IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2007 MTWCC 17

WCC No. 2006-1662

LINDA JOHNSON

Petitioner

vs.

MHA WORKERS' COMP TRUST

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Appealed to Supreme Court June 21, 2007
Appeal Dismissed on Appellant's Motion 10/19/07

Summary: Petitioner petitioned the Court relative to two claims for benefits. The first relates to an injury that allegedly occurred on February 18, 2005. The second relates to an injury that allegedly occurred on October 4, 2005.

Held: Regarding her February 18, 2005, claim, Petitioner has not met her burden of proof that she suffered a compensable injury. The Court concludes Petitioner suffered a compensable injury to her right shoulder and arm on October 4, 2005.

Topics:

> **Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-407.** Where Petitioner's claim is governed by the post-1995 version of § 39-71-407, MCA, her reliance on *Moffett v. Bozeman Canning,* 95 Mont. 347, 26 P.2d 973 (1933), *Plainbull v. Transamerica Ins. Co.,* 264 Mont. 120, 870 P.2d 76 (1994), and *Prillaman v. Community Medical Center,* 264 Mont. 134, 870 P.2d 82 (1994), is largely misplaced. Unlike these pre-1995 cases, Petitioner has to establish with objective medical findings that an injury occurred.

Injury and Accident: Objective Medical Evidence of. Where Petitioner's claim is governed by the post-1995 version of § 39-71-407, MCA, her reliance on *Moffett v. Bozeman Canning,* 95 Mont. 347, 26 P.2d 973 (1933), *Plainbull v. Transamerica Ins. Co.,* 264 Mont. 120, 870 P.2d 76 (1994), and *Prillaman v. Community Medical Center,* 264 Mont. 134, 870 P.2d 82 (1994), is largely misplaced. Unlike these pre-1995 cases, Petitioner has to establish with objective medical findings that an injury occurred.

Injury and Accident: Objective Medical Evidence of. Taking the evidence as a whole – the objective findings that an injury occurred, the fact that Petitioner's type of injury can be caused by lifting, the absence of any symptoms before the date of injury, and the immediate onset of symptoms at the time of the incident – the Court concludes it is more probable than not that Petitioner's October 4, 2005, injury occurred from activities arising out of and in the course of her employment at Community Medical Center.

Causation: Injury. Taking the evidence as a whole – the objective findings that an injury occurred, the fact that Petitioner's type of injury can be caused by lifting, the absence of any symptoms before the date of injury, and the immediate onset of symptoms at the time of the incident – the Court concludes it is more probable than not that Petitioner's October 4, 2005, injury occurred from activities arising out of and in the course of her employment at Community Medical Center.

Injury and Accident: Aggravation: Generally. Taking the evidence as a whole – the objective findings that an injury occurred, the fact that Petitioner's type of injury can be caused by lifting, the absence of any symptoms before the date of injury, and the immediate onset of symptoms at the time of the incident – the Court concludes it is more probable than not that Petitioner's October 4, 2005, injury occurred from activities arising out of and in the course of her employment at Community Medical Center.

¶ 1 The trial in this matter was held on January 16, 2007, in Missoula, Montana. Petitioner Linda Johnson was present and represented by Norman L. Newhall. Respondent MHA Workers' Comp Trust was represented by Chad R. Vanisko.

¶ 2 Exhibits: Exhibits 1 through 33 were admitted without objection.

¶ 3 Witnesses and Depositions: The depositions of Petitioner, Lennard S. Wilson, M.D., Richard A. A. Day, M.D., Robert J. Vincent, M.D., and Dana Headapohl, M.D., were taken and submitted to the Court. Petitioner and Paula Vidrine were sworn and testified at trial.

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

¶ 4a Whether Petitioner's February 18, 2005, and October 4, 2005, claims should be accepted.

¶ 4b Whether Petitioner is entitled to indemnity benefits, retroactive and prospective, as a result of her claims.

¶ 4c Whether Petitioner is entitled to medical benefits, retroactive and prospective, as a result of her claims.[1]

FINDINGS OF FACT

¶ 5 Petitioner resides in Missoula, Missoula County, Montana.[2]

¶ 6 Petitioner was sworn and testified at trial. This Court finds her testimony credible.

¶ 7 At all times pertinent to this case, Petitioner was a Certified Nursing Assistant (CNA) at Community Medical Center (CMC) in Missoula, Montana.[3]

¶ 8 Petitioner worked on the "medical-surgical" floor at CMC. The patients treated on this floor were those suffering from severe physical disabilities as well as patients recovering from surgery. Her work included very heavy lifting, including transfers, bathing, showering, toileting, repositioning, and assisting patients in and out of bed, including quadriplegics, paraplegics, elderly stroke victims, and persons just out of surgery.[4] There were up to 36 patients on the floor and Petitioner was often the only CNA. Nurses were frequently too busy to assist and, for example, if a patient needed to go to the bathroom, Petitioner often did the necessary transfers without help.[5]

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[1] Final Pretrial Order at 2.

[2] Trial Test.

[3] Ex. 1; Ex. 2; Trial Test.

[4] Petitioner Dep. 22:4-13; Trial Test.

[5] Petitioner Dep. 22:16 - 23:4; Trial Test.

February 18, 2005, Claim

¶ 9 On February 18, 2005, Petitioner filled out an Incident Report reporting conditions in her left arm, neck, and shoulder. In that report she recorded February 3, 2005, as the incident date, but also noted, "I don't know a specific incident where this happened . . . ."[6]

¶ 10 On January 19, 2005, Petitioner reported to First Care with the onset of pain and burning in her left humerus. She did not recall any traumatic injury. X-rays showed severe osteoporosis. The pain was "predominately in the posterior aspect of her arm and her elbow region" with "some myofascial tenderness and spasm in her trapezius area" of her left shoulder.[7]

¶ 11 According to medical records from Dr. Dana C. Headapohl, Petitioner stated that on January 20, 2005, while not at work, she woke up with left arm pain.[8] In other medical records from First Care and Dr. Raymond A. Howard, Petitioner claimed an onset of pain and burning in her left humerus since about January 16, 2005. She did not recall any traumatic injury as causing the problem.[9]

¶ 12 Dr. Howard referred Petitioner to Dr. Richard A.A. Day, who diagnosed Petitioner with left C7 radiculopathy.[10]

¶ 13 On March 22, 2005, Dr. Day performed an anterior fixation and interbody fusion at the C6-7 interspace.[11]

¶ 14 Petitioner was advised on February 28, 2005, that her claim was being denied as an accident because her claim did not meet the statutory definition of an accident, and that further investigation was underway to determine whether she suffered from an occupational disease related to her employment.[12]

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[6] Ex. 1.

[7] Ex 24 at 6.

[8] Ex 19 at 1.

[9] Ex. 24 at 6; Trial Test.

[10] Ex. 22 at 47-48.

[11] Ex. 22 at 9-12.

[12] Ex. 8.

¶ 15 In response to inquiries made by Respondent, Dr. Day noted in a March 28, 2005, letter that he was unable to say with any degree of certainty whether Petitioner' symptoms were related to her work. Specifically Dr. Day noted:

> My own recollection of this case and review of the notes do not point to any specific work-related accident or injury. In general, I do not feel that [an] occupation as a CNA necessarily predisposes patients to advanced degenerative disk disease, and therefore I cannot, with any degree of certainty, attribute her symptoms and subsequent requirement for surgery to be directly related to her work.[13]

¶ 16 On May 25, 2005, Petitioner was referred by the Montana Department of Labor and Industry to Dr. Headapohl for an independent medical examination (IME) to determine whether Petitioner was suffering from an occupational disease.[14]

¶ 17 Dr. Headapohl determined that the proximate causation test for an occupational disease was not met, and therefore, Petitioner was not suffering from an occupational disease as a result of her employment.[15]

¶ 18 In her deposition testimony, Dr. Headapohl testified that, in her opinion, Petitioner's job duties would not predispose her to cervical spine injuries nor cause aggravation of preexisting conditions.[16] "The neck condition was not consistent with cumulative trauma from her job. The types of pressures and stresses that nursing staff get are in the L5-S1 region; they don't occur in the neck."[17]

October 4, 2005, Claim

¶ 19 In another Incident Report signed by Petitioner on October 4, 2005, Petitioner reported problems with her right arm and shoulder. In the description portion of the report she stated, "I helped a [patient] into bed. The back of the bed was up. I reached across

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[13] Ex. 22 at 36.

[14] Ex. 19 at 1.

[15] Ex. 19 at 12-13.

[16] Headapohl Dep. 15:4-14.

[17] Headapohl Dep. 15:13-16.

the bed to put the bed down and felt something strange in my [right] shoulder. Now it feels like it's moving in there."[18]

¶ 20 Drs. Day and Wilson agree that the February 18, 2005, condition and the October 4, 2005, incident are not related.[19]

¶ 21 Petitioner was seen in the emergency room on October 4, 2005, for right shoulder pain. She was prescribed medication for pain and muscle spasm and placed on work restrictions through October 11, 2005.[20] She was not to lift over 5 pounds and was restricted from any pushing or pulling.[21]

¶ 22 On October 5, 2005, Petitioner's supervisor wrote the following comments on the Incident Report:

> [Petitioner] was helping very heavy [patient] back to bed over [400 pounds]. Lift[ed] legs into bed, reached across bed to adjust height, felt something in shoulder.[22]

¶ 23 On October 7, 2005, CMC Employee Health Coordinator Kitty Strowbridge reported to Respondent that Petitioner advised she was "taking care of a patient who was very heavy. She was assisting this patient back to bed who weighed in excess of 400 [pounds]. She lifted the patients [sic] legs up onto the bed, reached across the bed to the opposite rail to lower the head of the bed using the controls that were on the other side of the bed. When she did that she felt something funny in her shoulder. She reported this to Christy Odlin the Charge Nurse that night."[23]

¶ 24 After the October 4, 2005, incident Ms. Strowbridge inquired of Petitioner whether she was aware of CMC's lifting policy.[24] Petitioner testified at trial that she believed that

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[18] Ex. 2.

[19] Wilson Dep. 24:18-25; Day Dep. 27:3-15.

[20] Ex. 20 at 1, 4.

[21] Ex. 20 at 3.

[22] Ex. 2 at 1.

[23] Ex. 6 at 4.

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

CMC's lifting policy required that two people be used when lifting more than 100 pounds and that a mechanical lift was to be used when lifting more than 150 pounds.[25]

¶ 25 Petitioner reported to First Care on October 11, 2005, that she continued to have right shoulder pain and that she hurt her right shoulder lifting a patient.[26]

¶ 26 Dr. Robert J. Vincent examined Petitioner on October 11, 2005. He characterized Petitioner's condition as a lifting injury and imposed work restrictions including a 10-pound lift and carry limit, no reaching or working above the chest with the right arm, and no patient transfers/lifting/position changing.[27]

¶ 27 Dr. Vincent's clinic note advised:

> She just assisted a patient into bed and lifted her legs onto the bed and reached across the bed with her right arm to pick up the bed control. As she did so she felt a pop or a snap in her upper back area and immediate pain. She reported the injury but did not feel it was severe enough to warrant medical treatment at the time. She continued to work. She was pushing a wheelchair with a patient down the hall and noted that she was particularly weak and having a lot of pain doing that. She therefore decided she would be seen at First Care.[28]

¶ 28 Dr. Vincent's physical exam lists Petitioner's weight at 98 pounds and he observed that she is a "very thin, poorly developed muscle-wise woman . . . ."[29] At trial, Petitioner testified that she weighs 98 pounds and is five-feet, two inches tall.[30]

¶ 29 On October 11, 2005, Dr. Vincent noted "obvious winging of the right scapula that is quite prominent." He concluded that the "most likely etiology [of the scapular winging] is long thoracic nerve injury. This can be seen with trauma, though less likely with the minor trauma she had, and more commonly with more severe trauma like a motor vehicle

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[25] Trial Test.

[26] Ex. 25 at 2.

[27] Ex 21 at 18.

[28] Ex. 21 at 14.

[29] Ex. 21 at 15.

[30] Trial Test.

accident."[31] Dr. Vincent suggested the possibility that the scapular winging on the right could be related to the surgery for the left-sided C7 radiculopathy. Accordingly, he referred Petitioner to Dr. Day for consultation regarding this issue and concluded "Work-relatedness of the scapular winging and long thoracic nerve injury is not yet established, however certainly if it were pre-existing[,] her current symptoms were related to the injury on 10/4/05 and therefore might be considered aggravation of a preexisting condition."[32] Dr. Vincent further stated that Petitioner was not medically stationary and a permanent impairment had not been determined.[33]

¶ 30 Dr. Vincent saw Petitioner again on October 25, 2005, to follow-up for scapular pain. Petitioner had attempted to return to light-duty work the previous week and reported to Dr. Vincent that the work was aggravating her pain and limiting her activities. He noted that Petitioner had an appointment to see Dr. Day the following Monday to determine whether the scapular winging secondary to long thoracic nerve palsy "could be a consequence of her surgery or surgical procedure or positioning on the surgical table."[34]

¶ 31 On October 25, 2005, Respondent denied liability for the October 4, 2005, claim, noting that it would again review its denial after receipt of Dr. Day's report and opinion.[35] That same day, Respondent wrote Dr. Day requesting his opinion as to the causation of the scapular winging and long thoracic nerve injury. With this letter, Respondent included medical records from Dr. Vincent.[36]

¶ 32 On October 31, 2005, Dr. Day wrote to Dr. Vincent that he had seen Petitioner and stated she was injured "approximately four weeks ago while stretching across a bed and helping to lift a patient[,] she felt a strain in her right shoulder." He conducted a neurosurgery evaluation which revealed "symptoms most consistent with brachial plexopathy." He referred Petitioner to Dr. Lennard S. Wilson for nerve conduction studies to confirm the diagnosis. Dr. Day did not suspect a radicular cervical lesion.[37]

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[31] Ex. 21 at 16.

[32] Ex. 21 at 17.

[33] *Id*.

[34] Ex. 21 at 12.

[35] Ex. 11.

[36] Ex. 12.

[37] Ex. 22 at 4.

¶ 33 On October 31, 2005, Dr. Day took Petitioner off work pending an evaluation by Dr. Wilson.[38]

¶ 34 On November 8, 2005, Dr. Vincent saw Petitioner again. Dr. Vincent stated that, according to Petitioner, Dr. Day did not feel her shoulder and upper back injury was related to her prior surgery or disk disease. Rather, Petitioner related that Dr. Day felt she "had a problem with the brachial plexus, which is consistent with the diagnosis of a long thoracic nerve injury." Dr. Vincent stated that the cause of her symptoms was still unclear. He removed Petitioner from work pending the nerve conduction study (EMG) by Dr. Wilson.[39]

¶ 35 Dr. Vincent next saw Petitioner on November 22, 2005. At the time of this visit, the consult with Dr. Wilson had not taken place. Nevertheless, Dr. Vincent characterized the potential causation as an idiopathic neuritis-type illness that he did not think was "substantially caused by her injury. However, Dr. Vincent also stated that he needed Dr. Wilson's consultation and EMG to confirm that. Petitioner's "Total Work Removal" status was continued.[40]

¶ 36 The EMG was conducted on December 1, 2005, and demonstrated active denervation of right long thoracic nerve distribution.[41]

¶ 37 Following the EMG, Dr. Wilson issued his report dated December 1, 2005. The history of the condition was obtained from Petitioner and discussion with Dr. Vincent, as well as previous notes from Dr. Day.[42] He recited that Petitioner was assisting a patient in bed and "simply leaned over with the right arm extending across the bed to flick on controls. The patient states that her right arm suddenly felt weak. She had an aching sensation in her right shoulder without sensory loss. The patient found that she could not push a wheelchair as she could not stabilize her arm."[43] Dr. Vincent's notes were not available.[44] Dr. Wilson conducted a physical exam which was essentially normal except for Petitioner's ongoing symptoms. In his assessment, he advised that there was an "abrupt onset of right

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[38] Ex. 22 at 31; Ex. 22 at 29.

[39] Ex. 21 at 9-11.

[40] Ex. 21 at 7-8.

[41] Ex. 23 at 8.

[42] Ex. 23 at 7.

[43] *Id*.

[44] *Id*.

shoulder weakness occurring on 10/4/05."[45] He found that no antecedent infection or any type of viral syndrome existed prior to the October 4, 2005, event.[46] His diagnosis was "either traumatic or idiopathic long thoracic nerve injury."[47]

¶ 38 On December 8, 2005, Dr. Vincent again saw Petitioner. He agreed with Dr. Wilson's assessment and advised her that she "has a probable idiopathic nerve palsy." "He [Dr. Wilson] thinks that it is unlikely that the activity of reaching across a bed for a TV control or a bed control would be significant enough trauma to produce a nerve injury such as this."[48] Later in the same note Dr. Vincent noted, "[b]oth Dr. Wilson and myself believe that the description of the activity when she alleges her symptoms began would certainly be very unusual for that movement to be adequate trauma to result in nerve injury. I suspect she had a slowly insidious onset of her symptoms and the pain may have been worsened or triggered by that, though I doubt whether the actual palsy of the nerve resulted from the activity at work. I think basically the underlying cause is not work related."[49] He confirmed, "[C]urrently she is not able to return to her position as a CNA, and the long-term outcome and prognosis is unclear at this point."[50]

¶ 39 Also on December 8, 2005, Dr. Vincent wrote to Raymond Howard, D.O. In this letter, Dr. Vincent again characterized the onset of symptoms as resulting from "reaching across a bed to retrieve a TV control and suddenly suffering severe right upper back and shoulder pain," and stated that the "possible trauma she suffered by reaching across a bed to retrieve a control was not likely to be significant enough to result in a brachial plexus or nerve injury."[51]

¶ 40 On December 12, 2005, Dr. Day responded to Respondent's October 25, 2005, letter.[52] Dr. Day advised that the scapular winging was, "at least temporally, if not causally, related to a work-related injury, since it does not appear to be a preexisting condition and

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[45] Ex. 23 at 4.

[46] Ex. 23 at 4, 7.

[47] Ex. 23 at 4.

[48] Ex. 21 at 3.

[49] *Id*.

[50] Ex. 21 at 4.

[51] Ex. 21 at 1-2.

[52] Ex. 22 at 3.

no other offending etiologies have been identified. Therefore, I would consider her current injury to be work related."[53]

¶ 41 On January 10, 2006, Respondent wrote to Dr. Wilson. In this letter, Respondent noted that causation was not specifically addressed in Dr. Wilson's report and requested clarification.[54]

¶ 42 In response to Respondent's request, Dr. Wilson replied on January 12, 2006, and offered his impression that the Petitioner's condition was "unrelated to the activity she performed at work, namely reaching across a bed, helping an individual into bed, without trauma, lifting, unusual twisting, etc."[55] He stated that long thoracic nerve palsy is "usually an idiopathic or post-infectious problem, but on rare occasions can be post-traumatic."[56]

¶ 43 On January 23, 2006, Respondent provided Dr. Wilson with a copy of the incident report that was omitted from the January 10, 2006, correspondence. On February 20, 2006, Respondent contacted Dr. Wilson's office and was advised that he had the incident report and his opinion was unchanged.[57]

¶ 44 On February 22, 2006, Respondent wrote to Dr. Day and asked if he agreed with Dr. Wilson's January 12, 2006, letter that "[l]ong thoracic nerve palsy is usually an idiopathic or post-infectious problem, but on rare occasions can be post-traumatic."[58] Respondent further inquired whether it was still Dr. Day's opinion that the long thoracic nerve palsy was a result of Petitioner's reported incident on October 4, 2005.[59]

¶ 45 On February 27, 2006, Dr. Day sent Respondent a handwritten reply stating, "I defer to Dr. Wilson and Dr. Vincent's opinion on this issue based on results [of] further testing performed."[60]

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[53] *Id*.

[54] Ex. 13.

[55] Ex. 23 at 1.

[56] *Id*.

[57] Ex. 14.

[58] Ex. 15 at 1.

[59] *Id*.

[60] Ex. 22 at 1.

¶ 46 Dr. Day testified that although infrequent, the type of lifting maneuver that could result in a stretch injury to the long thoracic nerve would be "a person trying to maybe lift more than they could or should whereby the weight overpowers the extremity and results in a stretch in the muscles and the nerves in the arm."[61] In considering whether lifting was a cause of Petitioner's injury, Dr. Day testified that one would need to consider what was the position of the person lifting, how much were they lifting, what was involved, and was there anybody assisting them.[62]

¶ 47 Dr. Day acknowledged it was possible that attempting to lift 100 pounds with arms outstretched could cause the type of injury observed in Petitioner.[63] Dr. Day included weightlifting among the sports-related activities that could injure the long thoracic nerve and acknowledged that "the list could be endless of what the scenarios might develop whereby you could potentially injure this nerve."[64] Dr. Day further acknowledged that there could be a brief delay between the injury and the onset of symptoms.[65]

¶ 48 When asked if it might be "significant" to the history of Petitioner's injury that "she had, only a few moments before reaching across the bed, been lifting a very heavy patient – actually the legs of a very heavy patient, a lady that was nearly 400 pounds," Dr. Day testified that the activity "sounds like a heavy exertional activity" and if one is trying to determine "how she could have injured this nerve, I think all [that information is] very important . . . ."[66]

¶ 49 Dr. Day agreed that the symptoms of Petitioner's condition first appeared on October 4, 2005, as an abrupt onset while she was working.[67]

¶ 50 Regarding other possible causes of the injury to the long thoracic nerve, Dr. Day agreed that cervical radiculopathy was ruled out.[68] Dr. Day also ruled out the prior surgery

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[61] Day Dep. 30:12-15.

[62] Day Dep. 29:7-12.

[63] Day Dep. 30:24 - 31:8.

[64] Day Dep. 32:3-9.

[65] Day Dep 32:10-19.

[66] Day Dep. 32:20 - 34:13.

[67] Day Dep. 35:4-14; 36:15 - 37:8.

[68] Day Dep. 39:11-22.

approximately six or seven months earlier for symptoms in the left upper extremity as a cause of Petitioner's October 4, 2005, injury.[69]

¶ 51 Dr. Day testified that heavy lifting, depending upon the mechanism of the lifting, can cause long thoracic nerve injury.[70]

¶ 52 When asked if it would have been relevant to his inquiry to know the type of lifting that Petitioner had been engaged in right before the symptoms manifested, Dr. Day testified that "it's important to have as much detail as possible regarding the type of activity she was involved with in and around the time she reported the injury."[71]

¶ 53 Dr. Day agreed that the EMG studies conducted by Dr. Wilson are an objective medical finding of injury to the long thoracic nerve.[72]

¶ 54 Dr. Vincent testified that there are three causes of long thoracic nerve injuries, namely, trauma that can be either direct trauma or a stretching kind of trauma, infection, and an idiopathic cause.[73]

¶ 55 When questioned regarding infectious and idiopathic causes, Dr. Vincent testified that "infectious and idiopathic are probably all in the same group. [I]diopathic basically means we don't truly know . . . . [W]e're postulating that it's inflammatory, infectious, but we sort of just truly don't know the pathology of it . . . ."[74]

¶ 56 Dr. Vincent acknowledged that scapular winging often results from insults to the long thoracic nerve; that the lengthy course of the nerve presents multiple anatomic locations for potential injury; that the nerve itself is small in diameter and fragile appearing in contrast to adjacent nerves of the brachial plexus; that the nerve can be injured through direct compression by the scalene muscle during contraction while exercising; and that a history of lifting heavy weights is present in many patients suffering from the injury.[75]

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[69] Day Dep. 39:23 - 40:9.

[70] Day Dep. 40:17-20.

[71] Day Dep. 45:3-13.

[72] Day Dep. 41:7-11.

[73] Vincent Dep. 8:19 - 9:10.

[74] Vincent Dep. 47:7 - 48:8.

[75] Vincent Dep. 49:13 - 51:15.

¶ 57 In the history portion of his clinic note of October 11, 2005 (erroneously dated October 12, 2005), Dr. Vincent recited, "[S]he just assisted a patient into bed and lifted her legs onto the bed and reached across the bed with her right arm to pick up the bed control."[76] Later in the same note Dr. Vincent characterized the incident on October 4, 2005, as a "relatively trivial injury with simply reaching across a bed"[77] and in his deposition testimony referred to the activity of "reaching across the bed for the bed control or TV control or whatever it was."[78]

¶ 58 Petitioner had no evidence of problems with scapular winging prior to the events at work on October 4, 2005.[79]

¶ 59 Dr. Vincent suspected that Petitioner experienced an insidious onset and that her pain may have been worsened or triggered by her reaching across the bed.[80] Dr. Vincent also testified that he researched medical authorities regarding the etiology of injury to the long thoracic nerve. The case studies he reviewed included an injury to an individual who noticed a sharp pain in his right scapular region when he was clearing tables at work. This case study acknowledged the possibility that the injury was caused by a stretch injury while lifting at work and that the temporal relationship of acute pain while waiting tables would support this diagnosis, although the presentation was atypical.[81]

¶ 60 With respect to Petitioner's injury, Dr. Vincent testified that there is no objective medical evidence to demonstrate or show an inflammation or infection of her long thoracic nerve.[82]

¶ 61 Dr. Wilson was not Petitioner's treating physician. He saw her on one occasion for her right shoulder symptoms.[83]

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[76] Ex. 21 at 14.

[77] Ex. 21 at 16.

[78] Vincent Dep 8:15-18.

[79] Vincent Dep. 54:16-21; Trial Test.

[80] Ex. 21 at 3-4; Vincent Dep. 74:8 - 75:17.

[81] Vincent Dep. 25:8-22; Vincent Dep. Ex. 8.

[82] Vincent Dep. 76:6-9.

[83] Wilson Dep. 25:1-20.

¶ 62 Dr. Wilson agreed that scapular winging often results from insults to the long thoracic nerve.[84]

¶ 63 Dr. Wilson acknowledged that traumatic injury to the long thoracic nerve does not occur in most patients from strenuous upper extremity activity or lifting heavy weights.[85]

¶ 64 Dr. Wilson maintained that he had no evidence that Petitioner had been weightlifting.[86] He believed that the evidence indicated only "a lady who reached across a bed and noticed her arm was weak."[87] When repeatedly asked by Petitioner's counsel in the deposition whether lifting can cause Petitioner's type of injury, Dr. Wilson refused to acknowledge any other history of the incident except that "this lady reached across the bed . . . ."[88]

¶ 65 Dr. Wilson conceded that it is "very unlikely but possible" that lifting a heavy dead weight with your arms outstretched could cause the injury.[89] Moreover, Dr. Wilson agreed that the findings of the EMG that was conducted on Petitioner constitute an objective medical finding of injury to the long thoracic nerve.[90]

¶ 66 Regarding other possible causes, Dr. Wilson ruled out hereditary myopathy as a potential cause.[91]

¶ 67 Dr. Wilson concluded that the etiology of Petitioner's injury is either traumatic or idiopathic.[92]

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[84] Wilson Dep. 28:8-11.

[85] Wilson Dep. 31:25 - 32:5.

[86] Wilson Dep. 38:12-13.

[87] Wilson Dep. 38:12-15.

[88] Wilson Dep. 39:19 - 41:24.

[89] Wilson Dep. 42:2-4.

[90] Wilson Dep. 44:16-19.

[91] Wilson Dep. 33:5-8.

[92] Wilson Dep. Ex. 2 at 3; Wilson Dep. 45:18-25.

¶ 68 Dr. Wilson's opinion that the origin of the injury was more likely idiopathic, rather than traumatic, was based on the "history."[93] The only history on which Dr. Wilson was relying, however, was that Petitioner "was assisting a patient in bed and simply leaned over with the right arm extending across the bed to flick on the control."[94] Dr. Wilson conceded, however, "[I]f this lady had told me that I just lifted 200 pounds of patients and did this, then that would have been in the report and we would have had a different discussion."[95]

¶ 69 Dr. Wilson explained his opinion as follows:

> [T]here's a lot in medicine we don't understand. It's called idiopathic. Why do people get certain diseases? I see them all day long. To try to make logic out of something where there is good clinical evidence that we don't know what causes these things . . . . And what is to be intellectually honest to say we don't have causation and unless there's something obvious then it falls into this group.[96]

¶ 70 Petitioner sustained a partial wage loss as a result of her condition from October 4, 2005, to October 31, 2005. Petitioner has suffered a complete wage loss as a result of her condition from October 31, 2005, to the present.[97]

CONCLUSIONS OF LAW

¶ 71 The claims at issue in this case are governed, respectively, by the 2003 and 2005 versions of the Montana Workers' Compensation Act since those were the laws in effect at the time of Petitioner's industrial accidents.[98]

¶ 72 Petitioner bears the burden of proving by a preponderance of the evidence that she is entitled to the benefits she seeks.[99]

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[93] Wilson Dep. 48:10-15.

[94] Wilson Dep. 48:3 - 49:5.

[95] Wilson Dep. 50:14-18.

[96] Wilson Dep. 52:9-20.

[97] Trial Test.

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

[99] *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).

¶ 73 Both of Petitioner's claims present issues of the nature and amount of evidence necessary to support claims for compensation under the Workers' Compensation Act. In this regard, Petitioner's burden of proof is set forth in § 39-71-407(2), MCA, which provides as follows:

> (2)(a) An insurer is liable for an injury, as defined in 39-71-119, if the injury is established by objective medical findings and 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.
>
> (b) Proof that it was medically possible that a claimed injury occurred or that the claimed injury aggravated a preexisting condition is not sufficient to establish liability.[100]

¶ 74 Objective medical findings means medical evidence, including diagnostic evidence, substantiated by clinical findings.[101] Dr. Headapohl testified that imaging studies of Petitioner and findings on physical examination by Dr. Day constituted objective medical findings supporting the diagnosis of a herniated disk and left-sided C7 radiculopathy. With respect to the February 18, 2005, claim, the Court concludes that Petitioner has established by objective medical findings either that an injury has occurred or an injury has aggravated a preexisting condition.

¶ 75 Drs. Day and Wilson both testified that Dr. Wilson's EMG studies of Petitioner's right shoulder symptoms constituted objective medical findings establishing an injury to the long thoracic nerve.[102] With respect to the October 4, 2005, claim, the Court therefore concludes that Petitioner has established by objective medical findings that the claimed injury has occurred.

¶ 76 Section 39-71-407(2), MCA, also requires that Petitioner establish that a claimed injury occurred or aggravated a preexisting condition on a more-probable-than-not basis. Subparagraph (2)(b) goes on to specify that proof of medical possibility is not sufficient to establish liability.

¶ 77 Finally, § 39-71-407(7), MCA provides:

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[100] § 39-71-407(2), MCA.

[101] § 39-71-116(19), MCA.

[102] Day Dep. 41:4-11; Wilson Dep. 44:16-19.

> An employee is not eligible for benefits payable under this chapter unless the entitlement to benefits is established by objective medical findings that contain sufficient factual and historical information concerning the relationship of the worker's condition to the original injury.

¶ 78 In interpreting the pertinent provisions of § 39-71-407, MCA, Petitioner relies principally on a series of cases beginning with *Moffett v. Bozeman Canning*[103] and culminating with *Plainbull v. Transamerica Insurance Company*[104] and *Prillaman v. Community Medical Center*.[105] In light of the amendments to this statute in 1995, Petitioner's reliance on these cases is largely misplaced.

¶ 79 All of the cases Petitioner relied upon were decided prior to the amendments to § 39-71-407, MCA, in 1995. As such, their analysis and interpretation of this statute is of limited utility to this Court's determination, which must apply the post-1995 version of § 39-71-407, MCA. The Montana Supreme Court recognized as much in *Matthews v. State Compensation Insurance Fund*,[106] when it rejected an injured worker's reliance on *Plainbull* as it pertained to a post-1995 injury.[107]

¶ 80 In rejecting the claimant's reliance on *Plainbull*, the Court in *Matthews* specifically noted:

> [I]n 1995, the legislature amended § 39-71-407, MCA, to provide in pertinent part that "[a]n insurer is liable for an injury, as defined in 39-71-119, *if the injury is established by objective medical findings* and if the claimant establishes that it is more probable than not.... " Section 39-71-407(2)(a), MCA (1995) (emphasis added). In addition, the legislature inserted the requirement that "[a]n employee is not eligible for benefits payable under this chapter unless the entitlement to benefits is established by objective medical findings that contain sufficient factual and historical information concerning the relationship of the workers' condition to the original injury." Section 39-71-407(6), MCA (1995).[108]

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[103] *Moffett v. Bozeman Canning*, 95 Mont. 347, 26 P.2d 973 (1933).

[104] *Plainbull v. Transamerica Ins. Co.*, 264 Mont. 120, 870 P.2d 76 (1994).

[105] *Prillaman v. Community Medical Cent.*, 264 Mont. 134, 870 P.2d 82 (1994).

[106] *Matthews v. State Compensation Ins. Fund*, 296 Mont. 76, 985 P.2d 741 (1999).

[107] *Id.* at ¶ 16.

[108] *Id.*

¶ 81 The Court summarized the new statutory scheme as follows: "Thus, unlike the claimant in *Plainbull*, Matthews had to establish with objective medical findings that an injury occurred."[109]

¶ 82 The Court must determine within the framework of the post-1995 version of § 39-71-407, MCA, whether either of Petitioner's claimed injuries are compensable.

February 18, 2005, Left-Sided Claim

¶ 83 The Court has reviewed all of the evidence, including the medical evidence, testimony at trial, and the indirect evidence relating to Petitioner's left-sided claim. The objective medical findings establish that Petitioner has suffered an injury, namely, disk herniation and left-sided C7 radiculopathy, which has aggravated a preexisting condition. However, viewed in its totality, the Court concludes the evidence is too scant to meet Petitioner's burden of proving, on a more-probable-than-not basis, that she suffered an injury which aggravated a preexisting condition in the course and scope of her employment. Significantly, Petitioner stated in the Incident Report that she was unaware of a specific incident to which she could attribute her injuries. Furthermore, no medical testimony was presented establishing that Petitioner suffered from an occupational disease. Therefore, Petitioner has failed to establish that she is entitled to benefits for her February 18, 2005, claim.

October 4, 2005, Right-Sided Claim

¶ 84 Having considered all of the evidence, including the medical evidence and the circumstantial evidence, relating to Petitioner's October 4, 2005, claim, the Court is persuaded that Petitioner sustained a work-related injury on October 4, 2005. The medical evidence establishes that the long thoracic nerve can be injured by heavy lifting. With respect to other potential causes of injury to the long thoracic nerve, Petitioner's left-sided C7 radiculopathy and subsequent surgery were ruled out. No evidence exists of any right shoulder condition prior to October 4, 2005, which may explain her symptoms. No history of infection, vaccination, or systemic illness explains the injury. The doctors agree that the cause of Petitioner's injury could be either traumatic or idiopathic. They concede that trauma includes stretching injuries from lifting. They concede that the alternative diagnosis, idiopathic, means they do not know the etiology. From the medical evidence, the Court concludes that there is a strong possibility that Petitioner's work activity on October 4, 2005, was a cause of her injury. In the absence of other corroborating evidence, mere medical possibility is not sufficient for Petitioner to prevail. In this case, however, other evidence is present in support of Petitioner's claim.

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[109] *Id.*

¶ 85 Immediately before the onset of Petitioner's symptoms, she had been engaged in very heavy lifting while lifting the legs of a 400-pound patient into bed. In view of the medical testimony and Petitioner's description of the event, which the Court finds to be credible, the Court is convinced this lifting activity was the likely cause of Petitioner's injury. Immediately after her shift on October 4, 2005, Petitioner sought help for her symptoms. Petitioner also promptly advised her supervisor about the lifting activity in which she was engaged at the time of her injury. In fact, Petitioner's lifting activity was of enough significance that it prompted her employer to remind her about CMC's lifting policies. This leads the Court to conclude that Petitioner's employer believed her lifting activity was implicated in causing her injury. Otherwise, the reminder about lifting policies makes little sense.

¶ 86 Petitioner's symptoms were characterized as "abrupt onset" while she was working. As noted by Dr. Vincent, case studies disclosed incidents of injury to the long thoracic nerve following heavy lifting.

¶ 87 Also significant to the Court's determination is the temporal relationship between Petitioner's work activity and the onset of symptoms. There is absolutely no evidence of Petitioner experiencing any problems with her right shoulder prior to her work activity on October 4, 2005. The work activity in which Petitioner was engaged at the time of her injury was heavy, awkward lifting which the doctors acknowledge can cause injury to the long thoracic nerve. In reaching their initial conclusions, the Court believes Drs. Vincent and Wilson relied upon an inaccurate and abbreviated history of Petitioner's activities on the day of the accident. Neither of them acknowledged that immediately before the onset of symptoms, Petitioner had been engaged in heavy lifting. Instead, Dr. Vincent described Petitioner's activities as simply "reaching across the bed" and Dr. Wilson accepted this history. Dr. Wilson acknowledged that if he had known Petitioner had been engaged in heavy lifting, his report might have been different. Dr. Day observed that heavy lifting by Petitioner on the day of the incident would be significant to her history and should have been subject to further inquiry.

¶ 88 Taking the evidence as a whole — the objective findings that an injury occurred, the fact that this type of injury can be caused by lifting, the absence of any symptoms before the event of October 4, 2005, and the immediate onset of symptoms at the time of the incident — the Court concludes it is more probable than not that Petitioner's October 4, 2005, injury occurred from activities arising out of and in the course of her employment at CMC.

JUDGMENT

¶ 89 Respondent is not liable for Petitioner's February 18, 2005, claim.

¶ 90 Respondent is liable for Petitioner's October 4, 2005, claim.

¶ 91 Petitioner is entitled to indemnity and medical benefits, retroactive and prospective, as a result of her October 4, 2005, claim.

¶ 92 Petitioner is awarded her costs.

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

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

DATED in Helena, Montana, this 22nd day of May, 2007.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Norman L. Newhall
Chad R. Vanisko
Submitted: January 16, 2007