

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2012 MTWCC 14

WCC No. 2011-2735

LOUANN KOCH

Petitioner

vs.

EMPLOYERS' INSURANCE GROUP

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Petitioner was injured in a non-work-related motor vehicle accident in October 2009. In March 2010, she slipped and fell at work but did not believe she suffered any significant injury from the industrial accident. Her back condition worsened and by May 2010, she could not perform her job duties. Petitioner contends that her physical complaints changed after the May 2010 industrial accident and that it caused her current condition. Respondent denied liability for Petitioner's claim, contending that she has not proven that her industrial accident caused her injuries.

Held: Petitioner suffered a compensable injury in the course and scope of her employment and she is entitled to workers' compensation benefits.

Topics:

Evidence: Expert Testimony: Physicians. The IME physician believed Petitioner was embellishing and exaggerating her pain; however, no amount of purported embellishment will cause the objective medical finding of a herniated disk to appear on an MRI. The weight of the evidence preponderates towards Petitioner's contention that her disk herniation was caused by her IA where a diagnostic radiologist opined that the herniated disk should have appeared on a CT scan that predated the Petitioner's IA if it was present then, and a spinal surgeon testified that the mechanism of Petitioner's IA was more probably than not the cause of Petitioner's herniated disk.

Physicians: Conflicting Evidence. Where an IME physician disregarded the objective medical finding of a herniated disk because he believed the claimant exaggerated her complaints of pain, the Court did not find the physician's causation opinions to be entitled to great weight.

Medical Evidence: Objective Medical Findings. The IME physician believed Petitioner was embellishing and exaggerating her pain; however, no amount of purported embellishment will cause the objective medical finding of a herniated disk to appear on an MRI.

Medical Conditions: Herniated Disk. Petitioner was in a car accident five months before her IA. A CT scan of her back at the time did not reveal a herniated disk. When a T12-L1 herniated disk appeared on a post-IA MRI, a diagnostic radiologist opined that given the size of Petitioner's herniation, it should have been evident on the earlier CT scan if it had existed at that time.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-407. Under § 39-71-407(2)(a)(i), MCA, an insurer is liable for an injury if the injury is established by objective medical findings and if the injured worker establishes that it is more probable than not that the claimed injury occurred. The weight of the evidence preponderates towards Petitioner's contention that the objective medical finding of a disk herniation was caused by her IA where a diagnostic radiologist opined that the herniated disk should have appeared on a CT scan that predated the Petitioner's IA if it was present then, and a spinal surgeon testified that the mechanism of Petitioner's IA was more probably than not the cause of her herniated disk.

Proof: Causation. The weight of the evidence preponderates towards Petitioner's contention that the objective medical finding of a disk herniation was caused by her IA where a diagnostic radiologist opined that the herniated disk should have appeared on a CT scan that predated the Petitioner's IA if it was present then, and a spinal surgeon testified that the mechanism of Petitioner's IA was more probably than not the cause of her herniated disk.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-701. Where Petitioner was taken off work by her treating physician in May 2010, and no doctor has opined that she has

reached maximum healing, the Court concluded Petitioner suffered a total loss of wages and is entitled to TTD since May 2010.

Benefits: Temporary Total Disability Benefits.

Where Petitioner was taken off work by her treating physician in May 2010, and no doctor has opined that she has reached maximum healing, the Court concluded Petitioner suffered a total loss of wages and is entitled to TTD since May 2010.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-2905. Under § 39-71-2905, MCA, an appropriate party may petition this Court for a determination of any dispute concerning benefits after satisfying the statutory mediation requirements. Here, the parties have not set forth any “dispute” regarding the calculation of Petitioner’s average weekly wage. With no apparent dispute, the Court will not guess as to the parties’ respective positions and arguments and declines to rule on this issue.

Jurisdiction: Dispute. Under § 39-71-2905, MCA, an appropriate party may petition this Court for a determination of any dispute concerning benefits after satisfying the statutory mediation requirements. Here, the parties have not set forth any “dispute” regarding the calculation of Petitioner’s average weekly wage. If there is no dispute concerning benefits, this Court lacks subject matter jurisdiction.

¶ 1 The trial in this matter occurred on October 5, 2011, in Billings, Montana. Petitioner Louann Koch was present and was represented by Richard J. Martin. Charles G. Adams represented Respondent Employers’ Insurance Group (Employers). Employers’ senior claims adjuster Teri Bohnsach, CPCU, also attended.

¶ 2 Exhibits: I admitted Exhibits 1 through 3 and 5 through 14 without objection.¹ Koch withdrew Exhibit 4 prior to trial.

¶ 3 Witnesses and Depositions: The parties agreed that the depositions of Koch, Scott K. Ross, M.D., Renae Engberg, and Kimberly LeFore, LMP, NCMMT, can be considered part of the record. Koch and Engberg were sworn and testified. On October 13, 2011, the Court participated by telephone in the post-trial deposition of Jeffrey Lindenbaum, M.D. On October 14, 2011, the Court participated by telephone in

¹ After trial, I noted that the parties had not submitted an Exhibit 10. Counsel clarified that Exhibit 10 does not exist.

the deposition of Anthony William Roccisano, DO. Counsel filed the post-trial depositions, which I consider part of the record.

¶ 4 Issues Presented: The Pretrial Order sets forth the following issues:²

Issue One: Whether Petitioner suffered a compensable workers' compensation injury while in the course and scope of her employment on March 5, 2010, at the Muzzle Loader Café in Billings, Montana, either as a new injury or a temporary aggravation or a permanent aggravation of a pre-existing condition.

Issue Two: Whether Petitioner is entitled to medical benefits for medical treatment as prescribed by Dr. Roccisano.

Issue Three: Whether Petitioner is entitled to temporary total disability benefits pursuant to § 39-71-701, MCA, from May 6, 2010, through the present.

Issue Four: What is Petitioner's average weekly wage?

FINDINGS OF FACT

¶ 5 Koch testified at trial. I found her to be a credible witness. Koch worked as a waitress at the Muzzle Loader Café (Muzzle Loader) for approximately six years.³

¶ 6 On October 4, 2009, Koch was involved in a motor vehicle accident. She was a passenger in a vehicle that was struck from behind. Koch testified that she hit her head, her knees hit the dashboard, her left hip hit the console, and her right shoulder hit the passenger door. Koch went to the emergency room of the Billings Clinic Hospital and reported back pain and numbness in her feet. Koch followed up with additional post-accident care at the Billings Clinic.⁴

¶ 7 Koch testified that after the motor vehicle accident, she experienced pain in her tailbone and in her upper neck and shoulders. She also noticed tingling in her fingers and toes and she had shooting pains and muscle spasms that radiated from her tailbone into her hip and leg.⁵

² Pretrial Order, Docket Item No. 24, at 2.

³ Trial Test.

⁴ Trial Test.

⁵ Trial Test.

¶ 8 On October 13, 2009, Eric B. Schubert, M.D., reviewed radiologic reports from Koch's CT scans of the head, cervical spine, and lumbar spine, and her cervical MRI and after examination diagnosed her with cervicgia and lumbago secondary to whiplash mechanism of injury. Dr. Schubert further noted that Koch reported intermittent numbness in her hands and feet. Dr. Schubert suggested a lumbar MRI, but Koch declined. Dr. Schubert took Koch off work for two weeks, pending a follow-up examination.⁶ On October 27, 2009, Dr. Schubert released Koch to return to work without restrictions.⁷

¶ 9 Koch returned to work on October 28, 2009. In November and December of 2009, Koch received chiropractic treatments for her neck and tailbone. Koch testified that she had good days and bad days, and she generally felt better after an adjustment.⁸ Koch began receiving massage therapy from Kimberly LeFore, LMP, NCMMT, on February 25, 2010. Koch testified that she sought this treatment to try to get some "relief" in her shoulders and tailbone.⁹

¶ 10 On March 5, 2010, Koch slipped on a dropped menu at work and fell, landing hard on her tailbone and hitting her right knee. Koch testified that she was not in pain after falling, but she was embarrassed. She went into the restroom to collect herself. One of Koch's supervisors retrieved first aid supplies to help Koch bandage her knees, which she skinned when she fell. Koch then returned to waiting tables and finished her shift.¹⁰

¶ 11 Koch testified that she had some bruising on her right hip and low back after her fall.¹¹ A few days later, Koch began to experience a burning pain in her mid back.¹² Koch testified that she began to have muscle spasms after her slip and fall accident, and she had never had them previously.¹³ However, Koch did not seek medical treatment for her industrial accident. Koch explained that she was already receiving ongoing medical care for her motor vehicle accident injuries.¹⁴

⁶ Ex. 5 at 11-14.

⁷ Ex. 5 at 19.

⁸ Trial Test.

⁹ Trial Test.

¹⁰ Trial Test.

¹¹ Koch Dep. 13:4-8.

¹² Koch Dep. 12:5-14.

¹³ Trial Test.

¹⁴ Trial Test.

¶ 12 On the Monday following Koch's industrial accident, the Muzzle Loader's owner, Renae Engberg, returned to work after a few days off. Koch told Engberg that she had slipped and fallen. Koch testified that she did not file a workers' compensation claim at the time she told Engberg about the industrial accident and she and Engberg did not discuss whether they should file a claim.¹⁵

¶ 13 Koch saw LeFore on March 9, 2010 – three days after her industrial accident.¹⁶ Koch testified that she told LeFore that she had slipped and fallen at work, that her back was "really sore," and that she had bruising on her lower back and right hip from the fall.¹⁷ Koch testified that she can differentiate the pain she has from the motor vehicle accident with the pain she has from her industrial accident because each incident caused pain in different areas of her back.¹⁸

¶ 14 In May 2010, Koch found she was very limited in what she could do because of pain and limited range of motion. Koch testified that she spent most of her time applying heat or ice and either sitting in a chair or lying in bed. In May 2010, Koch discontinued treatment with LeFore because LeFore recommended that she seek treatment with another doctor. Koch had continued to see her chiropractor for periodic adjustments and treatment for headaches and tailbone pain through the beginning of May 2010. Koch testified that she told both the chiropractor and LeFore about her slip and fall at the Muzzle Loader. Koch testified that she was able to continue working during this time period because of the chiropractic care, massage therapy, and the use of heat and ice. However, by the beginning of May 2010, Koch found that she could not stand up straight, she was tripping and dropping things, and she could no longer carry loaded trays at work.¹⁹

¶ 15 On May 6, 2010, Koch went to the Billings Clinic after LeFore recommended that she seek other medical treatment. Koch saw James F. Girolami, M.D. Koch testified that she reported to him that following a chiropractic adjustment, she felt good and decided to clean her home. Koch testified that she spent three or four hours vacuuming, doing laundry, and cleaning her home's bathrooms. Koch stated that she did not suffer any sort of fall or other injury while cleaning.²⁰ Koch testified that since October 2009, the only two injuries she has suffered to her back were the motor vehicle

¹⁵ Trial Test.

¹⁶ Trial Test.

¹⁷ Koch Dep. 13:9-18.

¹⁸ Trial Test.

¹⁹ Trial Test.

²⁰ Trial Test.

accident and her March 5, 2010, industrial accident.²¹ Koch testified that she did not tell Dr. Girolami about her slip and fall at work during her initial visit, but when she returned to see him after an MRI was taken, she asked him whether it could account for her condition.²²

¶ 16 On Dr. Girolami's recommendation, Koch attempted to schedule an appointment with Dr. Schubert. Up to this time, all of Koch's medical treatment had been covered by insurance related to her October 2009 motor vehicle accident. Koch discovered that she needed to file a workers' compensation claim in order to have Dr. Schubert's care covered. On May 20 or 21, 2010, Koch asked Engberg to obtain a claim number so that Koch could receive additional medical care. Engberg then contacted Employers' senior claims adjuster Teri Bohnsack. Koch told Bohnsack about her slip and fall at work as well as her earlier motor vehicle accident. Koch testified that Bohnsack told her that she needed to attend an independent medical examination (IME) with Scott K. Ross, M.D., and that Bohnsack would determine whether Koch's workers' compensation claim was compensable based on the outcome of the IME.²³

¶ 17 Koch testified that at the Muzzle Loader, she received a wage of \$7.25 per hour plus tips.²⁴ Koch has not worked since May 2010.²⁵

¶ 18 Renae Engberg testified at trial. I found her to be a credible witness. Engberg owns the Muzzle Loader. Engberg testified that Koch was a good employee and she was well liked by her co-workers and by customers.²⁶

¶ 19 Engberg testified that Koch was off of work for nearly a month after her October 4, 2009, motor vehicle accident, but when she returned to work she resumed her job duties the same as before the accident. Engberg testified that she does not recall Koch missing any work shifts from the time she returned after the motor vehicle accident until May 2010.²⁷

¶ 20 Engberg learned about the March 5, 2010, industrial accident from Koch. Engberg asked Koch if she had been injured and Koch replied that she was fine, but

²¹ Trial Test.

²² Trial Test.

²³ Trial Test.

²⁴ Trial Test.

²⁵ Trial Test.

²⁶ Trial Test.

²⁷ Trial Test.

that she was embarrassed about the fall. They never discussed the incident again.²⁸ Engberg testified that she never noticed anything amiss in Koch's job performance after the industrial accident until May 6, 2010, when Koch called off work because of severe back pain. After seeking medical care, Koch gave Engberg a note taking her off work. Koch later provided additional off-work slips. At a later date, she asked Engberg to file a workers' compensation claim. Engberg testified that by that time, she had forgotten about the March 5, 2010, slip and fall until Koch reminded her about it.²⁹

¶ 21 Kimberly LeFore, LMP, NCMMT, testified by deposition taken September 23, 2011. LeFore is a massage therapist, licensed through the State of Washington since 1991 and currently licensed in Montana.³⁰ LeFore first saw Koch in February 2010 on referral from a chiropractor.³¹ LeFore testified that she did not reference Koch's March 5, 2010, industrial accident in her subsequent treatment notes because she was treating Koch for her motor vehicle accident injury, and the subsequent slip and fall was not her "focus."³² LeFore noted that on March 9, 2010, she noted that Koch had slipped and fallen.³³ LeFore testified that in April 2010, Koch primarily complained about headaches. This changed on May 6, 2010, when Koch complained of pain in her left lower back and hip.³⁴ LeFore testified that although she noted that Koch's pain had increased significantly after cleaning her home, she was not suggesting that cleaning caused Koch's pain, but rather that Koch's attempt to return to a normal activity level put her in pain the next day.³⁵ LeFore further testified that the spasm in Koch's low back and sciatic area which she observed that day had never been present to the same severity, and that it was "very dramatic" and "awful" on that date.³⁶ At that point, LeFore believed Koch needed to see a specialist for her back problems.³⁷

¶ 22 On May 6, 2010, James F. Girolami, M.D., saw Koch for low-back pain. Dr. Girolami described Koch's history of injury in an October 2009 motor vehicle accident and further noted:

²⁸ Trial Test.

²⁹ Trial Test.

³⁰ LeFore Dep. 3:16-20; 4:16-18.

³¹ LeFore Dep. 6:20-25.

³² LeFore Dep. 25:11-15.

³³ LeFore Dep. 9:11-15.

³⁴ LeFore Dep. 21:21 – 22:6.

³⁵ LeFore Dep. 22:10-24.

³⁶ LeFore Dep. 23:7-21.

³⁷ LeFore Dep. 24:18-24.

The patient does work as a waitress and apparently, did return to work after [the motor vehicle accident]. Apparently, she has had kind of waxing and waning of both neck and low back pain, but mainly, recently, has been bothered by low back pain. She had been seeing James Pickens, DC, one of the local chiropractors, and has been getting adjustments and in fact, just had an adjustment from him a couple of days ago. She states that she felt pretty good actually after this and in fact, felt so good yesterday that she was doing a lot of household chores that she had not been doing for awhile and this morning, woke up with rather severe pain in the low back area. . . . She states that she just feels very uncomfortable because of the pain in the low back area and into the left buttock.³⁸

Dr. Girolami took Koch off work until May 11, 2010.³⁹ It does not appear that he ever released her to return to work.

¶ 23 Dr. Girolami did not mention Koch's March 5, 2010, industrial accident in this treatment note. Dr. Girolami noted that Koch had previously declined a lumbar MRI, but that at the present time, she agreed to obtain one upon his recommendation.⁴⁰ On May 7, 2010, Douglas G. Bell, M.D., interpreted an MRI of Koch's spine. Among other findings, Dr. Bell noted a left paracentral disk herniation with an 8 millimeter superior extension producing moderate ventral conus deformity at T12-L1.⁴¹

¶ 24 On May 10, 2010, Dr. Girolami saw Koch to discuss the MRI findings. He referred Koch to a neurosurgeon because of the abnormal findings on the MRI.⁴²

¶ 25 On May 24, 2010, Ryan Schwanke, M.D., saw Koch to establish a relationship as her primary care physician. Dr. Schwanke noted Koch's history of a motor vehicle accident and further noted that in March 2010, "she had a fall where she had extension of her right leg and flexion of her left knee and since that time has had some low back pain and worsening of this neck and upper back pain." Dr. Schwanke further noted that Koch reported that her low-back pain was not from the motor vehicle accident but was a new complaint that arose after her March 2010 fall.⁴³

³⁸ Ex. 5 at 23.

³⁹ Ex. 5 at 24.

⁴⁰ Ex. 5 at 22-25.

⁴¹ Ex. 5 at 26.

⁴² Ex. 5 at 27-29.

⁴³ Ex. 5 at 30.

¶ 26 On June 22, 2010, Bohnsack wrote to Koch and informed her that Bohnsack had determined that, while Koch had had an “incident” at the Muzzle Loader on March 5, 2010, Bohnsack was not accepting liability for the subsequent medical treatment Koch received because the medical records she received did not support a conclusion that the treatment was related to an industrial injury. Bohnsack informed Koch that she would schedule an IME with Dr. Ross and would re-evaluate Employers’ liability after Dr. Ross issued a report.⁴⁴

¶ 27 On July 15, 2010, Dr. Ross issued his IME report regarding Koch’s condition. Dr. Ross noted the reason for consultation as “for a determination of work relatedness/causation re: the examinee’s subjective complaints of low back pain.”⁴⁵ Dr. Ross reviewed Koch’s medical history and interviewed her. He then conducted a physical examination, and assessed Koch as having subjective complaints of low-back and left groin pain without objective correlation on physical examination, and “[e]xaggerated/embellished pain responses, examination inconsistencies, nonorganic findings”⁴⁶ In response to questions posed by Bohnsack, Dr. Ross opined that Koch’s subjective complaints of low-back pain were not attributable to her March 5, 2010, industrial accident.⁴⁷

¶ 28 On July 15, 2010, Bohnsack informed Koch that Employers’ would continue to deny liability for her condition as Dr. Ross’ IME report indicated that Koch’s low-back complaints were unrelated to her March 5, 2010, industrial accident.⁴⁸

¶ 29 Dr. Ross testified via deposition taken September 23, 2011. Dr. Ross is the chairman of the department of occupational medicine at the Billings Clinic.⁴⁹ Dr. Ross testified that during his physical examination of Koch, he found inconsistencies between what she reported and what he observed and he observed nonorganic findings including Waddell’s findings. Dr. Ross opined that Koch exaggerated and embellished pain responses to light touch, that she became “tearful and upset” during the evaluation, and that he could not find any objective correlation to her subjective complaints of lumbar pain.⁵⁰ Dr. Ross opined that it was not medically more probable than not that

⁴⁴ Ex. 2 at 12.

⁴⁵ Ex. 13 at 1.

⁴⁶ Ex. 13 at 23.

⁴⁷ Ex. 13 at 24-26.

⁴⁸ Ex. 2 at 15.

⁴⁹ Ross Dep. 4:17-21.

⁵⁰ Ross Dep. 18:4-16.

Koch's low-back complaints at the time of her IME were attributable to her March 5, 2010, industrial accident.⁵¹

¶ 30 Dr. Ross testified that although Koch's May 2010 MRI revealed objective findings which could explain her pain complaints, he found inconsistencies in her examination and therefore he did not believe he could opine whether she herniated a disk from her industrial accident.⁵²

¶ 31 Jeffrey Lindenbaum, M.D., testified by telephonic deposition taken October 13, 2011. Dr. Lindenbaum is a diagnostic radiologist.⁵³ Dr. Lindenbaum agreed with Dr. Bell's reading of Koch's May 7, 2010, MRI, in which Dr. Bell noted a left paracentral disk herniation with 8 millimeter superior extension producing moderate ventral conus deformity at T12-L1.⁵⁴ Dr. Lindenbaum also noted that the moderate ventral conus deformity both he and Dr. Bell observed meant that the herniation was causing a concavity on Koch's spinal cord at that level.⁵⁵ Dr. Lindenbaum further opined:

Q . . . [I]f that same finding existed at the time you did the CT scan on October 4th, '09, would it be apparent to you on the October 4, '09 CT scan?

A I really think it would have, yeah, although I don't typically rely on the CT scan to diagnose herniated discs, that finding is large enough that I think it should have been evident, even in retrospect as I'm looking now, I don't see anything like that at that location.⁵⁶

¶ 32 Anthony Roccisano, D.O., testified by deposition taken October 14, 2011. Dr. Roccisano is an orthopedic surgeon specializing in spine surgery at Ortho-Montana in Billings.⁵⁷ Dr. Roccisano examined Koch on April 1, 2011, on referral from Dr. Schwanke for back and leg pain and spasms. Dr. Roccisano took a history from Koch and examined her. He recommended a repeat MRI of her spine, noting, "Her story and what I have available to me I do think [her condition] is related to her fall in March as her symptoms are different than the car accident."⁵⁸ An MRI taken May 27,

⁵¹ Ross Dep. 19:23 – 20:2.

⁵² Ross Dep. 27:3-18.

⁵³ Lindenbaum Dep. 3:1-2.

⁵⁴ Lindenbaum Dep. 5:17 – 6:2.

⁵⁵ Lindenbaum Dep. 8:3-6.

⁵⁶ Lindenbaum Dep. 6:10-18.

⁵⁷ Roccisano Dep. 4:10-12.

⁵⁸ Ex. 14 at 1-6.

2011, revealed a disk herniation at T12-L1 with mild deformity of the thoracic cord at that level.⁵⁹

¶ 33 Dr. Roccisano opined:

My opinion is that by reviewing the records, and Dr. Schubert's note, which he did a very thorough exam after her car accident in October, that she had what I would say is a normal neurologic exam, she had normal deep tendon reflexes, she had no clonus and that she then progressively started to have more symptoms after her fall and had some issues in terms of numbness and tingling and the ability to continue to work, and so by reviewing it, I would say her history and imaging and her exam follow a time course where the fall in March could easily, more likely than not or more probable than not, be the cause of her disc herniation.⁶⁰

¶ 34 Dr. Roccisano further opined that a disk herniation at T12-L1 is more likely to be caused by a fall onto one's buttocks or falling from a very tall height onto one's knees or legs than the flexion-type injury more typically seen in motor vehicle accidents.⁶¹

CONCLUSIONS OF LAW

¶ 35 This case is governed by the 2009 version of the Montana Workers' Compensation Act (WCA) since that was the law in effect at the time of Koch's industrial accident.⁶² Koch bears the burden of proving by a preponderance of the evidence that she is entitled to the benefits she seeks.⁶³ I have concluded that Koch has met her burden.

ISSUE ONE: Whether Petitioner suffered a compensable workers' compensation injury while in the course and scope of her employment on March 5, 2010, at the Muzzle Loader Café in Billings, Montana, either as a new injury or a temporary aggravation or a permanent aggravation of a pre-existing condition.

¶ 36 Under § 39-71-407(2)(a)(i), MCA, an insurer is liable for an injury if the injury is established by objective medical findings and if the injured worker establishes that it is more probable than not that the claimed injury occurred. Section 39-71-119, MCA,

⁵⁹ Ex. 14 at 8-9.

⁶⁰ Roccisano Dep. 22:7-18.

⁶¹ Roccisano Dep. 22:19 – 24:16.

⁶² *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

⁶³ *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).

defines “injury,” in pertinent part, as internal or external physical harm to the body that is established by objective medical findings and is caused by an accident.

¶ 37 Causation is an essential element to an entitlement to benefits and the claimant has the burden of proving a causal connection by a preponderance of the evidence.⁶⁴ In Koch’s case, it is undisputed that an “accident” occurred. The dispute centers around whether an “injury” resulted.

¶ 38 Koch testified that while she initially did not believe she was injured from her March 5, 2010, slip and fall, she later experienced a change in her ongoing back problems, both in the types of symptoms and in their severity. She testified that it was not until after the March 5, 2010, industrial accident that she began to have pain in certain areas of her back and a burning pain in her mid back. Engberg testified that when Koch returned to work after her October 2009 motor vehicle accident, Koch resumed her normal job duties without difficulty. As the testimony of Koch, Engberg, and LeFore indicate, Koch was able to perform her job duties without difficulty until her condition began to decline after her industrial accident.

¶ 39 As I previously noted in *Stewart v. Liberty Northwest Ins. Corp.*, the mere fact that a claimant’s condition developed after an industrial accident is insufficient evidence to support a conclusion that the industrial accident caused the injury.⁶⁵ In *Stewart*, the only evidence I found in support of the claimant’s contention that she had suffered an injury was her treating physician’s opinion that, while he could not explain how her condition was related to a knee surgery she underwent after an industrial injury, he concluded that it must be related to the surgery because it arose afterwards.⁶⁶ In Koch’s case, however, there are additional causation opinions to consider.

¶ 40 First, I note that Dr. Ross opined that Koch’s back problems are unrelated to her March 5, 2010, industrial accident. In explaining his reasoning for reaching this opinion, Dr. Ross essentially stated that, because he observed nonorganic findings during Koch’s IME, and because he concluded that she was exaggerating her pain, he disregarded the objective medical findings of the herniated disk at T12-L1 on the MRI. Certainly, a doctor’s opinion regarding the accuracy of an injured worker’s account of symptoms and their severity are legitimate factors for the doctor to use in assessing the injured worker’s condition. However, no amount of purported exaggeration or embellishment of symptoms will cause a herniated disk to appear on an MRI. This is also not a situation like this Court faced in *Ford v. Sentry Cas. Co.*, in which the

⁶⁴ *Grenz v. Fire and Cas. of Conn.*, 250 Mont. 373, 380, 820 P.2d 742, 746 (1991) (citing *Brown v. Ament*, 231 Mont. 158, 163, 752 P.2d 171, 174 (1988)).

⁶⁵ *Stewart v. Liberty Northwest Ins. Corp.*, 2007 MTWCC 41, ¶ 30.

⁶⁶ *Stewart*, ¶ 30.

claimant's subjective complaints did not correlate with objective medical findings of a cervical disk herniation.⁶⁷ Dr. Ross acknowledged that the objective medical findings from the MRI could explain Koch's pain complaints. Even assuming that Dr. Ross is correct and that Koch exaggerated and embellished her subjective complaints during her IME, this does not negate objective medical findings which correlate with those subjective complaints. In this instance, I do not give Dr. Ross' opinions great weight.

¶ 41 Neither Dr. Girolami nor Dr. Schwanke – both of whom treated Koch – offered a causation opinion regarding her condition. Dr. Lindenbaum, a diagnostic radiologist, opined that while a CT scan is not an optimal tool for diagnosing a herniated disk, that given the size of Koch's herniation and with the benefit of hindsight, the herniation should have been evident on the October 2009 CT scan if it existed at that time. Dr. Roccisano, an orthopedic surgeon specializing in spine surgery, opined that Koch's March 5, 2010, industrial accident more probably than not caused her disk herniation. Given Drs. Lindenbaum's and Roccisano's qualifications and their review of Koch's medical records, I find their opinions persuasive in this matter.

¶ 42 Based on the evidence presented, I conclude that the weight of the evidence preponderates towards Koch's contention that her disk herniation was caused by her March 5, 2010, industrial accident. I therefore conclude she suffered an injury in the course of that accident and her injury is compensable under the WCA.

Issue Two: Whether Petitioner is entitled to medical benefits for medical treatment as prescribed by Dr. Roccisano.

¶ 43 Since I have concluded that Koch suffered a compensable workers' compensation injury on March 5, 2010, while in the course and scope of her employment, Employers' is liable for reasonable primary medical services for conditions resulting from the injury for those periods as the nature of the injury or the process of recovery requires, and other benefits as permitted by § 39-71-704, MCA.

Issue Three: Whether Petitioner is entitled to temporary total disability benefits pursuant to § 39-71-701, MCA, from May 6, 2010, through the present.

¶ 44 Under § 39-71-701, MCA, a worker is eligible for temporary total disability (TTD) benefits when the worker suffers a total loss of wages as a result of an injury and until the worker reaches maximum healing, or until the worker has been released to return to the employment in which the worker was engaged at the time of the injury or to employment with similar physical requirements. In the present case, the evidence before the Court indicates that Koch has suffered a total loss of wages as a result of her

⁶⁷ *Ford v. Sentry Cas. Co.*, 2011 MTWCC 19, ¶ 45.

injury and no doctor has opined that she has reached maximum healing. I therefore conclude she is entitled to TTD benefits from May 6, 2010, when Dr. Girolami took her off work.

Issue Four: What is Petitioner's average weekly wage?

¶ 45 Section 39-71-123, MCA, sets forth the means by which a worker's average weekly wage is determined. In this case, Koch testified that she earned \$7.25 per hour plus tips from her time-of-injury employment. Some of Koch's paystubs were attached as an exhibit to her deposition. In the Pretrial Order, Koch contended that she "was earning \$253 per week in wages and \$280 a week in tips which were duly and fully reported."⁶⁸ Employers' has not disputed Koch's calculations.

¶ 46 Under § 39-71-2905, MCA, a claimant, an insurer, an employer alleged to be an uninsured employer, or the Uninsured Employers' Fund may petition this Court for a determination of any dispute concerning benefits after satisfying the statutory mediation requirements. In the case at hand, the parties have not set forth any "dispute" regarding the calculation of Koch's average weekly wage. With no dispute apparent, I will not guess as to the parties' respective positions and arguments. In fact, it is not clear to me that the parties disagree. If there is no dispute concerning benefits, this Court lacks subject matter jurisdiction. Therefore, I decline to rule on this issue at this time. If a dispute exists regarding the calculation of Koch's average weekly wage, the parties may seek the Court's judgment on this issue by way of a motion for reconsideration.

JUDGMENT

¶ 47 Koch suffered a compensable workers' compensation injury while in the course and scope of her employment on March 5, 2010, at the Muzzle Loader Café in Billings, Montana.

¶ 48 Koch is entitled to medical benefits for medical treatment as prescribed by Dr. Roccisano.

¶ 49 Koch is entitled to temporary total disability benefits pursuant to § 39-71-701, MCA, from May 6, 2010, through the present.

¶ 50 The parties shall calculate Koch's average weekly wage in accordance with § 39-71-123, MCA.

⁶⁸ Pretrial Order at 3.

¶ 51 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 30th day of April, 2012.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Richard J. Martin
Charles G. Adams
Submitted: November 21, 2011