IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWCC 50

WCC No. 9407-7085

LINDA BYUN

Petitioner

vs.

MONTANA SCHOOLS GROUP INSURANCE AUTHORITY

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Claimant, who fell on her buttocks and shoulder blade after slipping on ice, underwent two neck surgeries, but suffered continued shoulder blade pain. Twho physicians treating claimant, a neurosurgeon and a physiatrist, agree claimant suffers from thoracic outlet syndrome and should be treated for that condition. The records of a second physiatrist provide some support for this conclusion. In contrast, three physicians who conducted an independent medical examination for the insurer concluded claimant does not suffer from thoracic outlet syndrome and find her current medical condition unrelated to the industrial accident.

Held: Where the conflict in medical opinion is based in large part on philosophical differences regarding the occurrence and etiology of thoracic outlet syndrome, but no detailed evidence concerning the medical reasons for the dispute in this particular case have been provided, it is difficult to evaluate the opposing positions. Given the record, the opinion of the treating physician must be given the greater weight. Claimant is suffering from thoracic outlet syndrome, requires treatment for that condition, and remains temporarily totally disabled until she reaches maximum medical healing following additional treatment.

Topics:

> **Medical Evidence: Conflicting Evidence.** Where the conflict in medical opinion is based in large part on philosophical differences regarding the occurrence and etiology of thoracic outlet syndrome, but no detailed evidence concerning the

medical reasons for the dispute in this particular case have been provided, it is difficult to evaluate the opposing positions. Given the record, the opinion of the treating physician must be given the greater weight.

Proof: Conflicting Medical Evidence. Where the conflict in medical opinion is based in large part on philosophical differences regarding the occurrence and etiology of thoracic outlet syndrome, but no detailed evidence concerning the medical reasons for the dispute in this particular case have been provided, it is difficult to evaluate the opposing positions. Given the record, the opinion of the treating physician must be given the greater weight.

Medical Conditions (By Specific Condition): Thoracic Outlet Syndrome. Where the conflict in medical opinion is based in large part on philosophical differences regarding the occurrence and etiology of thoracic outlet syndrome, but no detailed evidence concerning the medical reasons for the dispute in this particular case have been provided, it is difficult to evaluate the opposing positions. Given the record, the opinion of the treating physician must be given the greater weight. Claimant is suffering from thoracic outlet syndrome, requires treatment for that condition, and remains temporarily totally disabled until she reaches maximum medical healing following additional treatment.

Physicians: Treating Physician: Weight of Opinions. Where the conflict in medical opinion is based in large part on philosophical differences regarding the occurrence and etiology of thoracic outlet syndrome, but no detailed evidence concerning the medical reasons for the dispute in this particular case have been provided, it is difficult to evaluate the opposing positions. Given the record, the opinion of the treating physician must be given the greater weight.

Physicians: Conflicting Evidence. Where the conflict in medical opinion is based in large part on philosophical differences regarding the occurrence and etiology of thoracic outlet syndrome, but no detailed evidence concerning the medical reasons for the dispute in this particular case have been provided, it is difficult to evaluate the opposing positions. Given the record, the opinion of the treating physician must be given the greater weight.

The trial in this matter was held on December 12, 1994, in Kalispell, Montana. The petitioner, Linda Byun (claimant), was present and represented by Ms. Laurie Wallace. Respondent, Montana Schools Group Insurance Authority (MSG), was represented by Mr. Leo S. Ward. Claimant testified on her own behalf. Exhibits 1 through 6 and 8 were admitted by stipulation. Exhibit 7 was admitted over claimant's objection. Exhibit 9 was admitted for demonstrative purposes only. The depositions of claimant, Dr. John Demakas, Jean Carmen, Mickey Rosato, Anne Pazza, and Dr. Ethan Russo were admitted.

Issues presented: Claimant seeks payment of medical expenses for treatment by a thoracic outlet specialist. She also seeks a continuation of temporary total disability benefits, attorney fees and a penalty.

FINDINGS OF FACT

1. Claimant is presently forty-eight (48) years of age. She has lived and worked in Troy, Montana all of her adult life. She has a high school education and has worked as a bartender, waitress and janitor. (Tr. at 31-32.)

2. In 1980 claimant began working at the Troy High School as a janitor. (Tr. at 31.) In 1988 claimant took a second job at the Trojan Lanes, a bowling alley, doing janitorial work.

3. On January 19, 1991, claimant suffered an industrial injury in the course and scope of her employment with Troy Public School. (Tr. at 34.) She slipped on icy steps, became airborne and landed on her buttocks. She also hit her shoulder blade. (Tr. at 35; Ex. 4 at 178.)

4. At the time of the accident, the Troy Public School was enrolled under Compensation Plan No. 1 and was self-insured through MSG. The claim was adjusted for MSG by Alexsis Risk Management.

5. MSG accepted liability for claimant's injury and has paid medical benefits and temporary total disability benefits.

6. Prior to her injury in January of 1991, claimant suffered numerous injuries and ailments. (Tr. at 52-56, 63-70.) While MSG has taken great pains to outline those injuries and ailments, they were not significant to the ultimate medical opinions expressed in medical records and by the two physicians who testified in this case.

7. Following her fall, the claimant felt pain in her tailbone and back. However, she continued working and finished her work shift for that day.

8. Claimant first sought medical care on January 22, 1991, when she saw Dr. Griffith in Troy, Montana. Dr. Griffith's office note reflects that claimant reported she had fallen on January 19, 1991, and struck her tailbone and shoulder blade area. (Ex. 2 at 178.) At the time of his examination, claimant had tenderness and a bruise over the coccyx (tailbone) and pain in her right hip. (*Id.*) Dr. Griffith prescribed Motrin (*Id.*), which is an anti-inflammatory and analgesic.

9. Within two weeks of her fall, the claimant began experiencing headaches and neck pain, along with numbness in her arms. (Tr. at 38-40.) On February 3, 1991, claimant's symptoms were sufficiently serious that she sought treatment at the emergency room of St. John's Lutheran Hospital in Libby, Montana. (Rosato Dep. Ex. 2 at 74.) The emergency room records noted claimant's fall two weeks prior and stated that she reported fracturing her coccyx and "now has developed neck pain," and both her hands and arms are "going to sleep." (*Id*.) The diagnosis made at that time was a cervical strain and a contusion of her coccyx. (*Id.*)

10. A cervical myelogram and a CAT scan were done at Deaconess Medical Center in Spokane, Washington on February 19, 1991. The myelogram report noted "[m]oderate sized hard and/or soft discs are seen bilaterally at the C4-5 level". (Ex. 4 at 162 and 163.)

11. Claimant was referred to Dr. John Demakas, a neurosurgeon in Spokane, Washington. Dr. Demakas examined claimant for the first time on March 18, 1991. He recorded that claimant was suffering neck pain radiating into her shoulder, headaches, and occasional numbness and tingling in her "third, fourth, and fifth fingers primarily of the right hand but also the left hand and only at night awakening her." (Ex. 4 at 160.) He reviewed the reports of the cervical myelogram and CAT scan done on February 19, 1991. (*Id.*) He recommended surgery.

12. On April 16, 1991, Dr. Demakas performed a cervical discectomy and fusion at the C4-5 level. (Ex. 4 at 156; Demakas Dep. at 8.) He found extruded disc fragments, indicating "fresh disc pressure." (Demakas Dep. at 8-9.)

13. Following her surgery the claimant's neck pain initially improved but she developed considerable pain over her right scapula (shoulder blade). (Ex. 4 at 126, 130, 134; Demakas Dep. at 9.) Dr. Demakas prescribed physical therapy and a trial of a TENS unit to aid in her rehabilitation. (Ex. 4 at 143-152.)

14. When claimant continued to have scapular pain, Dr. Demakas decided that she should be treated conservatively and referred her to Dr. Aleksandra Zietak, a physiatrist. (Demakas Dep. at 10.)

15. Dr. Zietak examined claimant on September 13, 1991. (Ex. 4 at 126.) At that time claimant reported right shoulder blade pain radiating into her neck and right upper arm. She also reported "occasional numbness in her hands, more so on the right side. . . . at night with numbness along the lateral aspect of her left arm and forearm. . . . and more numbness and tingling throughout her entire right arm." (*Id.*) Dr. Zietak performed a physical examination and also undertook nerve conduction studies on the claimant. (Ex. 4 at 128.) The results of the nerve conduction studies were consistent with carpal tunnel syndrome. In addition to carpal tunnel syndrome, Dr. Zietak diagnosed claimant as

suffering "[c]hronic right shoulder girdle and neck pain most likely secondary to muscular strain" and recommended further physical therapy but with different modalities. (*Id*.)

16. Ultimately, carpal tunnel syndrome turned out to be a red herring. (Demakas Dep. at 12, 41.) While the nerve conduction study was consistent with a diagnosis of carpal tunnel syndrome, claimant's clinical symptoms were not. (Demakas Dep. at 12-13.) For example, her complaints of numbness in her third, fourth and fifth fingers are not typical of carpal tunnel. (*Id*.)

17. Claimant continued to experience symptoms and Dr. Demakas continued to see her periodically. (Ex. 4 at 106, 108, 117.) On June 29, 1992, he concluded that her symptoms were more consistent with lower brachial plexus irritation and thoracic outlet syndrome. The brachial plexus consists of nerves originating at the C-4, 5, 6, 7 and 8 levels which:

> . . . blend together in various patterns to become the major nerves; the axillary nerve that goes to the deltoid, the musculocutaneous nerve that goes to the biceps, long thoracic and suprascapular that go to the shoulder blade area. Also the three major nerves; the median nerve that goes to the hand that supplies fingers, intrinsic hand function for the thumb and first interosseous spaces, plus it has to do with some of the wrist flexion, the radial nerve that has to do with the triceps function and extension function, and a lot of sensation back here, and the ulnar nerve which is classically the funny bone that goes down and supplies the remaining intrinsic muscles of the hand and the muscle that allows your wrist to flex towards you an and in.

(Demakas Dep. at 16.) Nonetheless, Dr. Demakas suspected that the "primary problem remains her neck. " (Ex. 4 at 106.) In a letter to claimant's counsel on June 29, 1992, he summarized his views: "Basically, what I am saying is that she has irritation of the nerve roots in the cervical area that are making other sites along the arms in the pathway of those nerves more susceptible to irritation and symptomatology." (*Id.*) He attributed her symptoms to her industrial accident and agreed with a suggestion of claimant's counsel that claimant was suffering from "multiple crush syndrome." (Demakas Dep. at 15-16; Ex. 4 at 106.)

18. Dr. Demakas ordered further cervical MRIs. On July 10, 1992, claimant underwent a "Gadolinium[1] enhanced cervical MRI." (Ex. 4 at 91.) The MRI disclosed a herniated disk at the C5-6 level. In his deposition, Dr. Ethan Russo, a neurologist who was part of an IME panel which examined claimant, discussed the relationship of the new herniation to the old surgery. He testified that the original fusion at the C4-5 level:

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[1]For those who are interested, gadolinium is element 64 on the table of elements and has an atomic weight of 157.25. It is apparently rather rare. Dorland's Illustrated Medical Dictionary (27th Ed).

> . . . necessarily produces a lack of motion at a given spinal level. Conceptually it's possible that puts more pressure on other levels and produces a herniation. Because what we're doing is taking a flexible structure and knocking out one of the links. This may produce a mechanical stresses [sic] at other levels that may predispose towards an additional herniation.

(Russo Dep. at 34.) He confirmed that claimant's original fall on her buttocks could have caused herniated cervical discs. (*Id.* at 21.)

19. Dr. Demakas did not believe that the C5-6 herniation explained all of claimant's symptoms. (Demakas Dep. at 21.) However, on October 6, 1992, Dr. Demakas performed surgery on claimant for a herniated disc at the C5-6 level in the belief that the surgery would improve her symptoms. (*Id.* at 22.) In his opinion, the claimant's industrial accident and her first surgery necessitated the second surgery. (Ex. 4 at 87-88.)

20. The October 1992 surgery did alleviate claimant's right shoulder blade pain. (Demakas Dep. at 24.) However, claimant continued to experience neck pain, numbness in her arms and fingers, and headaches. (*Id.*; Ex. 4 at 13, 38, 44, 47, 50, 58.) Dr. Demakas characterized her numbness as becoming more "diffuse." (Demakas Dep. at 24.)

21. On February 2, 1993, Dr. Demakas performed Adson and military maneuvers. In the military maneuver the patient stands at attention and throws her shoulders back. (Demakas Dep. at 23.) In Adson's maneuver the patient brings an arm up and extends it back. (*Id.* at 24.) During the maneuvers the examining physician checks radial pulses. Obliteration of the pulses is considered a positive result indicating compression of nerves. (*Id.*) In claimant's case, both tests were positive and Dr. Demakas interpreted the results and claimant's continued symptoms as supporting a diagnosis of thoracic outlet syndrome (TOS). (Demakas Dep. at 23-24, 46.)

22. Dr. Demakas referred claimant to Dr. Larry Lamb, a physiatrist, for further evaluation. Dr. Lamb performed initial and follow-up examinations in June and July, 1993. (Ex. 4 at 45 and 47.) On the first examination Dr. Lamb noted her symptoms as neck pain and "ongoing numbness into the arms bilaterally and descending into the medial three fingers." (Ex. 4 at 47.) He conducted tests for TOS, with the following results:

> On evaluation for thoracic outlet syndrome, she has an equivocal Adson's test bilaterally; however, with the arms at parallel to horizontal, as we laterally extend the arm, she drops her pulse at about 20 degrees shy of the frontal plan [sic]. Shortly thereafter she notices a rather dramatic onset of hand numbness.

(*Id.* at 48.) Dr. Lamb wrote to Dr. Demakas on June 24, 1993, stating: "I concur with your former assessment that she is very likely suffering a double crush syndrome. It is unclear to me at this time whether this represents progression of the carpal tunnel syndrome or of thoracic outlet syndrome." (*Id.* at 48-49.) Dr. Lamb recommended an EMG and nerve conduction study.

23. Following a nerve conduction study, Dr. Lamb confirmed that claimant did have "mild CTS on the right side," but expressed doubt that CTS explained "all of her symptomatology" and suggested that "further evaluation for thoracic outlet syndrome would be indicated." (Ex. 4 at 45.)

24. Dr. Demakas saw claimant again on September 7, 1993. (Ex. 4 at 44; Demakas Dep. at 27-28.) She was still suffering the same symptoms. (*Id.*) By that time Dr. Demakas was firm in his diagnosis of TOS and referred claimant to Dr. Michael Judd, a Spokane vascular surgeon, for further evaluation and treatment. (*Id.*) Dr. Judd's speciality includes diagnosis and treatment of TOS.

25. Dr. Judd examined claimant on June 21, 1994, and confirmed the TOS diagnosis. (Ex. 4 at 2.) He prescribed Flexeril, a drug which relieves muscle spasm,[2] and heat. (*Id.*) A follow-up visit was schedule for four weeks later. (*Id.*)

26. The Court has no record of follow up treatment by Dr. Judd and the insurer has refused to authorize or pay for any treatment for TOS.

27. Dr. Demakas was firm in his diagnosis of TOS. (Demakas Dep. at 20.) He testified that only a minority of the medical community disagrees with the validity of TOS as a diagnosis. He further testified that treatment of TOS is usually "physical therapy and then possibly first rib resection, but beyond that I'd defer to Dr. Judd, in this particular case or to other people that do care for those patients." (*Id*. at 34.) He conceded that TOS surgery is "remarkably unsuccessful." (*Id.*)

28. Dr. Demakas last examined claimant on April 20, 1994. (Demakas Dep. at 32.) In his opinion, claimant was not at maximum healing because her TOS had not been treated. (*Id.* at 32, 55.) Before releasing her to return to work, Dr. Demakas wanted Dr. Judd to have an opportunity to treat her. (*Id.* at 56.)

29. In Dr. Demakas' medical opinion, the claimant's symptoms since her industrial accident are related to that accident. "I think the whole picture that I saw her for was a spectrum from the original injury." (Demakas Dep. at 32.)

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[2] Physicians' Desk Reference (48th Ed., 1994).

30. Based on a medical panel report and a deposition of Dr. Ethan Russo, a neurologist who conducted an IME of claimant on November 16, 1993, MSG disputes Dr. Demakas' opinions concerning TOS and the relatedness of claimant's current symptoms to her industrial accident. It did not dispute liability for claimant's two cervical surgeries.

31. At MSG's request, on November 16, 1993, claimant was examined by a panel of Missoula physicians. The panel consisted of a physiatrist (Dr. Dana Headapohl), an orthopedic surgeon (Dr. Timothy Browne), a psychologist (Robert Shea, Ph.D.), and Dr. Ethan Russo. (See Ex. 4 at 5-41.)

32. In a report signed by all of the panel members, the panel states that it does not agree with the TOS diagnosis. (Ex. 4 at 5.) That report, however, does not indicate the basis for disagreement. Rather it gives short replies to questions asked by MSG's adjuster, as follows:

> (3) Do you concur with a diagnosis of Thoracic Outlet Syndrome?
>
> No.

(*Id.*) Dr. Shea, of course, does not address the TOS in his report (Ex. 4 at 7) since he is not a medical doctor. In her report, Dr. Headapohl addressed the TOS in one short sentence: "Question thoracic outlet syndrome." (*Id.* at 15.) Dr. Browne did not address TOS at all in his report. (*Id.* 16.) Dr. Russo did address the TOS in his report, stating as follows:

> The pt is surmised to have had thoracic outlet, but in my experience this is an exceptionally rare Dx. I do not have copies of the exact tests done with respect to this issue in 7/93 when she had electrodiagnostics done. However, I do not see the point in doing them today because if she does have thoracic outlet syndrome, this is a congenital lesion and would really have no bearing on the accident in question. Seemingly, any carpal tunnel involvement which is not apparent to me today would not be related to the accident either.

(Ex. 4 at 18.) Dr. Russo also testified by deposition.

33. Dr. Browne's and Dr. Headapohl's concurrence in the panel report opinion that claimant is not suffering from TOS is given little weight since they saw claimant on one occasion and have not provided any explanation for their concurrence.

34. Dr. Russo's testimony, read as a whole, indicates a strong bias against any diagnosis of TOS. In his opinion, it exists, if at all, in only rare cases and is then due to

congenital defects, at least under normal circumstances, although he conceded that in a rare case it might be due to trauma. (Russo Dep. at 22-24, 26, 41.) He testified that he would be "shocked" if he had diagnosed TOS more than two or three times in his practice. (*Id.* at 40.) He testified that the diagnosis is controversial. In his words:

> Well, this is a subject under which you get a lot of extreme positions. There are many reputable neurologists who feel there is no such thing. There are many people that think this is a very common thing. I'm somewhere in the middle, tending towards the idea that this is a rare disorder. Thoracic outlet syndrome producing neurologic symptoms are extremely unusual, in my experience. . . . So I'm very skeptical of the diagnosis. Additionally, . . . the studies I have done in relation to it have rarely indicated the problem being present. So I'm very critical of the diagnosis. . . . My interpretation of this disorder is that it is a congenital defect and not an acquired condition under normal circumstances. So in terms of this case and the issues of what it might have to do with the accident in question, my interpretation is that it has nothing to do with the accident in question.

(*Id.* at 22-23.) When asked whether TOS could be caused by a traumatic occurrence, he replied, "Well, I suppose so, but what would be required from my standpoint would be demonstrable fibrotic change in the areas, thoracic outlet." (*Id.* at 26.) When asked whether TOS could be caused by falling on one's bottom, he responded, "It would be hard for me to conceive of how." (*Id.*)

35. I find Dr. Russo's opinion concerning TOS unpersuasive. It is clear he has a strong bias against the diagnosis, a bias that was not shared by Dr. Demakas, Dr. Judd, and Dr. Lamb. Dr. Demakas indicated that only a minority of physicians consider TOS a controversial diagnosis. Dr. Russo testified that "many reputable neurologists . . . feel there is no such thing." (Russo Dep. at 22.) His testimony does not indicate whether the controversy extends to other branches of medicine, or merely involves neurologists. The Court has not been provided with any further information concerning the debate or the basis for the debate. Under these circumstances, I find the treating physician's opinion more persuasive and am satisfied that it is more probable than not that the claimant is currently suffering from TOS.

36. On the relatedness issue, the panel offered the following response to a question put to it by MSG's adjuster:

> (4) Is Ms. Byun's present condition and/or the Thoracic Outlet Syndrome a direct result of her January 19, 1991 workers' compensation injury. If so, please outline for me how a cervical injury evolves into a diagnosis of Thoracic Outlet Syndrome?

It is difficult to see a direct connection.

(Ex. 4 at 5.) As with the TOS issue, the reports of Drs. Shea, Headapohl and Browne do not address the relatedness issue. In his report Dr. Russo says, "This case is very difficult from my standpoint in that I really do not know how things fit together with this accident." (*Id.* at 18.) Later on he states that "it is hard for me to understand the sequence of events or the relation to the accident in question." (*Id.*)

37. The Court gives little weight to the panel statement. No explanation is provided for the statement.

38. In his deposition Dr. Russo addressed the relatedness issue, assuming that TOS was a valid diagnosis. He opined that TOS is usually congenital and rarely traumatically induced. (Russo Dep. at 22-23, 26.) Dr. Russo, however, did not attempt to diagnose claimant's condition or address the relationship of her symptoms, as opposed to the diagnosis, to her industrial accident:

> Q. Now, as I understand your report, you did not make a diagnosis of Miss Byun's arm and hand pain and numbness at the time that you saw her?
>
> A. In an effort to get myself off the hook, again, this was a specialized examination. With respect to the issue at hand, it wasn't, strictly speaking, pertinent. I did weigh in on the issues of carpal tunnel and thoracic outlet, but only to go far enough to say that I did not feel that **they** were related to the accident in question. So I guess the answer to your question is I didn't definitively offer a diagnosis for her complaint.

(*Id.* at 38-39, emphasis added.) When asked for possible explanations for claimant's continued symptoms, he said that beyond the neck pain, which he "would attribute to the disk problems or arthritic change. . . . [T]he possibilities include putative thoracic outlet, it includes a local muscle spasm referred from the neck, it includes the possibility of fibromyalgia and then a whole bunch of other things that have essentially been ruled out by prior studies." (*Id.* at 42-43.) However, he noted that fibromyalgia is another diagnosis "of which I'm highly critical." (*Id.* at 43.)

39. As with the TOS diagnosis, I am persuaded by Dr. Demakas' opinion relating claimant's current condition and symptoms to her industrial accident. As with the philosophical dispute over the TOS diagnosis, the two deposed physicians did not provide any scientific or other explanation for their differences in philosophy. I am left with Dr. Demakas' statement that TOS advocates are in the majority but with the impression that at least many neurologists question the diagnosis, but with little else. Dr. Demakas has

been claimant's treating physician since shortly after her accident and lacking some more substantial basis to reject his opinions, I decline to do so. Moreover, his opinion relating claimant's current condition to her industrial accident is historically corroborated: Her symptoms arose following her accident and have persisted. I therefore find that her current condition is related to her industrial accident.

40. The medical panel determined on December 13, 1993, that claimant had reached maximum medical healing. That finding, however, was predicated on the panel's rejection of the TOS diagnosis. Since I have found Dr. Demakas' TOS diagnosis more persuasive, I also find his opinion that claimant will not reach maximum healing until treated for TOS to be the more persuasive.

41. MSG's refusal to approve TOS treatment and pay further benefits was not unreasonable. It relied on an independent medical evaluation and advice in concluding that claimant is not suffering from TOS and has reached maximum healing.

CONCLUSIONS OF LAW

1. The law in effect at the time of the injury governs the claimant's entitlement to benefits. *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 730 P.2d 380 (1986). Thus the 1989 version of the Workers' Compensation Act governs claimant's entitlement to benefits.

2. Claimant has the burden of proving by a preponderance of the evidence that she is entitled to compensation. *Ricks v. Teslow Consolidated,* 162 Mont. 469, 483-484, 512 P.2d 1304 (1973); *Dumont v. Wicken Bros. Construction,* 183 Mont. 190, 598 P.2d 1099 (1979). Claimant has sustained her burden.

3. Claimant seeks authorization to be treated by a TOS specialist. Her request hinges on whether she suffers from TOS and, if so, whether her TOS is a consequence of her industrial accident.

The Court has been presented with conflicting medical evidence. Two physicians treating claimant both agree that claimant suffers from TOS, and their opinions find some support in the records of Dr. Lamb, a physiatrist who examined claimant at her treating physician's request. Dr. Demakas, who has treated claimant since shortly after her injury, also concludes that claimant's condition, including her TOS, is a consequence of her industrial accident. On the other side, three physicians on an IME panel concluded that claimant does not suffer from TOS and that it is "difficult to see a direct connection" between the claimant's current condition and her industrial accident. Dr. Russo testified that if the TOS diagnosis is correct, the TOS is not related to claimant's injury. However, Dr. Russo disagreed with the TOS diagnosis altogether. He offered at least three

alternative diagnoses but did not attempt to arrive at a final one and did not state that any or all of the alternative diagnoses would be unrelated to claimant's industrial accident.

Thus, the Court must resolve a conflict in medical opinions that the physicians cannot themselves resolve. The task in this case is made more difficult because the differences in opinions are based in large part upon philosophical differences regarding the occurrence and etiology of TOS. However, no detailed evidence concerning the medical reasons for the dispute have been provided to the Court, making it difficult to evaluate the opposing positions. Dr. Demakas testified that only a minority of physicians are critical of TOS as a diagnosis. Dr. Russo did not contradict that statement but left the impression that substantial numbers of neurologists are critical.

MSG makes much of the fact that the two cervical surgeries did not relieve claimant's symptoms and suggests that the surgeries failed and that Dr. Demakas' opinions are unreliable. The fact that all of claimant's symptoms were not relieved by the surgeries does not mean the surgeries failed. Demonstrable cervical defects were addressed by the two surgeries; some symptoms improved. Moreover, Dr. Demakas indicated that claimant is suffering from multiple problems. I do not find anything in his treatment or opinions that persuade me to discard his opinions.

Under these circumstances, the treating physician's opinions must be accorded the greater weight. *Snyder v. San Francisco Feed & Grain,* 230 Mont. 16, 27, 748 P.2d 924 (1987). I therefore am persuaded that claimant is suffering from TOS and that her condition is related to her injury. Dr. Demakas' opinion relating claimant's symptoms to her injury is corroborated by the history of the symptoms.

Since I have found that claimant is suffering from TOS, I further find that treatment by a physician specializing in TOS is reasonable and appropriate. Since the insurer is liable for reasonable medical care for conditions caused or aggravated by an industrial injury, § 39-71-704(a), MCA (1989), MSG is liable for payment for such treatment.

4. Claimant seeks temporary total disability benefits. Section 39-71-701, MCA (1989), provides in pertinent part:

> (1) Subject to the limitation in 39-71-736, a worker is eligible for temporary total disability benefits when the worker suffers a total loss of wages as a result of an injury and until the worker reaches maximum healing.
>
> (2) The determination of temporary total disability must be supported by a preponderance of medical evidence.

Claimant has demonstrated her entitlement to temporary total disability benefits by a preponderance of medical evidence. Claimant has not worked since the week after the

industrial injury. Additionally, the claimant's treating physician, Dr. Demakas, refuses to release claimant to work at any job until she is treated for TOS. Maximum medical improvement is defined in section 39-71-116(10), MCA, as "the status reached when a worker is as far restored medically as the permanent character of the work-related injury will permit." Dr. Demakas' testimony establishes that claimant may benefit from further treatment. Therefore, she has not reached maximum healing. She continues to suffer a total loss of wages and is entitled to temporary total disability benefits until such time as she reaches maximum healing or returns to work.

5. The issue of rehabilitation benefits is premature at this point since claimant is not yet at MMI.

6. Claimant is not entitled to a penalty under section 39-71-2907, MCA. A finding that the insurer acted unreasonably is a prerequisite to an award of any penalty. I have found that MSG did not act unreasonably. It accepted the claim and paid temporary total disability benefits and medical benefits. In denying liability for TOS treatment and further temporary total disability benefits, it relied on medical opinions of an IME panel. While the Court has been persuaded by the treating physician's opinion rather than that of the panel, the conflict in medical opinions created a reasonable factual dispute which is appropriately resolved by the Court.

7. Claimant is entitled to costs but not attorney fees under section 39-71-611, MCA. Like the penalty, an award of attorney fees requires a finding that the insurer acted unreasonably, § 39-71-611(1)(c), MCA, and that finding is lacking in this case.

ORDER

1. Claimant is temporarily totally disabled. MSG shall continue to pay her temporary total benefits until she reaches maximum healing or returns to work.

2. MSG is liable for payment of medical treatment for thoracic outlet syndrome, including treatment by a physician specializing in TOS.

3. Claimant is not entitled to attorney fees.

4. Claimant is entitled to costs in an amount to be determined by the Court. She shall submit a verified bill of costs within twenty (20) days of this decision. MSG shall then have ten (10) days in which to file its objections, if any.

5. Claimant is not entitled to a twenty (20%) percent penalty.

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

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

Dated in Helena, Montana, this 21st day of June, 1995.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Ms. Laurie Wallace
Mr. Leo S. Ward