6:3-24.

⁶ Moseley Dep. 7:13-16.

⁷ Moseley Dep. 9:5-18.

⁸ See Letter to Dr. Moseley, Docket Item No. 49.

⁹ See Dr. Moseley’s Letter, Docket Item No. 52.

abnormal test results in the absence of TOS.¹⁰ Noting that Dr. Rosen's conclusions were based in part on a normal F wave reading on the EMG, Dr. Moseley pointed out that F waves are no longer used to diagnose TOS because SER monitoring is more accurate in assessing nerve conduction through the thoracic triangle and has made F wave obsolete as a diagnostic tool.¹¹ Dr. Moseley also pointed out that the newer multiarm blood flow sensors used for the Doppler test are extremely sensitive and more accurate than the version used 10 to 15 years ago.¹²

¶ 15 With respect to whether Petitioner's diagnosed TOS is the result of repetitive use versus a specific trauma, Dr. Moseley stated that, most of the time, he can make this determination through surgery.¹³ Dr. Moseley explained that with TOS, until surgery, he cannot determine which of these is the specific cause of Petitioner's TOS.¹⁴ In determining whether Petitioner is entitled to surgery, however, whether her TOS is the result of a specific incident or occupational disease is irrelevant since medical benefits have not been closed on any of her claims. Dr. Moseley has opined that the condition is related to her employment.

¶ 16 As Petitioner's treating physician, Dr. Moseley's opinion is entitled to greater evidentiary weight.¹⁵ A treating physician's opinion, however, is not conclusively presumed to be correct. If that were the case, this Court would effectively abdicate its role as fact-finder to the treating physician.¹⁶ This Court has previously held that at a minimum, "the treating physician is the tie breaker where there is evenly balanced, conflicting medical testimony."¹⁷ In the case at hand, there are four different doctors and four different diagnoses of Petitioner's condition. Dr. Moseley has diagnosed Petitioner with TOS, which he has testified are supported by objective findings. Dr. Rosen believes Petitioner has a cervical and trapezius strain, but he finds no objective medical findings to support

¹⁰ Moseley Dep. 12:12-18.

¹¹ Moseley Dep. 36:11-19.

¹² Moseley Dep. 31:14-23.

¹³ Moseley Dep. 23:18-21.

¹⁴ Moseley Dep. 8:20 - 9:12.

¹⁵ *Wall v. National Union Fire Ins. Co.*, 1998 MTWCC 11, ¶ 67.

¹⁶ *Kloepfer v. Lumbermens Mut. Cas. Co.*, 1994 MTWCC 5 at Conclusions of Law (CoL), ¶ 2.

¹⁷ *Wall*, ¶ 67.

Petitioner's complaints of ulnar strain. Dr. Gary found objective medical findings to support a diagnosis of bilateral tardy ulnar palsy, but found no objective medical findings to support the cervical strain and chronic pain syndrome he diagnosed. Dr. Singer diagnosed Petitioner as having myofascial pain and mild ulnar neuropathy. In short, not only do these doctors not agree with Dr. Moseley's diagnosis, they do not agree with each other.

¶ 17 Furthermore, both Dr. Rosen and Dr. Gary saw Petitioner for one examination, while Dr. Singer never saw Petitioner at all. This Court has previously held that between equally qualified physicians, the one who has treated a claimant for a longer amount of time would generally be in a better position to understand the claimant's diagnosis, prognosis, and impairment more fully than a physician who had evaluated the claimant on only one occasion.¹⁸ This factor also operates in Dr. Moseley's favor.

¶ 18 The Court finds *Kloepfer*¹⁹ helpful in resolving this case. In *Kloepfer*, Dr. Teal became the claimant's treating physician after she ceased to treat with Dr. Shaw. Dr. Teal recommended surgery to relieve claimant's work-related condition, although Dr. Shaw disagreed. In determining that the claimant was entitled to have the surgical procedure paid for by her workers' compensation insurer, this Court explained:

Even if the surgery was misdirected and the herniated disc was not the sole or primary cause of claimant's symptoms, Dr. Teal made a reasonable medical judgment that the herniated disc was the cause of claimant's symptoms. Under the Montana Occupational Disease Act, insurers are required to pay "reasonable medical services," section 39-72-704, MCA. There is no requirement that the services ultimately prove to be effective, or that the diagnosis of the underlying condition causing a claimant's symptoms be the correct one. Medicine is not a precise science. Physicians disagree and initial diagnoses sometimes prove to be wrong. While Dr. Shaw does not believe that the claimant's symptoms were caused by the herniated disc, or that surgery will alleviate her symptoms, Lumbermens has failed to show that Dr. Teal's opinions are outside the pale of reasonable medical judgment.²⁰

¹⁸ *Kloepfer*, CoL, ¶ 2.

¹⁹ *Kloepfer*, *supra*.

²⁰ *Kloepfer*, CoL, ¶ 4.

¶ 19 Similarly, in this case, Respondent has not shown that Dr. Moseley's opinions, although differing from the other doctors who have reviewed Petitioner's case, are beyond the pale of reasonable medical judgment. Regardless of which specific incident Petitioner's condition can be attributed to, Respondent has accepted liability for the claim. The Court finds Dr. Moseley's diagnosis to be reasonable under the circumstances. Therefore, Respondent is liable for the associated medical costs of Petitioner's treatment for TOS, including surgery.

¶ 20 Respondent asserts that if TOS surgery occurs, it is entitled to have a physician observe the operation to form medical opinions concerning the existence of TOS and its cause. Respondent points out that only one opportunity exists for physicians to observe the preoperative physical condition of Petitioner's shoulder, and that if Respondent is unable to have a physician observe the procedure, its rights will be irreparably prejudiced because it will be prevented from obtaining this evidence. Petitioner has not objected to Respondent's request. Therefore, this Court grants Respondent's motion to have a physician observe Petitioner's TOS surgery.

¶ 21 Finally, Petitioner moves this Court to grant interim TTD benefits pursuant to § 39-71-610, MCA. This statute provides that if an insurer terminates biweekly compensation benefits and the termination is disputed by the claimant, the Department of Labor and Industry may order an insurer to pay up to 49 days' additional biweekly compensation benefits.

¶ 22 Although this Court has held that a claimant need not prove entitlement to TTD benefits in order to qualify for interim benefits under § 39-71-610, MCA, this Court has further held that the claimant need tender substantial evidence which, if believed, would entitle claimant to the benefits.²¹ This Court has articulated a four-factor test for determining whether benefits should be temporarily reinstated under § 39-71-610, MCA, while a claimant pursues a claim on the merits:

First, was liability for the claim accepted? Second, were benefits paid, especially for a significant time period? Third, has the claimant demonstrated she will suffer significant financial hardship if section 39-71-610, MCA, interim benefits are not ordered? Fourth, has the claimant tendered a strong prima facie case for reinstatement of the benefits she is seeking?²²

²¹ *Montana Health Network v. Graham*, 2002 MTWCC 61, ¶ 6.

²² *Id.*, ¶ 5.

¶ 23 Petitioner has not put forth any argument in support of this motion and thus has failed to put facts in evidence to demonstrate whether these factors are met and, more specifically, has failed to prove that she will suffer significant financial hardship if these benefits are not ordered. Her motion for interim benefits is therefore denied.

ORDER

¶ 24 Petitioner's motion to allow medical treatment is **GRANTED**.

¶ 25 Respondent's motion to preserve evidence is **GRANTED**.

¶ 26 Petitioner's motion for interim TTD benefits pursuant to § 39-71-610, MCA, is **DENIED**.

DATED in Helena, Montana, this 12th day of October, 2006.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: James G. Edmiston
Kelly M. Wills
Submitted: May 1, 2006

**Order Granting Petitioner's Motion to Allow Medical Treatment,
Granting Respondent's Motion to Preserve Evidence, and Denying
Petitioner's Motion for Interim Benefits Pursuant to § 39-71-610, MCA - Page 9**