

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWCC 101

WCC No. 9505-7314

MARION J. DARLING

Petitioner

vs.

KALISPELL REGIONAL HOSPITAL

Employer/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Parties disputed whether work injury of nurses aide permanently aggravated her degenerative osteoarthritis.

Held: Where claimant had not returned to pre-injury status before exacerbation of back condition during vacation, respondent is liable for permanent aggravation of her underlying condition.

Topics:

Injury and Accident: Aggravation: Generally. Where claimant had not returned to pre-injury status before exacerbation of back condition during vacation, respondent is liable for permanent aggravation of her underlying condition.

Injury and Accident: Non-Work-Related. Where claimant had not returned to pre-injury status before exacerbation of back condition during vacation, respondent is liable for permanent aggravation of her underlying condition.

The trial in this matter was held on September 26, 1995, in Kalispell, Montana. Petitioner, Marion J. Darling (claimant), was present and represented by Mr. David W. Lauridsen. Respondent, Kalispell Regional Hospital (Hospital), was represented by Mr. Todd A. Hammer. Claimant, Lynn Stevenson, Ann Ingram, Julie Anderson, and Dr. Michael Righetti were sworn and testified. The depositions of Marion J. Darling and

Andrew James Hvidston, M.D. were submitted for the Court's consideration. Exhibit one was admitted except for pages 84 through 103. Exhibits 2 through 10 were admitted without objections.

Issues presented: The substantive issue presented is whether claimant's industrial injury of November 8, 1994, permanently aggravated her preexisting degenerative osteoarthritis. Claimant also seeks attorney fees, costs, and a penalty.

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

FINDINGS OF FACT

1. Claimant is presently 53 years of age. She has a GED and has worked as a nurses aide for a number of years.
2. Claimant has degenerative osteoarthritis dating back to the early 1980's. Her osteoarthritis extends to, but is not limited to, her lower back. (Ex. 1 at 1-3.) Since 1980 she has been treated on numerous occasions for flare-ups of low-back pain. (*Id.*) Over the years she has taken medications for her arthritis, including Feldene, Daypro, Clinoril, Naprosyn, and Ibuprofen.
3. Claimant's medical records reflect the following relevant history concerning her history of low-back pain.
 - a. The office notes of Oscar A. Swenson, M.D., who has treated claimant over the years, mention the onset of arthritis in early 1980. Claimant's arthritis affects her low back, hands, and neck. (Ex. 1 at 105-133.)
 - b. Dr. Swenson's office note of December 15, 1983, notes a history of back pain. (*Id.* at 107.)
 - c. On November 8, 1983, Dr. Swenson noted a worsening of claimant's arthritis, especially in her neck, but did not specifically note back pain. However, on December 15, 1983, he specifically noted low-back pain. (*Id.* at 107.)
 - d. On August 29, 1985, Dr. Swenson noted that claimant's back pain "has gotten worse" and that her pain was "[u]ncontrolled by Feldene 20 mg bid." (*Id.* at 109.) However, his notes do not indicate that her back pain continued to be uncontrolled and it is apparent from his later notes, other medical information, and

claimant's own testimony that claimant was experiencing an acute episode on that date and that her condition thereafter improved.

e. On January 29, 1990, claimant sought chiropractic treatment for low-back pain. The chiropractic history taken on that date reflects that claimant had a history of osteoarthritis of the lower back. At the time of the examination claimant was experiencing a "very uncomfortable back - (small)" and "sharp pains in [her] (R) thigh [that] seemed to radiate from [the] back." (*Id.* at 27; parenthesis in original.) It further states that claimant was experiencing low-back pain, neck stiffness and soreness, pain between her shoulders, and pain in her buttocks. (*Id.*)

4. On January 27, 1992, claimant again sought chiropractic care for low-back pain. The chiropractor's record reflects that claimant was experiencing low-back pain and had difficulty standing erect for long periods. (*Id.* at 30.) The record further indicates that claimant's acute episode of pain was triggered by an incident at work. (*Id.*) By April 17, 1992, claimant was reporting that her January acute episode of back pain had resolved. (*Id.* at 139.)

5. On October 12, 1992, claimant reported that she was having low-back pain. She did not relate her pain to a specific incident at work. On October 13, 1992, she was treated by Timothy Heaps, a chiropractor. His report indicates that she had a headache and pain extending down her neck into her lower back. (Ex. 1 at 38.) She was also complaining of lower-right leg pain. (*Id.*) Claimant was again seen by Dr. Heaps on October 15, 1992. Her symptoms had significantly improved. (*Id.*) On October 16, claimant reported that she was not having any problems working. In a written report, Dr. Heaps commented:

It is my opinion that Mrs. Darling is suffering from a chronic spinal degenerative condition that will necessarily predispose her to these exacerbations that she experiences. I could not say that this recent complaint is directly attributable to any particular work event although obviously any excessive physical exertion is likely to create a potential symptomatic episode.

(*Id.* at 38.) On October 19, 1992, claimant reported to Occupational Health Services (OHS), which was employed by the Hospital to monitor and assist injured workers¹, that she was able to continue working but complained that she hurt more if she worked a 12-hour shift. (*Id.* at 142-144.) She was limited to working eight-hour shifts. (*Id.* at 144.) On October 19, 1992, Dr. Heaps released claimant to return to work without restrictions. (*Id.* at 39.)

¹OHS is a subsidiary of the same company which owns the Kalispell Hospital.

6. Claimant filed a claim for compensation with regard to her October 1992 back condition. (Ex. 2.)

7. She was seen by Dr. John V. Stephens, a physiatrist, on December 15, 1992, as part of an occupational disease panel evaluation. At the time of the examination claimant reported that her pain was:

a dull ache in the lower back, kind of coming up into the lower mid-back region. Intermittently she will get a tingling sensation down the posterior thigh, posterior calf, and in the bottom of her right foot. She states this occurs if she stands for a long shift, say 8-12 hours or does heavy lifting. She states that sometimes her right foot almost feels swollen. She relates her pain is increased by sitting more than 30 minutes, by driving more than 60 minutes or heavy lifting.

(Ex. 1 at 3.) Dr. Stephens diagnosed her low-back condition as "degenerative lumbar disease." (*Id.* at 1.) He opined that her condition was an occupational disease and commented, "There is no indication on this examination that any factors other than work have contributed to her back condition though I should note that she has not had other evaluation, such as an arthritic panel, that might reveal some systematic arthritic condition." (*Id.*) Finally, he concluded that she was at maximum healing and placed no restrictions on her return to work but commented that "occasional chiropractic treatment would be reasonable." (*Id.*)

8. On October 4, 1993, claimant again sought chiropractic treatment from Dr. Heaps. She reported that she was injured while lifting a wheelchair at work, and that she had pain in her neck, lower back, and legs. (*Id.* at 42.) She was then seen by Dr. Loren S. Vranish, a family practitioner, on October 5, 1993. He released her to work eight-hour shifts on October 7, 1993. (*Id.* at 61A.) She thereafter returned to work without restrictions. (Ex. 1 at 45, 64.)

9. Claimant filed a claim for compensation with respect to the October 1993 incident. (Ex. 3.)

10. Following her return to work in October 1993, claimant continued to have occasional chiropractic treatments. Chiropractic records reflect treatments on November 17, 1993, March 14 and 18, 1994, April 27, 1994, August 12, 1994, and September 12, 1994.

November 8, 1994 Injury

11. On November 8, 1994, claimant again experienced acute low-back pain while lifting a patient in the course and scope of her employment as a nurses aide at the Hospital. She filed a claim for compensation. (Ex. 4.)
12. At the time of claimant's November 1994 injury, the Hospital was self-insured. It accepted the claim.
13. On November 8, 1994, claimant resigned her employment effective November 18, 1994, so that she could take an extended vacation with her husband. Her resignation was coincidental to her injury: she did not resign on account of the injury. She planned to reapply for employment upon her return from her vacation.
14. Occupational Health Services provides medical case management services for injured hospital employees. While it provides services for employees of the Hospital, it also provides services to employees of other employers. One of its employees is Ann Ingram, a nurse practitioner.
15. On November 9, 1994, Ms. Ingram examined claimant. She diagnosed a "[r]ight cervical strain and LS strain secondary to transferring injury 11/8/94." According to her examination note:

She [claimant] states that she thought the patient was going to sit directly down into the chair, but she tilted to the left, causing her to twist her back and her neck. She states that she really hasn't had any discomfort in the past year, but notes that she has had a history of osteoarthritis and been on nonsteroidals for the past thirteen years.

(Ex. 1 at 156.) Ingram further noted that claimant had "tenderness with palpitation in the paraspinous muscles in the lumbar area extending into the right buttock and down into the right leg, mid thigh area." (*Id.*) She approved claimant's return to work with the proviso that she ask for "assistance with heavier lifting." (*Id.*) She recommended that claimant continue taking Daypro,² a medication which had been previously prescribed, and Tylenol. (*Id.*) She also recommended continuation of chiropractic treatments and the use of ice. (*Id.*)

16. On November 9, 1994, claimant also sought chiropractic adjustment from Dr. Heaps. His note for that day reflects that claimant reported right low-back pain, right leg pain, pain

²Daypro is a non-steroidal anti-inflammatory drug. [Physicians' Desk Reference, 48th Ed. at 2199.]

going into the bottom of her right foot, and neck soreness and stiffness. (*Id.* at 48A, 49.)

17. On November 11, 1994, claimant was treated chiropractically by Dr. Heaps (*id.*) and also seen by Lynn Stevenson, a registered nurse employed by Occupational Health Services. Stevenson's note for that day reports that claimant "[s]tates her symptoms this time are **not as severe as last time.**" (*Id.* at 159, emphasis added.) Ms. Stevenson testified at trial that she recalled claimant telling her the pain was not as severe as it has been on past occasions when she had hurt her back.

18. Claimant was next seen by Ingram on November 16, 1994. Ingram recommended continuing chiropractic treatment and the medications, as well as a back stabilization class. She continued the restriction from heavy lifting. (*Id.* at 157.)

19. In accordance with her notice of resignation, claimant's last day of work was on November 18, 1994.

20. Claimant continued chiropractic treatments by Dr. Heaps. She saw him on November 16, 18, 23, and 28, 1994. Dr. Heaps' November 18, 1994 office note reports that claimant was "[f]eeling pretty good, but hurt again at work on 11-18-94." (*Id.* at 49.) The note does not elaborate on the reported injury of November 18th. His office note of November 28, 1994, reports that claimant was "[f]eeling sore from hiking and hunting." (*Id.*) Claimant testified at trial she accompanied her husband on a hunting trip. However, she was an observer and did not actually seek game; she walked less than one-quarter mile.

21. Claimant next saw Ingram on November 30, 1994. Claimant reported that the chiropractic treatments were not helping but that her condition was improving. She also reported that she had quit working but planned to return to work after Christmas. (*Id.* at 160.)

22. On December 7, 1994, claimant was treated by Dr. Heaps and also attended a back stabilization class. (*Id.* at 18.) Heaps reported that claimant was "feeling pretty good" and planned on taking a three week trip. (*Id.* at 51.)

23. On December 11, 1994, claimant and her husband went on vacation. Although their itinerary is not clear to the Court, it appears that they drove by car and went at least as far south as Arizona.

24. In early January, while driving back to Montana from her vacation, claimant suffered a severe flare-up of her back condition. She attributed her flare-up to taking only one-half her regular dose of Daypro and to riding in the car for two days.

25. After returning from her vacation on approximately January 9, 1995, claimant called Stevenson and told her of the flare-up. Stevenson suggested that she schedule an appointment with Ingram and resume her attendance in the back stabilization program.

26. Claimant was seen by Ingram on January 11, 1995. Ingram's office note reads in relevant part:

Marion is seen for follow-up of a lower back and neck injury. . . . She states that she feels she is back to pre-injury status, but about 3-4 days ago when they were traveling back from Arizona, she decided to discontinue her Daypro. She . . . feels that between going off this medication, as well as sitting for two days while they were driving across icy roads really contributed to her back pain. Today, however, she is feeling well and feels that the majority of her pain was related to her arthritis. She is anxious to start back to work through PROHS and does feel that she should not be doing any heavy lifting. She states that she really pays for it if she does do any heavy lifting.

O: Patient has some paraspinous muscle tenderness primarily in the cervical region and in the LS area. Range of motion is full of her upper back and neck with minimal discomfort, and range of motion of her lower back is full with flexion to her feet, but extension is limited to about 10 [degrees] due to LS tenderness. There were no neurological signs or symptoms either in the upper or lower extremities.

- A: 1) Work related right cervical strain and LS strain secondary to a transfer injury 11/8/94, resolved.
2) Osteoarthritis, scoliosis, and spina bifida occulta, stable.
- P: 1) Return to work in a permanent modified capacity of no lifting greater than 40#, and this is primarily because of her arthritis, not because of the work-related injury.
2) I wrote her a prescription for Part II video of the back stabilization classes.
3) Continue the Daypro and Tylenol as needed.
4) Recheck in OHS on a prn basis only, otherwise no follow-ups were scheduled, and we may go ahead and close her case, and she is comfortable with this plan.

(*Id.* at 162.) Ingram concluded that claimant's back strain had resolved but imposed a 40-pound lifting restriction.

27. Claimant testified at trial that she never told Ann Ingram she had reached preinjury status. However, in her deposition she testified that “perhaps” that was what she related to Ingram but that was not what she meant. (Darling Dep. at 16.) At trial she testified that when she told Ingram she felt better she was referring to feeling better than when suffering from the recent flare-up but that she felt that her pain level was still comparable to what had experienced before leaving for her trip.

28. Ingram testified that she was positive she asked claimant if she was at preinjury status and that the claimant answered affirmatively. She testified the claimant said her pain was related to her osteoarthritis, not the injury.

29. While I do not believe that claimant was deliberately misstating her recollection of the conversation, I do believe, and find, that Ingram’s recollection is the more accurate one.

30. On January 13, 1995, claimant returned to Dr. Heaps for chiropractic treatment. His office note for the visit reads:

Acute lower back pain after arriving home from a long car trip. Adjusted right sacrum, D10. Heat and massage was utilized.

(Ex. 1 at 53.)

31. Dr. Heaps saw claimant again on January 18, 1995. His office note from this visit states:

Patient states that the lower back won’t stop hurting. Particularly noticeable while walking or doing housework. Adjusted right sacrum, C2. Heat and massage was used.

(Ex. 1 at 53.) He treated her again on January 25, 1995, at which time he noted, “Dorso-lumbar pain particularly noticeable with activity.” (*Id.*) He then treated her on January 27, 1995, at which time he noted, “No comment. Adjusted right sacrum, L5. Heat and massage followed.” (*Id.*)

32. Claimant, in obvious distress, also sought care from Dr. Vranish. On January 24, 1995, she was examined by Nancy Knaff, a physician’s assistant who works with Dr. Vranish. Knaff’s note reads in relevant part:

Pt [patient] is a 52 y/o white female who presents to the clinic, had flare-up of her lumbar sacral strain. Lifted a pt in November, 1994. She has been treating it with Daypro. Is no longer working at KRH. Took a vacation to the

west coast, sitting in the car for prolonged periods of time aggravated symptoms.

(Ex. 1 at 67.) Knaff prescribed continued use of Daypro and added Robaxin³ to her medications. (*Id.*) She also recommended home exercises. (*Id.*)

33. On February 3, 1995, claimant returned to Dr. Vranish's office. The office note for that date states that claimant "**essentially had constant low back pain since November.**" (Ex. 1 at 67, emphasis added.) Diagnosis was "[l]ow back pain with sciatica, **unrelenting.**" (*Id.*, emphasis added.)

34. Claimant was again treated by Dr. Heaps on February 6, 1995. He reported that she had continuing low-back pain. (*Id.* at 54.)

35. On February 7, 1995, Dr. Vranish signed a certificate of condition stating that claimant had reached maximum medical healing. He restricted claimant to 40-pounds lifting. (*Id.* at 69.) Dr. Vranish apparently did not examine claimant before signing the certificate, rather he relied on Ingram's January 11, 1995 examination of claimant.

36. Claimant continued her chiropractic treatment by Dr. Heaps. On February 15, 1995, she reported "right sciatica into the heel, worse with walking for any distance." (*Id.* at 54.) On February 22, she reported that "she would even consider surgery if it freed her from the right leg pain." (*Id.*)

37. On March 1, 1995, claimant underwent an MRI. The MRI was interpreted as follows:

Marked chronic degenerative narrowing at the L2-3 interspace with prominent anterior osteophytic spur and disc protrusion and anterior Schmorl's node. Small posterior annular bulge at this level but no herniation or spinal stenosis.

Scoliosis of the lower lumbar spine with some facet degenerative change and mild narrowing at L4-5 but no specific disc herniation, spinal stenosis or foraminal narrowing identified.

³ Robaxin is indicated as an adjunct to rest, physical therapy, and other measures for the relief of discomforts associated with acute, painful musculoskeletal conditions. The mode of action of this drug has not been clearly identified, but may be related to its sedative properties. [Physicians' Desk Reference, 48th Ed. at 1899-1900.]

(*Id.* at 12, all caps in original.)

38. On March 3, 1995, claimant was seen by Dr. Vranish, who noted that she was having “a lot of difficulty in her back.” He recommended physical therapy. (*Id.* at 70.)

39. Claimant continued her chiropractic treatments for low-back pain with Dr. Heaps on March 3, 10, and 22, 1995. (*Id.* at 55.)

40. On March 10, 1995, Dr. Vranish wrote a letter to Julie Anderson, an adjuster for Putman and Associates. Putman was responsible for adjusting the November 1994 claim. In his letter, Dr. Vranish stated that although the majority of claimant's symptoms were due to her arthritis, the November injury had aggravated her arthritic symptoms. He imposed a permanent 15-20 pound lifting limitation, ascribing the limitation to claimant's osteoarthritis. (*Id.* at 74-75, 78.)

41. Claimant was examined by Dr. Andrew Hvidston, a board certified orthopedic surgeon, on April 27, 1995. He testified by deposition that claimant's low-back condition was not caused by her November 1994 injury but that the injury “exacerbated or worsened that preexisting low back condition.” He agreed that a 15-20 pound weight restriction is appropriate for claimant. (Hvidston Dep. at 14-15.) In his opinion, short of surgery, the exacerbation caused by the industrial accident is permanent. (*Id.* at 16, 20, 32.) His opinion was based on the history related by claimant. (*Id.*) Finally, Dr. Hvidston said he would defer to Dr. Vranish's opinion of the permanency of claimant's condition. (*Id.* at 22, 30-32.)

42. On August 1, 1995, at the Hospital's request, Dr. Michael Righetti, who is a board certified orthopedic surgeon, performed an independent medical examination of claimant. At that time claimant was in “significant” pain and was “getting fairly desperate in regards to wishing pain relief.” (Ex. 1 at 137.) In an August 1, 1995 letter to Putman and Associates, which adjusted the November 1994 claim for the Hospital, Dr. Righetti stated that claimant was suffering a preexisting occupational disease and that “whether or not they [her current symptoms] are directly related as to her injury of 11/94 or due to her chronic condition, is certainly the more gray area.” (*Id.* at 135.) On the other hand, he went on to observe that “it is fairly clear to me that the incident on 11/8/94 accelerated her pre-existing occupational disease or arthritic condition.” (*Id.*) Finally, he observed that claimant did not exaggerate her symptoms and that it was clear her present symptoms were very similar if not identical to the symptoms she was suffering in November of 1994. (*Id.* at 135.)

43. Dr. Righetti's report was referred to counsel for the Hospital who, in turn, wrote a letter to Dr. Righetti asking that he clarify whether the aggravation of claimant's symptoms was permanent or merely temporary. Dr Righetti responded:

I agree with Ann Ingram and Dr. Vranish that Mrs. Darling's injury of 11/8/94 was a temporary aggravation of her osteoarthritis. The effects of the injury were temporary and were resolved to a pre-injury status. This was realized in the patient's own words in her discussions with Ann Ingram.

(*Id.* at 138.) Dr. Righetti was referring to Ingram's report of January 11, 1995, that claimant had told her that she had reached preinjury status. He went on in his letter to state that following this return to preinjury status on January 11, 1995, claimant began to "deteriorate on somewhat of a steady pace." (*Id.*) He also noted the contradictory nature of some of the medical records. In particular, he questioned:

Dr. Vranish's statement of 2/7/95, which states she has reached MMI and is now able to return to the same job that she held at the time of injury and there were no permanent physical restrictions as a result of this injury. However, the patient does have a permanent 40 pound lifting restriction secondary to arthritis. Dr. Vranish's subsequent dictation only a month later now limits her lifting to 15-20 pound[s] and states that is because of her osteoarthritis. Again, it is clear to me that she had a fairly significant deterioration shortly after she thought she had recovered from her injury of 11/8/94.

(*Id.*)

44. Dr. Righetti testified at trial. Based on his review of all available medical records, x-rays, and MRI's, it was his opinion that the November 1994 injury caused only a temporary aggravation of claimant's condition. Because of a lack of specific objective evidence which would directly correlate claimant's present condition to her November 1994 injury, Dr. Righetti relied on medical history, particularly the history showing that claimant's condition improved following her November accident, then later deteriorated. Critical to the resolution of the issues in this case, Dr. Righetti relied on Ingram's January 11, 1995 office note which indicated that claimant felt she had returned to preinjury status. He testified that absent this improvement he would be inclined to believe claimant had suffered a permanent aggravation of her osteoarthritis.

45. Dr. Righetti was very forthright in his testimony and admitted that the connection, if any, between claimant's present condition and her November 1994 injury involves a gray area. He noted the possibility that the injury was "the straw that broke the camel's back," leading to permanent aggravation of the underlying condition. He conceded that if the claimant's condition had not improved he would be more apt to find the injury permanently worsened her condition, and that had not the claimant herself indicated in January 1995 that she had returned to preinjury status his opinion might change.

46. The central question I must resolve is whether in January 1995, the claimant in fact returned to preinjury status. If she did not, then Dr. Righetti's testimony, as well as that of Dr. Hvidston, support a finding, on a more probable than not basis, that the November 1994 injury permanently aggravated claimant's preexisting low-back condition. In this regard, I find that claimant in fact never reached preinjury status. There are a number of reasons why I am so persuaded.

a. While I do not believe that Ingram was untruthful concerning her January 1995 conversation with claimant, I find it doubtful that claimant fully understood or intended the meaning usually given to the words "preinjury status." Those words are often used in the workers' compensation context and are more likely than not words used initially by Ingram, whose job was to medically manage workers' compensation cases, and merely embraced by claimant in their conversation. While claimant conceded that she may have used words to that effect (Darling Dep. at 16, 27-28), she testified at trial that she may have only meant that she had returned to her pre-vacation trip status. Her explanation is not implausible as it is clear that the trip caused a severe flare-up in her symptoms, necessitating chiropractic treatment immediately upon her return from vacation in early January 1995.

b. Irrespective of the conversation, claimant's medical history strongly indicates that as of January 11, 1995, her symptoms had **not** returned to preinjury level. Two days previous to January 11, claimant had called Lynn Stevenson to report that she was suffering from an acute flare-up on account of her trip. Within two days after the conversation (January 13, 1995), claimant was back in Dr. Heaps' office for chiropractic care for "[a]cute lower back pain after arriving home from a long car trip." (Ex. 1 at 53.) By January 18, 1995, Dr. Heaps recorded that claimant "states that the lower back won't stop hurting." (*Id.*) Claimant continued to seek medical care during the last half of January, February, and March, by which time it became clear that her symptoms were not going to go away.

c. Claimant's condition is without question worse than it was before the injury. Prior to the injury she was able to return to work without restrictions following flare-ups of her back condition.

47. I find that the medical evidence, as well as the medical evidence taken together with non-medical evidence, preponderates in favor of claimant. Specifically, I find that claimant's November 8, 1994 industrial injury permanently aggravated claimant's preexisting back disease.

48. Julie Anderson is an adjuster for Putman and Associates. She testified at trial that no temporary total benefits were paid to claimant initially because she continued to work after the injury and then went on vacation. She further testified that no temporary total

disability benefits were paid after March 10, 1995, because Dr. Vranish reported claimant was at MMI.

49. While Dr. Vranish initially reported claimant at MMI as of January 11, 1995 (Ex. 1 at 69), he did so based on Ingram's report; he did not examine claimant. Thereafter, on May 4, 1995, Dr. Vranish reviewed the case and concluded that claimant had not reached maximum medical improvement until March 10, 1995. (*Id.* at 78.)

50. The Hospital's handling of this claim was not unreasonable. Claimant had a long history of back problems and it was not unreasonable to expect that her problems would increase with age and further work, and that she would suffer exacerbations along the way. There is persuasive medical evidence that she is suffering from an occupational disease, and the Hospital treated her condition as such. As Dr. Righetti testified, the question of temporary versus permanent aggravation does not always have a black or white answer, and involves a gray area. History is important to that determination, and in this case the Hospital relied on what claimant had reported to Ingram on January 11, 1995. Ingram verified the conversation under oath and it was not unreasonable for the hospital to rely on her recollection. Finally, Dr. Righetti provided medical support for the Hospital's determination that the aggravation was temporary.

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). Claimant's accident occurred on November 8, 1994, consequently the 1993 version of the Workers' Compensation Act applies.

2. The fact of injury is uncontested. The Hospital accepted liability for the November 8, 1994 industrial accident.

3. However, the Hospital contends that the injury caused only a temporary aggravation of claimant's preexisting osteoarthritis, and that her present condition is attributable to her underlying, preexisting condition. The law is clear that an insurer is liable for an injury as defined in section 39-71-119, MCA, if the claimant establishes it is more probable than not the injury aggravated a preexisting condition. Section 39-71-407(2), MCA (1993), provides:

(2) (a) An insurer is liable for an injury as defined in 39-71-119 if the claimant establishes that it is more probable than not that:

(i) a claimed injury has occurred; or

(ii) **a claimed injury aggravated a preexisting condition.** [Emphasis

added.]

The employer takes the employee as it finds him. *Houts v. Kare-Mor*, 257 Mont. 65, 68, 847 P.2d 701, 703 (1992) The employee is entitled to compensation if the condition was aggravated or accelerated by an industrial injury. *Hash v. Montana Silversmith*, 248 Mont. 155, 158, 810 P.2d 1174, 1175 (1991).

4. Whether or not an injury permanently or temporarily aggravated an underlying condition involves a question of causation. If the aggravation was only temporary, i.e., the claimant returned to her preinjury condition without residual effects from the injury, then the injury had no permanent effect and did not cause or contribute to the ultimate condition. If the injury did not wholly resolve and contributed to the ultimate condition, then the insurer providing coverage for the injury is liable for that condition.

Claimant has persuaded me by a preponderance of the evidence that her November 8, 1994, injury did not wholly resolve and triggered her current condition and current disability. In the foregoing findings of fact, I have outlined my reasons for reaching this conclusion and will not repeat them here.

Put differently, in a more classical case analysis, the employee is entitled to compensation if she suffers from a preexisting condition which is lit-up, "accelerated or aggravated by an industrial accident." *Robins v. Anaconda Aluminum Co.*, 175 Mont. 514, 519, 575 P.2d 67, 70 (1978). In *Birnie v. United States Gypsum Co.*, the Montana Supreme Court held that an industrial accident which aggravated a claimant's arthritic condition was disabling and compensable since it resulted in his inability to return to his time-of-injury job. *Birnie*, 134 Mont. 39, 45, 328 P.2d 133 (1958). The claimant in this case suffers from preexisting osteoarthritis. I am persuaded that her November 8, 1994 industrial accident "lit-up" her preexisting arthritic condition by making it more symptomatic, and that the greater symptoms in turn are disabling. As in *Birnie*, the claimant has been precluded from her time-of-injury job as a result of the aggravation of an arthritic condition.

5. The Hospital's handling of this claim was not unreasonable. Whether the November 8, 1994 injury caused a temporary or permanent aggravation was reasonably debatable. Therefore, claimant is not entitled to either attorney fees or a penalty. She is, however, entitled to her costs.

JUDGMENT

1. The claimant's November 8, 1994 industrial accident permanently aggravated her underlying low-back disease. Therefore, the Hospital, as a self-insurer, is liable for claimant's current low-back condition.

2. Claimant has not requested the Court to determine the specific compensation benefits which may be due her. Therefore, no determination regarding benefits is made.

3. The claimant is not entitled to attorney fees or a penalty.
4. Claimant is entitled to her costs in an amount to be determined by the Court. She shall have 20 days from the date of this judgment to submit a verified bill of costs. The Hospital shall thereafter have 10 days in which to file its objections, if any, to the bill of costs.
5. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.
6. Any party to this dispute may have 20 days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 4th day of December, 1995.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Ms. Laurie Wallace.
Mr. Todd A. Hammer
Date Submitted: September 26, 1995