

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2013 MTWCC 27

WCC No. 2013-3198

JULIE ENGLE

Petitioner

vs.

HARTFORD UNDERWRITERS INS. CO.

Respondent/Insurer.

APPEALED TO MONTANA SUPREME COURT – 01/27/14

**JUDGMENT VACATED AND WITHDRAWN PURSUANT TO STIPULATION OF THE
PARTIES – 05/15/14**

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Summary: After Respondent denied further benefits for Petitioner's accepted occupational disease claim, Petitioner petitioned the Court, arguing that her ongoing problems with her left elbow are caused by her occupational disease and that Respondent cannot now deny liability. Petitioner further argued that Respondent unreasonably denied her further benefits.

Held: Petitioner did not suffer a new injury which would sever Respondent's liability under § 39-71-407(5), MCA. It was unreasonable for Respondent to refuse to pay further benefits to Petitioner on this theory without any evidence to support its position and Petitioner is therefore entitled to a penalty and her attorney fees. Respondent has not proven that Petitioner's current elbow condition is unrelated to her occupational disease claim and therefore it remains liable for her condition.

Topics:

Proof: Conflicting Evidence: Medical. Where the insurer elicited medical opinions that Petitioner's elbow condition was caused by a childhood injury and that her current condition would have developed regardless of any later incident, it cannot then argue that it is relieved of

liability for an accepted occupational disease claim on the grounds that Petitioner suffered a subsequent permanent aggravation, particularly when its IME physicians did not agree that she suffered a permanent aggravation.

Proof: Burden of Proof: Aggravation. Where the insurer elicited medical opinions that Petitioner's elbow condition was caused by a childhood injury and that her current condition would have developed regardless of any later incident, the Court held that it did not meet its burden of proving that Petitioner suffered a permanent aggravation subsequent to the occupational disease claim for which the insurer had accepted liability.

Evidence: Conflicting. Although the insurer contended that Petitioner's doctors did not link her current arthritis to the earlier occupational disease claim for which the insurer accepted liability, the Court found evidence in the record which indicated that Petitioner's doctors noted a connection between her symptoms and her arthritis.

Claims: Acceptance. The Court rejected Respondent's contention that it had accepted liability for only one specific condition and not the entirety of Petitioner's elbow problems. A claims adjuster referred to Petitioner's elbow problems as "current complaints" and acknowledged that a physician had opined that Petitioner's job duties had accelerated the natural progression of her underlying elbow disease. The Court found that Respondent never made a distinction between any specific conditions in Petitioner's elbow, nor did its acceptance letter indicate that it believed Petitioner suffered from two unrelated conditions.

Claims: Acceptance. Where the insurer paid for all of Petitioner's elbow treatment from 2005 forward, even when the medical records indicated that the treatments were for various conditions, the Court rejected the insurer's argument that it only accepted one specific elbow condition and denied all others.

Physicians: Treating Physician: Weight of Opinions. Where the Court was presented with no evidence as to which medical records one IME physician reviewed in reaching his opinions, and the evidence indicated that another IME doctor did not review any of Petitioner's older medical records, and where the Court was not given sufficient evidence to

allow it to compare the qualifications of these doctors, the Court concluded that Petitioner's treating physician was entitled to greater weight.

Physicians: Treating Physicians: Weight of Opinions. Where the Court found that letters Respondent's counsel sent to certain IME doctors may have influenced their opinions, and these doctors were neither deposed nor testified at trial, the Court had no opportunity to explore whether the doctors reached their opinions independently of the attorney's letters. Therefore, the Court gave these opinions less weight.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-611. The Court found Respondent unreasonably adjusted Petitioner's claim where the claims adjuster deemed a fall Petitioner suffered after her occupational disease claim to be a new injury without reviewing any medical records or seeking additional medical opinions. While the adjuster determined that the subsequent fall severed liability and accelerated Petitioner's condition, nothing in the medical records supports that theory. Moreover, when Petitioner disputed the adjuster's conclusions, the adjuster did not investigate further, did not reinstate Petitioner's benefits, and did not conduct additional investigation after she received a medical opinion disputing the adjuster's theory of liability.

Attorney Fees: Cases Awarded. The Court awarded attorney fees where it found that the insurer unreasonably adjusted Petitioner's claim after a claims adjuster deemed a fall to be a new injury without reviewing any medical records or seeking additional medical opinions. The Court found nothing in Petitioner's medical records to support that theory. Moreover, when Petitioner disputed the adjuster's conclusions, the adjuster did not investigate further, did not reinstate Petitioner's benefits, and did not conduct additional investigation after she received a medical opinion disputing the adjuster's theory of liability.

Insurers: Adjusters. Where a claims adjuster wrote to Petitioner and informed her that Respondent was denying further medical treatment for her claim, the Court found that Respondent had denied a payment and therefore Petitioner could be awarded a penalty and attorney fees.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-2907. The Court found Respondent unreasonably adjusted Petitioner's claim where the claims adjuster deemed a fall

Petitioner suffered after her occupational disease claim to be a new injury without reviewing any medical records or seeking additional medical opinions. While the adjuster determined that the subsequent fall severed liability and accelerated Petitioner's condition, nothing in the medical records supports that theory. Moreover, when Petitioner disputed the adjuster's conclusions, the adjuster did not investigate further, did not reinstate Petitioner's benefits, and did not conduct additional investigation after she received a medical opinion disputing the adjuster's theory of liability.

Penalties: Insurers. The Court awarded a penalty against an insurer after it found that the claims adjuster deemed a fall Petitioner suffered after her occupational disease claim to be a new injury without reviewing any medical records or seeking additional medical opinions. While the adjuster determined that the subsequent fall severed liability and accelerated Petitioner's condition, nothing in the medical records supports that theory. Moreover, when Petitioner disputed the adjuster's conclusions, the adjuster did not investigate further, did not reinstate Petitioner's benefits, and did not conduct additional investigation after she received a medical opinion disputing the adjuster's theory of liability.

¶ 1 The trial in this matter occurred on October 15, 2013, at the Civic Center in Great Falls. Petitioner Julie Engle was present and represented by J. Kim Schulke. Kelly M. Wills represented Respondent Hartford Underwriters Ins. Co. (Hartford).

¶ 2 Exhibits: I admitted Exhibits 1 through 11, 13, and 14 without objection. Engle withdrew Exhibit 12. Hartford withdrew Exhibit 15. I admitted Exhibits 16 and 17 over Engle's objections.

¶ 3 Witnesses and Depositions: I admitted Engle's deposition and it can be considered part of the record. Engle was sworn and testified.

¶ 4 Engle's counsel stated that on October 14, 2013, she received a copy of Engle's unemployment claims file from Hartford's counsel. Engle objected to the introduction of those records due to the untimely exchange. I reserved ruling on Engle's objection until such time as Hartford would attempt to introduce those records at trial. Ultimately, I allowed Hartford to question Engle regarding her recollection of her application for unemployment benefits, and Hartford did not move to admit the records into evidence.

¶ 5 Issues Presented: The parties present the following issues for resolution:

Issue One: Whether the non-work-related fall Engle experienced on August 11, 2011, was a new injury such that Hartford's liability was terminated in accordance with § 39-71-407(5), MCA (2003);

Issue Two: Whether Hartford has been unreasonable in the adjustment of this claim such that the Court should impose a 20% penalty and award Engle her attorney fees;

Issue Three: Whether Engle suffered a non-work-related injury to her left elbow such that Hartford is not liable for any compensation or medical benefits caused by the subsequent non-work-related injury pursuant to § 39-71-407(5), MCA (2003); and

Issue Four: Whether any ongoing problems Engle has with her left elbow are a consequence of the 2005 occupational disease claim.

FINDINGS OF FACT

¶ 6 Engle testified at trial. I found her to be a credible witness.

¶ 7 In approximately 1973, at about the age of 12, Engle was involved in an accident with a horse. She sustained a fracture of her ulna and the dislocation of her left elbow. The break was set and approximately one year later a plastic head (Silastic prosthesis/implant) was placed on her radius. Petitioner is now 52 years old.¹

¶ 8 On May 15, 1996, Engle sought treatment for her right elbow with Gregory S. Tierney, M.D. She reported that she had been having right-elbow pain for about four months and that it started while she was performing her job duties as a waitress.² On August 21, 1996, she also began to complain of left-wrist pain.³ On September 9, 1996, Dr. Tierney referred Engle to Charles D. Jennings, M.D., who continued treating her. On February 20, 1997, Engle underwent surgery on both arms, including a shortening of her left ulna.⁴ On March 17, 1998, she underwent an additional surgery to remove hardware which had been retained during the previous surgery.⁵

¹ Pretrial Order at 2, Uncontested Facts, Docket Item No. 23.

² Ex. 3 at 2.

³ Ex. 3 at 2.

⁴ Ex. 3 at 10-11.

⁵ Ex. 3 at 14.

¶ 9 On May 24, 1999, Engle sought further medical treatment, complaining of numbness and tingling in her hands and fingers as well as pain in her left shoulder. Dr. Jennings opined that she had bilateral median and ulnar neuropathy.⁶ Engle subsequently underwent conservative treatment including splinting at night, but surgery remained a future possibility.⁷

¶ 10 On June 26, 2001, Engle underwent a carpal tunnel release surgery on her left hand.⁸ Engle testified that to the best of her recollection, she was subsequently released to return to work without permanent restrictions.⁹

¶ 11 From August 2001 through July 2005, Engle worked as a waitress and also worked as a tax advisor and instructor for H&R Block.¹⁰ Near the end of April 2004, Engle also began to work part-time as a dog groomer for Mike Norton, D.V.M., at Best Friends Animal Hospital (Best Friends).¹¹ Engle worked six to eight hours per day, two days per week, bathing, drying, and brushing dogs.¹²

¶ 12 On July 14, 2005, Engle returned to see Dr. Jennings. She complained of increased pain in her left elbow and wrist. Dr. Jennings noted that Engle reported that it hurt to hold a plate with her left hand, and that she had also been working part-time as a groomer. Engle stated that her grooming job duties significantly aggravated her symptoms and that she had resigned from the dog-grooming job the previous month. Dr. Jennings examined Engle and reviewed x-rays of her forearm. He did not see any significant progression of the proximal migration of her radius, but opined that her symptoms were probably due to progressive degenerative changes in the radiocapitellar articulation. Dr. Jennings did not believe surgery would be beneficial at that time.¹³

¶ 13 On July 14, 2005, Engle filled out a First Report of Injury and Occupational Disease in which she alleged that she had a strain or injury to her elbow on May 26, 2005, while working part-time at Best Friends.¹⁴

⁶ Ex. 3 at 18-19.

⁷ Ex. 3 at 19.

⁸ Ex. 3 at 28.

⁹ Trial Test.

¹⁰ Trial Test.

¹¹ Trial Test.

¹² Trial Test.

¹³ Ex. 3 at 34.

¹⁴ Ex. 2.

¶ 14 On July 26, 2005, Dr. Jennings again saw Engle for her left-elbow condition. He took new radiographs and found that the Silastic head of Engle's radial head prosthesis had become displaced. However, he opined that this was not the source of her symptoms. He expressed concern that Engle had lost some grip strength. He fitted her with a tennis elbow brace and noted that he would consider surgical exploration and removal of the Silastic implant, but he did not believe aggressive treatment was warranted.¹⁵

¶ 15 On August 30, 2005, Engle reported to Dr. Jennings that she had continuing pain and weakness in her forearm and that she was unable to lift or grip much with the left hand. Dr. Jennings noted:

[S]he emphatically states that she was doing very well until approximately March of this year when she began to notice pain in the elbow during the period of time that she was dog grooming. She felt that the dog grooming put a lot of excessive strain on the elbow and that this is a significant factor in causing the deterioration.¹⁶

¶ 16 On October 11, 2005, Dr. Jennings wrote a letter to Linda Slavik, Hartford's claims adjuster, in which he summarized Engle's history of elbow problems and opined, "It is my feeling that her current status is a consequence of a preexisting condition which significantly deteriorated as a result of her dog grooming activities." Dr. Jennings recommended that Engle undergo surgery to remove the Silastic implant, noting that while he was not positive that it would alleviate her symptoms, he found that Engle was very motivated to return to work and that the surgery could help her to do so.¹⁷

¶ 17 On January 18, 2006, Robert J. Seim, M.D., evaluated Engle for an independent medical examination (IME). He reviewed her medical history and x-rays and opined that Engle had suffered a failure of her Silastic prosthesis secondary to wear over a long time, but accelerated by repetitive motion of pronation and supination as required for scrubbing dogs. Dr. Seim opined that Engle could return to work in a light-duty capacity or could perform medium-duty tasks that did not require stress or continuous use of her left arm. He further found documentary evidence to establish a causal relationship between her activities and the problem with her elbow. He opined that while Engle had a preexisting condition, a significant material change in her condition occurred as a result of her occupational duties. He noted that although Engle worked both as a waitress and a dog groomer, the job duties she performed as a waitress did not cause

¹⁵ Ex. 3 at 42.

¹⁶ Ex. 3 at 42.

¹⁷ Ex. 3 at 43-44.

her problems in the years prior to her accepting the dog-grooming position. He further noted that the motions which she performed as a dog groomer were the motions which would aggravate and cause deterioration of the radial head area. Dr. Seim noted that while Engle's condition was to some degree a natural progression of her underlying condition, it was accelerated by the dog grooming.¹⁸

¶ 18 On February 6, 2006, Slavik wrote to Engle and reported that Dr. Seim had found a causal connection between Engle's current complaints and Engle's occupational duties at Best Friends. Slavik stated:

Based upon this medical opinion, we will agree to pay benefits pertaining to your workers' compensation claim. Dr. Seim's opinion indicates that you have a preexisting condition, however, your activities working as a dog groomer have accelerated the natural progression of the condition.

We will pay for the medical treatment provided by Dr. Jennings since July 2005 and future medical treatment that is deemed reasonable and necessary treatment for this condition.¹⁹

¶ 19 On April 4, 2006, Dr. Jennings examined Engle and also noted that he had reviewed Dr. Seim's report. Dr. Jennings was uncertain as to Engle's best course of treatment, but he was considering operating on her elbow, removing the Silastic implant and implanting a metallic radial head, or possibly "produc[ing] a one-bone forearm," which he believed would solve Engle's pain complaints but would also eliminate her ability to rotate her forearm.²⁰

¶ 20 On April 28, 2006, Alexander N. Chung, M.D., saw Engle for a second opinion at Dr. Jennings' request. Dr. Chung made several medical findings and then opined:

I think that this patient's problems are coming mainly from her left elbow arthritis which I would deem to be severe. . . . I feel that she should undergo a series of cortisone injections to see if she gets any relief and if this does not work, then I would recommend she go ahead and undergo open arthrotomy of the left elbow, removal of the fractured silastic implant and removal of any loose bodies within the elbow. This would be done in an attempt to buy her more time and avoid total elbow replacement. . . . Unfortunately, I do not think that removing the silastic implant and putting a metallic radial head implant into this patient will afford her any relief

¹⁸ Ex. 4.

¹⁹ Ex. 7.

²⁰ Ex. 3 at 45-47.

whatsoever. I think that this is mainly a degenerative process at this time and we are essentially in salvage mode for this patient.²¹

¶ 21 On July 5, 2006, Engle returned to Dr. Jennings to discuss treatment options. Dr. Jennings noted that Dr. Chung had found significant involvement of the lateral facet of the humeroulnar joint. Dr. Jennings reviewed some x-rays and observed evidence of osteoarthritis in the area that might be a contributing factor to Engle's symptoms. He found that more of her tenderness was over the lateral aspect of her elbow in the region of the radial head although he also believed that her activity level was too great for her to benefit from an elbow replacement at that time.²²

¶ 22 On July 7, 2006, Dr. Jennings noted that he discussed Engle's elbow problems with Dr. Chung. They agreed to try a series of steroid injections, and the next possible option would be debridement of the joint and removing the Silastic components. But, he noted, "neither of us had much hope for this being a long-term solution." They both felt Engle was too young for a total elbow replacement.²³

¶ 23 On August 30, 2006, Dr. Chung assumed Engle's care, apparently because Dr. Jennings was retiring.²⁴

¶ 24 On March 23, 2007, Dr. Chung saw Engle for the first time since the previous August. They again discussed treatment options and he noted that he intended to contact Engle's workers' compensation insurer to pursue authorization for Engle to be seen out of state for consideration of a surgical procedure.²⁵

¶ 25 In October of 2007, Engle underwent surgery at the Mayo Clinic. She resumed treating with Dr. Chung in November 2007.²⁶ On December 7, 2007, Dr. Chung opined that Engle was not at maximum medical improvement (MMI) and he predicted that she would not reach MMI in the near future.²⁷

¶ 26 On June 23, 2008, Dr. Chung responded to questions from Hartford and indicated that Engle had reached MMI on that date, which was approximately six months from the date he last saw her. He noted that Engle needed an impairment

²¹ Ex. 3 at 62-64.

²² Ex. 3 at 68.

²³ Ex. 3 at 70.

²⁴ Ex. 3 at 72.

²⁵ Ex. 3 at 75-76.

²⁶ Ex. 3 at 80.

²⁷ Ex. 3 at 87.

rating and opined, “From my point of view she can [return to her time-of-injury job].”²⁸ Dr. Chung also wrote a letter of explanation to Slavik in which he explained:

It is my impression that Ms. Engle has now reached maximum medical improvement. She is now six months from the last time I saw her and have not heard back from this patient regarding how she is doing. She will need further surgery in the future.²⁹

¶ 27 On July 17, 2008, Dr. Chung saw Engle for a follow-up appointment and noted that Engle reported significant improvement in her elbow since her surgery. Dr. Chung opined that Engle was at MMI although he noted that he believed Engle would need further treatment from her surgeon at the Mayo Clinic in the future.³⁰

¶ 28 On August 27, 2008, Engle underwent an impairment rating evaluation with K. Allan Ward, M.D., who opined that Engle had a 2% whole person impairment rating.³¹

¶ 29 On September 25, 2008, Engle returned to see Dr. Chung. She reported that she had hit her left elbow against a wall the previous week and she was experiencing pain. Dr. Chung examined Engle and told her that she could expect to have “good days and bad days” with her elbow. He opined that she had irritated the joint, but found her to remain at MMI. He noted again that he believed Engle would need a total elbow replacement in the future.³²

¶ 30 Engle testified that she worked as a waitress sporadically in 2008 and 2011.³³ She did not work as a waitress after 2011.³⁴ The only job Engle has held since 2011 is her job with H&R Block.³⁵ Engle works as a master tax advisor.³⁶ She also teaches basic courses for other H&R Block employees.³⁷

¶ 31 On August 11, 2011, Engle went to Benefis Health System in Great Falls and complained of elbow pain following a fall. X-rays revealed no evidence of an acute

²⁸ Ex. 3 at 90.

²⁹ Ex. 3 at 91.

³⁰ Ex. 3 at 93.

³¹ Ex. 3 at 93-95.

³² Ex. 3 at 95-96.

³³ Engle Dep. 11:8 – 13:14.

³⁴ Engle Dep. 13:15-17.

³⁵ Engle Dep. 13:18-20.

³⁶ Engle Dep. 15:23 – 16:1.

³⁷ Engle Dep. 16:2-7.

fracture, although significant degenerative progression since two previous x-rays was noted.³⁸ Engle explained that she tripped on a garden hose and fell forward onto both forearms.³⁹ Engle testified that she sought medical attention the same day as the fall because she was in severe pain.⁴⁰ Engle testified that prior to that fall, she periodically experienced some aching in her left elbow, particularly when she was waitressing.⁴¹

¶ 32 On August 26, 2011, Engle returned to see Dr. Chung. Dr. Chung noted that Engle had “tweak[ed]” her left elbow in the August 11, 2011, fall. X-rays revealed worsening osteoarthritis involving the radial articular surface of the ulnohumeral articulation, but no evidence of any new fracture. Dr. Chung noted:

I went through the films with her again and told her that she is eventually going to need a total elbow replacement. Because of the malunited ulnar fracture from long ago I think that this is going to be a very complex case .

. . .

Dr. Chung also gave Engle a cortisone shot to alleviate her symptoms.⁴²

¶ 33 On November 22, 2011, Jennifer Hepfner, Account Specialist for Specialty Risk Services, wrote to Engle and informed her that Hartford was denying further medical treatment regarding her claim. Hepfner noted, “You reported that on 8/11/11 you fell on your elbow while you were at a friend’s house and as a result further injured your elbow which now requires a total elbow replacement sooner than anticipated.” Hepfner stated that Engle’s claim for additional benefits was denied pursuant to § 39-71-407(5), MCA.⁴³

¶ 34 On December 23, 2011, Engle faxed a response letter and pertinent medical records to Hepfner, disputing Hartford’s denial of further medical treatment.⁴⁴ However, Hartford did not reinstate her benefits.

¶ 35 On May 14, 2012, Dr. Chung saw Engle for follow-up, noting that Hartford had denied Engle further coverage for her left elbow. Dr. Chung gave Engle another cortisone shot.⁴⁵

³⁸ Ex. 6.

³⁹ Engle Dep. 28:17-20.

⁴⁰ Engle Dep. 27:14-23.

⁴¹ Engle Dep. 32:10-15.

⁴² Ex. 3 at 96.

⁴³ Ex. 9.

⁴⁴ Ex. 10.

¶ 36 On May 6, 2013, Dr. Chung responded to questions from Engle's counsel in which he opined that: no objective medical findings indicated that Engle suffered a new and distinct injury to her left elbow as a result of her August 11, 2011, fall; Engle most likely reagggravated her already severe left-elbow arthritis and did not suffer a new injury or materially worsen her condition as a result of the August 11, 2011, fall; and Engle did not suffer a permanent aggravation or accelerate her need for treatment as a result of the August 11, 2011, fall. Dr. Chung noted that "reinjury episodes are usually episodic [and] not permanent. Her longstanding arthritis is however permanent."⁴⁶

¶ 37 On August 8, 2013, Hartford's counsel wrote to Mark Rotar, M.D., in anticipation of Dr. Rotar's medical records review regarding Engle's elbow condition. In the four-page, single-spaced letter, counsel summarized points of Engle's medical history which he found pertinent to Dr. Rotar's records review. For two full pages, counsel parsed the words of Engle's counsel's May 2013 letter to Dr. Chung and set forth arguments as to why Hartford's counsel believed the questions were not a "proper inquiry" into Engle's condition. Hartford's counsel noted that Dr. Chung opined that Engle will likely need an elbow replacement. Hartford's counsel then argued that the medical records indicate that the surgery will be necessary due to arthritis in the elbow joint, and suggested to Dr. Rotar several potential alternatives he might consider as the cause of Engle's arthritis.⁴⁷

¶ 38 In response, Dr. Rotar wrote to Hartford's counsel on August 26, 2013, and stated that after a records review he had determined that Engle's need for a total elbow replacement was due to wear of her ulnohumeral joint related to her childhood injury. Dr. Rotar concluded that Engle's need for a total elbow replacement was not related to her workers' compensation claim and that the failure of the Silastic prosthesis did not aggravate or accelerate the arthritic changes which had led to Engle's need for a total elbow replacement. Dr. Rotar opined that it was medically probable that Engle's August 11, 2011, fall aggravated the underlying arthritis in her elbow, but it did not cause the arthritis and it was not related to the workers' compensation claim.⁴⁸

¶ 39 On August 29, 2013, Hartford's counsel sent Dr. Rotar's letter to Emily Heid, M.D., with an accompanying letter in which Hartford's counsel again summarized certain portions of Engle's medical history regarding her elbow, argued that Engle's

⁴⁵ Ex. 3 at 106-07.

⁴⁶ Ex. 3 at 112-13.

⁴⁷ Ex. 16 at 4-7.

⁴⁸ Ex. 16 at 1-3.

questions to Dr. Chung were improper, and highlighted the portions of Dr. Rotar's letter which supported Hartford's position.⁴⁹

¶ 40 On September 6, 2013, Dr. Heid conducted an IME of Engle. Dr. Heid reviewed Engle's medical records and physically examined her. Dr. Heid opined that Engle's underlying arthritis and pain were due to her childhood injury. She further opined that Engle's dog-grooming job was not responsible for the deterioration of the Silastic implant. Dr. Heid opined that Engle's loss of range of motion was due to the natural progression of arthritis in her elbow, and that any indication for elbow replacement surgery is related to the childhood injury and the placement of the Silastic implant. Dr. Heid opined that all of the treatment Engle received for her elbow problems was necessary as a result of the childhood injury and treatment, and that Engle would have developed arthritis regardless of any later incident. Dr. Heid stated, "It is my opinion that with or without the brief period she spent as a dog groomer, the outcome for her elbow would have been the same. I am unable to state that she sustained even a permanent or temporary aggravation of her left elbow as a result of that position."⁵⁰

¶ 41 After he received Dr. Heid's IME report, Hartford's counsel wrote to Dr. Heid and asked her to clarify a few points.⁵¹ On September 23, 2013, Dr. Heid responded to Hartford's counsel and opined that Engle would have developed arthritis in her elbow even without the 2007 surgery at the Mayo Clinic. Dr. Heid opined that the surgery did not materially worsen or accelerate the arthritis. Dr. Heid further opined that neither the failure of the Silastic implant nor the 2007 surgery caused Engle's arthritic changes.⁵²

CONCLUSIONS OF LAW

¶ 42 Typically, an employee's last day of work is the point in time from which an occupational disease claim must flow.⁵³ Engle's last day of work at Best Friends occurred in mid-June 2005.⁵⁴ Therefore, the 2003 Workers' Compensation Act controls her claim.

⁴⁹ Ex. 17 at 20-23.

⁵⁰ Ex. 17 at 4-19.

⁵¹ Ex. 17 at 2-3.

⁵² Ex. 17 at 1.

⁵³ *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).

⁵⁴ Although Engle set forth a date of injury of May 26, 2005, on the First Report of Injury and Occupational Disease, she did not file her claim until after she left her employment at Best Friends. Therefore, the date of her last day of work – and not the date of her alleged injury – controls. Had she filed her claim prior to her last day of work her right to compensation would have accrued at that time. *Bouldin v. Liberty Nw. Ins. Corp.*, 1997 MTWCC 8.

¶ 43 The injured worker bears the burden of proving by a preponderance of the evidence that she is entitled to the benefits she seeks.⁵⁵

Issue One: Whether the non-work-related fall Engle experienced on August 11, 2011, was a new injury such that Hartford's liability was terminated in accordance with § 39-71-407(5), MCA (2003); and Issue Three: Whether Engle suffered a non-work-related injury to her left elbow such that Hartford is not liable for any compensation or medical benefits caused by the subsequent non-work-related injury pursuant to § 39-71-407(5), MCA (2003).

¶ 44 Although the parties have offered two issues regarding whether Hartford remains liable for Engle's claim in light of § 39-71-407(5), MCA, I do not appreciate a distinction between them and I have therefore combined them for resolution.

¶ 45 As set forth above, Engle fell on August 11, 2011, and thereafter sought medical treatment for her elbow. Hartford contends that this fall constitutes a subsequent injury which would relieve it from liability under § 39-71-407(5), MCA,⁵⁶ and which allowed it to terminate Engle's benefits on these grounds on November 22, 2011. However, Engle argues that Hartford offers insufficient medical evidence to support this contention.⁵⁷

¶ 46 Under § 39-71-407(5), MCA, if a claimant who has reached MMI suffers a subsequent non-work-related injury to the same part of the body, the insurer is not liable for any compensation or medical benefits caused by the subsequent injury.

¶ 47 Engle notes that Dr. Chung opined that the August 11, 2011, fall did not cause a new injury. Engle further argues that while Drs. Rotar and Heid both stated that her August 11, 2011, fall aggravated her preexisting condition, neither opined that it was a permanent aggravation. Engle also points out that Dr. Chung examined her two weeks after the fall, while Dr. Heid examined her five years later, and Dr. Rotar never physically examined her. Furthermore, Dr. Chung had examined her elbow both before and after her fall. Engle argues that Dr. Chung's opinion should also carry more weight because he is her treating physician.⁵⁸

⁵⁵ *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).

⁵⁶ Pretrial Order at 7.

⁵⁷ Pretrial Order at 5-6.

⁵⁸ *EBI/Orion Group v. Blythe*, 281 Mont. 50, 931 P.2d 38 (1997).

¶ 48 Hartford argues that the August 11, 2011, treatment note documents findings of an acute injury.⁵⁹ Hartford contends that Engle injured her elbow when she fell on August 11, 2011, and that she received medical care for that injury. Hartford further notes that Engle did not work as a waitress after that fall, and that her symptoms increased after the fall. Hartford argues that since Engle received prescription pain medication and a series of injections which failed to alleviate her symptoms, the fall must have caused a permanent aggravation of her elbow condition.⁶⁰

¶ 49 Hartford's reliance on the medical opinions of Drs. Rotar and Heid to support its argument that Engle suffered a permanent aggravation of her condition is problematic. Hartford elicited opinions from Drs. Rotar and Heid in which each opined that Engle's childhood accident – neither her work as a waitress, nor the work she performed as a dog groomer, nor the August 11, 2011, fall – is responsible for the present condition of her elbow. As set forth in the findings above, while Dr. Rotar opined that the August 11, 2011, fall aggravated Engle's arthritis, he believed that her need for a total elbow replacement was due to her childhood injury. Similarly, Dr. Heid opined that all of Engle's elbow problems stemmed from her childhood accident and that Engle would have developed arthritis regardless of any later incident. While Drs. Rotar and Heid disagree with Engle's position as to whether her current elbow condition is due to her 2005 occupational disease, they do not dispute that the August 11, 2011, fall did not permanently aggravate her elbow condition.

¶ 50 In *Briney v. Pacific Employers Ins. Co.*, 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 current disability has the burden of proving that allegation, which is in the nature of an affirmative defense, by a preponderance of the evidence.⁶¹

¶ 51 In the present case, Hartford has not met this burden as the preponderance of the evidence actually supports Engle's position. I therefore conclude that Hartford has not been relieved of liability for Engle's condition due to any subsequent injuries pursuant to § 39-71-407(5), MCA.

⁵⁹ Respondent's Trial Brief at 5, Docket Item No. 17.

⁶⁰ Respondent's Trial Brief at 5-6.

⁶¹ 283 Mont. 346, 351, 942 P.2d 81, 84 (1997). (Citations omitted.) See more recently *Uffalussy v. St. Patrick Hosp. and Health Sciences Cent.*, 2007 MTWCC 45, ¶ 78.

Issue Four: Whether any ongoing problems Engle has with her left elbow are a consequence of the 2005 occupational disease claim.

¶ 52 Although Hartford accepted liability for Engle's occupational disease, it contends that its acceptance consisted only of the deterioration and failure of her Silastic implant, and not her arthritis. Hartford contends that it never paid for any treatment regarding Engle's other elbow problems. Hartford argues that it accepted liability for Engle's claim pursuant to Dr. Seim's IME report, and that he limited the occupational disease to the Silastic implant failure.⁶² Hartford further argues that no medical provider has opined that Engle's severe arthritis is linked to her 2005 occupational disease, but notes that Dr. Rotar and Dr. Heid have opined that Engle's arthritis is unrelated to her occupational disease and is a result of her childhood injury.⁶³

¶ 53 Engle disagrees with Hartford on several grounds. Engle disputes Hartford's contention that it never paid for treatment of her elbow other than the Silastic implant failure and disputes Hartford's contention that no medical provider linked her arthritis to her occupational disease. Engle also argues that the opinions of Drs. Rotar and Heid should be given little weight, both in light of the conflicting opinion of her treating physician and because she believes the letters Hartford's counsel wrote to these doctors influenced the opinions they reached. Finally, Engle argues that Hartford accepted liability for her occupational disease, and it cannot now unaccept it.⁶⁴

¶ 54 At trial, Engle argued that Dr. Chung's medical records indicate that he diagnosed her with arthritis the first time he examined her, repeatedly mentioned her arthritis, and consistently stated that she would eventually need an elbow replacement. Engle argues that even when Dr. Chung placed her at MMI, he noted she would need future treatment. Engle argues that Hartford paid for all of her treatment with Dr. Chung even though he frequently noted that he was treating her arthritis.⁶⁵ Engle further notes that Hartford paid her impairment rating in 2008, even though Dr. Ward did not differentiate between loss of range of motion caused by arthritis and that caused by the Silastic implant failure.⁶⁶

¶ 55 In reviewing the medical records, I cannot agree with Hartford's contention that Engle's doctors did not link Engle's arthritis to her occupational disease. In fact, the records indicate that while Engle's doctors recognized that her Silastic implant had

⁶² Respondent's Trial Brief at 2-3.

⁶³ Respondent's Trial Brief at 13.

⁶⁴ Petitioner's Trial Brief at 4-7.

⁶⁵ Petitioner's Trial Brief at 7.

⁶⁶ Petitioner's Trial Brief at 7.

failed, they believed her symptoms, which Engle attributed to her work as a dog groomer, were caused by Engle's arthritis. As set forth more fully in the findings above, in July and August of 2005, Dr. Jennings noted that Engle's Silastic implant had deteriorated, but he was reluctant to attribute her symptoms to it. While he was not opposed to Engle undergoing surgery to correct the Silastic implant, he expressed doubt that correcting the implant would improve her symptoms. He did, however, opine that her elbow condition had deteriorated due to her job duties as a dog groomer.⁶⁷

¶ 56 When Dr. Chung saw Engle for a second opinion in April 2006, he also opined that her symptoms were not caused by her Silastic implant and that removing it would afford her no relief. He opined that her symptoms were caused by her severe arthritis and that she would eventually need a total elbow replacement.⁶⁸ In spite of the fact that Dr. Chung believed Engle's symptoms were not caused by the failed Silastic implant, Hartford never disapproved his treatment, which was intended to alleviate the symptoms he attributed to Engle's arthritis.

¶ 57 I can find no basis for Hartford's contention that, from the outset, it accepted liability only for Engle's Silastic implant failure. In its letter accepting liability, Hartford noted that Dr. Seim had found a causal connection between Engle's "current complaints" and her occupational duties at Best Friends. Hartford acknowledged that Engle had a preexisting condition and that Dr. Seim found that Engle's job duties had accelerated its natural progression.⁶⁹ The language of the acceptance letter does not support Hartford's current position that Engle suffered from two unrelated conditions in her elbow and that Hartford accepted liability for only one of them.

¶ 58 When Hartford accepted Engle's occupational disease claim, it did not make a specific distinction between the conditions or any limitations on Hartford's acceptance of liability.⁷⁰ I further note that although Hartford relies upon the opinions of Drs. Rotar and Heid which attribute Engle's current complaints to arthritis in her ulnohumeral joint, Hartford alleges that this is a condition unrelated to Engle's occupational disease claim. However, Dr. Chung identified significant involvement of the lateral facet of the humeroulnar joint on April 28, 2006.⁷¹

¶ 59 Furthermore, Hartford acknowledged during its closing argument that it paid for all of Engle's elbow treatment from 2005 forward. Hartford's position that it only paid for

⁶⁷ See *supra* ¶¶ 14-16.

⁶⁸ See *supra* ¶ 20.

⁶⁹ See Ex. 7.

⁷⁰ See *supra* ¶ 57.

⁷¹ See Dr. Jennings' Progress Note of 07/05/06, Ex. 3 at 68.

treatment relating to the Silastic implant failure is at odds with the record, which indicates that many of the treatments Engle received – and for which Hartford admits that it paid – such as the injections, were intended to treat Engle’s arthritis and not the Silastic implant failure.

¶ 60 Engle argues that Hartford fabricated the idea that her elbow problems are two unrelated conditions in an effort to avoid ongoing liability for the claim it accepted in 2006.⁷² Engle argues that Hartford “cannot now attempt to parse the pre-existing condition that resulted from the remote 1973 injury and claim that they only accepted liability for the natural progression of some of it.”⁷³ Engle argues that only Drs. Rotar and Heid attempted to divide her condition into two separate conditions. Engle alleges that the idea of separating her elbow condition into two unrelated diagnoses was introduced to them by Hartford’s counsel in the letters sent to the doctors prior to their review of Engle’s case. Engle argues that the information set forth in the letters is misleading and that by putting “a spin” on the facts, Hartford’s counsel led the doctors to conclude that her elbow problems were two discrete conditions and that Hartford was liable for only one and not the other.⁷⁴

¶ 61 Engle argues that Hartford’s “argumentative” letters diminish the weight of Drs. Rotar’s and Heid’s opinions.⁷⁵ Engle draws the Court’s attention to *Davis v. Credit General Ins. Co.*, in which this Court held that what it characterized as the “slanted” letters an insurer’s attorney sent to two doctors prior to their rendering opinions regarding the case led the Court to give those opinions less weight.⁷⁶ In *Davis*, while the Court did not find the letters misleading, the Court noted, “Nevertheless, the argumentative aspects . . . highlight the hazard of arguing facts to experts before they render their opinions. The more slanted the presentation . . . the less confidence the Court is likely to have in the expert’s opinion.”⁷⁷

¶ 62 Engle argues that Dr. Chung’s opinions are entitled to greater weight since he is her treating physician. Additionally, she argues that it is difficult to assign weight to Dr. Rotar’s opinions because neither she nor the Court know what his qualifications are, and she further contends that she does not know which medical records he reviewed, nor does his report indicate if he looked at any of her x-rays. As for Dr. Heid’s IME, Engle argues that Dr. Heid examined her on only one occasion, did not review any x-

⁷² Petitioner’s Trial Brief at 4.

⁷³ Petitioner’s Trial Brief at 7.

⁷⁴ Petitioner’s Trial Brief at 4-6; Closing Argument of Engle’s Counsel.

⁷⁵ Petitioner’s Trial Brief at 5-6.

⁷⁶ 2000 MTWCC 48.

⁷⁷ *Davis*, ¶ 59.

rays, and did not review any medical records prior to 2005, and therefore her opinion is also entitled to less weight.⁷⁸

¶ 63 I agree with Engle's arguments regarding the respective weight of Dr. Chung's opinion versus the opinions of Drs. Rotar and Heid. Dr. Chung's opinion is entitled to greater weight since he is Engle's treating physician. Moreover, Engle's summary of the medical records reviewed – or not reviewed – by these doctors appears correct. I do not know which medical records Dr. Rotar reviewed, and it is clear that Dr. Heid did not review any of Engle's older medical records. Furthermore, the evidence presented to the Court has not allowed me to compare the qualifications of these doctors.

¶ 64 As for the influence of Hartford's counsel's letters on the opinions of Drs. Rotar and Heid, I have reviewed the medical records as well as Hartford's letter accepting liability for the occupational disease claim, and I have found no indication that a distinction was made between Engle's Silastic implant failure and her arthritis prior to Hartford's counsel suggesting this distinction to Drs. Rotar and Heid in his letters. While it is possible that Dr. Rotar and/or Dr. Heid may have made such a distinction upon investigating Engle's case, I cannot discount the possibility that counsel's suggestions influenced their perceptions of the case. Since neither doctor was deposed nor testified at trial, I did not have the opportunity, as the Court did in *Davis*, to explore whether these doctors reached their respective opinions independently of the letters. Since I remain skeptical as to how they reached their conclusions, I give the opinions less weight.

¶ 65 The medical records clearly reflect that Engle's treating physicians recognized both the Silastic implant failure and the arthritis when they treated Engle after she began working as a dog groomer. Furthermore, it is evident that Hartford paid for all of Engle's treatment, regardless of the specific condition to which it related, and Hartford also paid Engle's impairment rating without making any attempt to distinguish between the two conditions. Since Drs. Rotar and Heid introduced this new theory only after it was suggested to them by Hartford's counsel, and without the opportunity to question either doctor about the bases for these opinions, I view this theory with some skepticism and do not find it persuasive in light of the other medical opinions in evidence. For these reasons, I conclude that the ongoing problems Engle is experiencing are as a result of her 2005 occupational disease claim.

⁷⁸ Petitioner's Trial Brief at 6.

Issue Two: Whether Hartford has been unreasonable in the adjustment of this claim such that the Court should impose a 20% penalty and award Engle her attorney fees.

¶ 66 Pursuant to § 39-71-611, MCA, an insurer shall pay reasonable attorney fees if the insurer denies liability for a claim for compensation, the claim is later adjudged compensable by this Court, and this Court determines the insurer's actions in denying liability were unreasonable. Section 39-71-2907, MCA, provides that this Court may increase by 20% the full amount of benefits due a claimant when an insurer unreasonably delays or refuses to pay benefits prior or subsequent to an order granting benefits from this Court.

¶ 67 Engle argues that Hartford unreasonably denied her benefits in November 2011 when its claims adjuster refused to authorize payment for further medical treatment on the grounds that the August 11, 2011, fall constituted a new injury. Engle notes that even after she presented Hepfner with medical records from Dr. Chung in which he opined that the fall did not cause a new injury, the adjuster did not act upon that information and neither reinstated benefits nor sought an additional medical opinion.

¶ 68 Hartford argues that it did not unreasonably deny Engle's benefits in light of her August 11, 2011, fall, and further argues that since the denial, Engle has not received any medical care and therefore there has been no actual denial of coverage.

¶ 69 Engle argues that insurers have an affirmative duty to investigate workers' compensation claims and that absent such investigation, the denial of a claim for benefits is unreasonable.⁷⁹ Engle contends that in this case, Hartford's claims adjuster failed in Hartford's duty to investigate her request for additional medical benefits after her August 11, 2011, fall. Engle argues that the claims adjuster simply deemed the fall to be a new injury without reviewing medical records or seeking additional medical opinions.⁸⁰

¶ 70 Engle further argues that Hartford's claims adjuster unreasonably ignored Dr. Chung's opinion of May 6, 2013, in which he responded to questions from Engle's counsel. Engle argues that, as set forth in *S.L.H. v. State Comp. Mut. Ins. Fund*, a claims examiner cannot, without any medical consultation or advice, ignore the opinion of a treating physician and refuse to pay benefits.⁸¹ Engle argues that Hartford's claims

⁷⁹ Petitioner's Trial Brief at 8, citing *S.L.H. v. State Comp. Mut. Ins. Fund*, 2000 MT 362, ¶ 50, 303 Mont. 364, 15 P.3d 948.

⁸⁰ Petitioner's Trial Brief at 8.

⁸¹ See *S.L.H.*, ¶ 65.

adjuster acted unreasonably when she failed to attempt to obtain a different medical opinion in light of Dr. Chung's opinion.⁸²

¶ 71 In *S.L.H.*, the Montana Supreme Court noted that, as previously held, absent at least a minimal investigation of a claim's validity, denial of a claim for benefits is unreasonable. In that instance, the court found that the claims adjuster for S.L.H.'s claim performed a "very minimal investigation" by requesting the doctor's notes pertaining to treatment for which S.L.H. sought coverage.⁸³ The court further noted that a claims examiner cannot, without any medical consultation or advice, reasonably ignore the opinion of a claimant's treating physician and refuse to pay for medication prescribed by the treating physician, although in S.L.H.'s case, the court found her treating physician's notes to be equivocal.⁸⁴

¶ 72 In Engle's case, Hartford's claims adjuster reached the conclusion that liability was severed for Engle's claim because of the August 11, 2011, fall and denied further liability for her claim without conducting any investigation. While Hepfner maintained that Engle's fall accelerated her need for an elbow replacement, nothing in the medical records supports that theory. When Engle disputed the adjuster's conclusions, the adjuster did not inquire further, and when the adjuster subsequently received the May 6, 2013, opinion of Dr. Chung in response to Engle's counsel's questions, the adjuster neither reinstated benefits nor sought additional medical advice.

¶ 73 Hartford further argues that it has not denied any payment from which to award a penalty or attorney fees. This is incorrect. As noted above, on November 22, 2011, Hartford wrote to Engle and informed her that Hartford was denying further medical treatment regarding Engle's claim. But for Hartford's denial, there would be no dispute to adjudicate.

¶ 74 I find that Hartford unreasonably denied Engle's claim after her August 11, 2011, fall. Therefore, I conclude that Hartford is liable for Engle's attorney fees and a penalty pursuant to §§ 39-71-611, and -2907, MCA, respectively.

JUDGMENT

¶ 75 The non-work-related fall Engle experienced on August 11, 2011, was not a new injury such that Hartford's liability was terminated in accordance with § 39-71-407(5), MCA (2003).

⁸² Petitioner's Trial Brief at 9.

⁸³ *S.L.H.*, ¶¶ 61, 66.

⁸⁴ *S.L.H.*, ¶ 65.

¶ 76 Engle did not suffer a non-work-related injury to her left elbow such that Hartford is not liable for any compensation or medical benefits caused by the subsequent non-work-related injury pursuant to § 39-71-407(5), MCA (2003).

¶ 77 Any ongoing problems Engle has with her left elbow are a consequence of the 2005 occupational disease claim.

¶ 78 Hartford has been unreasonable in the adjustment of this claim such that the Court shall impose a 20% penalty and award Engle her attorney fees.

¶ 79 Pursuant to ARM 24.5.348(2), this Judgment is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

DATED in Helena, Montana, this 31st day of December, 2013.

(SEAL)

JAMES JEREMIAH SHEA
JUDGE

c: J. Kim Schulke
Kelly M. Wills
Submitted: October 15, 2013