

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2014 MTWCC 14

WCC No. 2014-3293

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LOUANN KOCH

Petitioner

vs.

EMPLOYERS INSURANCE GROUP

Respondent/Insurer.

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**APPEALED TO MONTANA SUPREME COURT - 06/18/14  
DISMISSED ON APPEAL PER STIPULATION OF PARTIES – 08/28/14**

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

**Summary:** After this Court held that Petitioner's claim was compensable and ordered Respondent to pay medical benefits for reasonable primary medical treatment as prescribed by her treating physician, Petitioner's treating physician ordered a new MRI and began diagnostic epidural injections in an attempt to locate the source of Petitioner's ongoing symptoms. After paying for the MRI and the first injection, Respondent denied further liability and ceased paying for Petitioner's prescription medications, arguing that Petitioner could not prove a causal connection between the new MRI findings and her industrial injury. Petitioner contends that she is entitled to ongoing medical benefits and coverage of her prescription medications. She further contends that Respondent has unreasonably denied her benefits and that she is entitled to her attorney fees and a penalty.

**Held:** Petitioner is entitled to the medical treatment prescribed by her treating physician, and is further entitled to coverage for the medications he prescribes for treatment of her injuries related to her industrial injury claim. Respondent unreasonably terminated Petitioner's benefits when it ceased authorizing her treating physician's recommended diagnostic tests, and when it later refused to pay for Petitioner's prescription medication. Petitioner is therefore entitled to a penalty and her attorney fees.

## **Topics:**

**Insurers: Claim Management.** A ruling by this Court that a claim is compensable should not be viewed as a blank check written out to Petitioner's treating physician. However, after liability is established, an insurer cannot decide to terminate a treating physician's diagnostic work-up in the middle of the process for no discernible reason.

**Benefits: Medical Benefits: Liability.** A ruling by this Court that a claim is compensable should not be viewed as a blank check written out to Petitioner's treating physician. However, after liability is established, an insurer cannot decide to terminate a treating physician's diagnostic work-up in the middle of the process for no discernible reason.

**Physicians: Independent Medical Examinations: Generally.** The Court found the opinions of an IME physician unpersuasive where the physician did not consider the fact that the Court already concluded that Petitioner had suffered a compensable injury and where the physician found that Petitioner's pain complaints were not caused by her industrial accident because he did not consider radiological findings or muscle spasms to be objective medical findings, and where the Court found he avoided making objective medical findings by failing to conduct appropriate testing.

**Physicians: Treating Physician: Weight of Opinions.** The Court found the opinions of an IME physician unpersuasive where the physician did not consider the fact that the Court already concluded that Petitioner had suffered a compensable injury and where the physician found that Petitioner's pain complaints were not caused by her industrial accident because he did not consider radiological findings or muscle spasms to be objective medical findings, and where the Court found he avoided making objective medical findings by failing to conduct appropriate testing.

**Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-116.** While the Court does not expect medical providers to know and apply the legal definition of "objective medical findings," the Court will consider items enumerated in the statute as objective medical findings – such as muscle spasms – to be objective medical findings, even if the medical provider does not consider them to be.

**Medical Evidence: Objective Medical Findings.** While the Court does not expect medical providers to know and apply the legal definition of

“objective medical findings,” the Court will consider items enumerated in the statute as objective medical findings – such as muscle spasms – to be objective medical findings, even if the medical provider does not consider them to be.

**Physicians: Diagnosis [Impression].** Had Respondent allowed Petitioner’s treating physician to finish his inquiry, ruling out some potential diagnoses, the physician would then have been in the position to opine whether Petitioner’s industrial accident was the cause of her ongoing problems. If the treating physician ultimately found that Petitioner’s problems stem from something unrelated, Respondent would then be relieved of liability. However, after this Court held that Respondent was liable, it could not block the physician’s ability to properly diagnose and treat Petitioner by refusing to authorize reasonable diagnostic procedures.

**Benefits: Medical Benefits: Prescriptions.** Even if Petitioner had reached MMI, under *Hiatt*, the insurer was still required to pay for her medications prescribed to treat her work-related injuries.

**Benefits: Medical Benefits: Primary Medical Services.** Even if Petitioner had reached MMI, under *Hiatt*, the insurer was still required to pay for her medications prescribed to treat her work-related injuries.

**Unreasonable Conduct by Insurer.** While the Court can envision some circumstances in which an insurer could justifiably refuse to authorize certain treatment on the grounds of causation, the present circumstances are not those. Here, this Court previously ordered Respondent to pay for reasonable primary medical services as recommended by Petitioner’s treating physician. Where Respondent subsequently arbitrarily terminated authorization for treatment while the physician was in the middle of diagnosing Petitioner, was unreasonable. Furthermore, Respondent ceased authorizing Petitioner’s prescription medications because she had allegedly reached MMI, but it gave no consideration to whether, under *Hiatt*, it was appropriate to do so.

**Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-611.** Once Petitioner’s claim was adjudged compensable, Respondent became liable for it. After Respondent refused to authorize treatment and terminated liability without clear justification, the Court found its actions unreasonable and held Petitioner to be entitled to her attorney fees.

**Attorney Fees: Unreasonable Denial or Delay of Benefits.** Once Petitioner's claim was adjudged compensable, Respondent became liable for it. After Respondent refused to authorize treatment and terminated liability without clear justification, the Court found its actions unreasonable and held Petitioner to be entitled to her attorney fees.

**Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-2907.** Once Petitioner's claim was adjudged compensable, Respondent became liable for it. After Respondent refused to authorize treatment and terminated liability without clear justification, the Court found its actions unreasonable and held Petitioner to be entitled to a penalty.

**Penalties: Insurers.** Once Petitioner's claim was adjudged compensable, Respondent became liable for it. After Respondent refused to authorize treatment and terminated liability without clear justification, the Court found its actions unreasonable and held Petitioner to be entitled to a penalty.

¶ 1 The trial in this matter occurred on April 15, 2014, in Billings, Montana. Petitioner Louann Koch attended and was represented by Richard J. Martin. Charles G. Adams represented Respondent Employers' Insurance Group (Employers).

¶ 2 Exhibits: I admitted Exhibits 1 through 17 without objection.

¶ 3 Witnesses and Depositions: Koch and Dale M. Peterson, M.D., were sworn and testified at trial.

¶ 4 Issues Presented: The Pretrial Order sets forth the following issues:<sup>1</sup>

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

Issue Two: Whether Petitioner is entitled to medications prescribed by Dr. Roccisano for treatment of her injuries related to her workers' compensation claim.

Issue Three: Whether a penalty and attorney fees should be awarded to Petitioner.

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<sup>1</sup> Pretrial Order, Docket Item No. 25, at 2.

## PROCEDURAL HISTORY

¶ 5 This claim was the subject of a previous ruling by this Court. On April 30, 2012, I issued Findings of Fact, Conclusions of Law and Judgment, in which I held that Koch's claim was compensable.<sup>2</sup>

¶ 6 In those Findings of Fact, I made findings which are beneficial to recite here. Koch worked as a waitress at the Muzzle Loader Café for approximately six years.<sup>3</sup> On March 5, 2010, she slipped and fell at work, landing hard on her tailbone and hitting her right knee.<sup>4</sup> A few days later, she began to experience a burning pain in her mid back. However, she did not seek medical treatment for the industrial accident because she was already receiving medical treatment for injuries she had suffered in a motor vehicle accident some months previously.<sup>5</sup> In May 2010, she described the industrial accident to her medical providers. Her symptoms worsened and she sought additional treatment and filed a workers' compensation claim.<sup>6</sup>

¶ 7 On June 22, 2010, a claims adjuster wrote to Koch on behalf of Employers and stated that Employers would not accept liability for Koch's medical treatment because Employers had concluded that the treatment was not related to the industrial accident.<sup>7</sup> After an independent medical examination (IME) by Scott K. Ross, M.D., Employers reiterated its denial of liability.<sup>8</sup>

¶ 8 Among other doctors who treated Koch during this time period, Anthony Roccisano, D.O., examined her on April 1, 2011, after which he opined that her back and leg pain and spasms were more likely than not related to her industrial accident.<sup>9</sup> Dr. Roccisano is an orthopedic surgeon specializing in spine surgery at Ortho Montana in Billings.<sup>10</sup> He recommended an MRI, which revealed a disk herniation at T12-L1 with mild deformity of the thoracic cord at that level.<sup>11</sup>

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<sup>2</sup> *Koch v. Employers' Ins. Grp.*, 2012 MTWCC 14.

<sup>3</sup> *Koch*, ¶ 5.

<sup>4</sup> *Koch*, ¶ 10.

<sup>5</sup> *Koch*, ¶ 11.

<sup>6</sup> *Koch*, ¶¶ 14-16.

<sup>7</sup> *Koch*, ¶ 26.

<sup>8</sup> *Koch*, ¶ 28.

<sup>9</sup> *Koch*, ¶¶ 32, 33.

<sup>10</sup> *Koch*, ¶ 32.

<sup>11</sup> *Id.*

¶ 9 After considering the evidence presented, I concluded that Koch had met her burden of proving that her disk herniation was caused by the March 5, 2010, industrial accident, and that she suffered a compensable injury under the Workers' Compensation Act.<sup>12</sup> In reaching that conclusion, I expressed concerns regarding Dr. Ross' IME report and did not give his opinions great weight.<sup>13</sup> I further concluded that Koch was entitled to medical benefits for medical treatment as prescribed by Dr. Roccisano. Specifically, I stated:

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.<sup>14</sup>

#### FINDINGS OF FACT

¶ 10 After this Court found Employers liable and ordered it to pay for Koch's treatment, Koch returned to treat with Dr. Roccisano. On July 11, 2012, he noted:

She remains about the same and has been in a court settlement with work comp. Apparently, they have made an agreement that this is a workers comp injury and will be covering it from here on out. She is now ready to pursue treatment of her pains which have been going on for about 2 years now.<sup>15</sup>

¶ 11 Dr. Roccisano reported that Koch had "burning, stabbing, aching pains in her lower back which radiates into her groins bilaterally" and that she had similar pain in her right leg.<sup>16</sup> He found that her ability to walk any distance was significantly limited due to pain.<sup>17</sup> Dr. Roccisano indicated that his plan was to obtain a T12-L1 epidural steroid injection (ESI), and that if this treatment did not give Koch any relief, he would recommend a repeat MRI.<sup>18</sup>

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<sup>12</sup> Koch, ¶ 42.

<sup>13</sup> Koch, ¶ 40.

<sup>14</sup> Koch, ¶ 43.

<sup>15</sup> Ex. 3 at 6.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Ex. 3 at 7.

¶ 12 On August 21, 2012, Koch saw Dr. Roccisano for a follow-up appointment. She reported that she did not obtain any relief from the injection and that her muscle spasms may have worsened.<sup>19</sup> Dr. Roccisano recommended a repeat MRI and the use of muscle relaxers. He noted that he wanted the MRI to be of the thoracic and lumbar spine, observing, “Due to the position of the disc herniation and may be better seen on one or the other.”<sup>20</sup>

¶ 13 On September 7, 2012, Dr. Roccisano noted that he had reviewed Koch’s thoracic and lumbar MRI. He stated:

The lumbar MRI really shows no changes to her prior imaging. The thoracic MRI is quite interesting. At T6-7 there is a left-sided disc herniation that does abut the cord. There is also a disc herniation at T8-9.

Dr. Roccisano recommended an injection at C6-7.<sup>21</sup>

¶ 14 On September 18, 2012, Lisa Schrottenboer, R.N., of Coventry Workers’ Comp Services, wrote to Dr. Roccisano and asked him whether, on a medically probable or not basis, Koch’s thoracic spine condition was directly related to her March 5, 2010, workers’ compensation claim. Dr. Roccisano replied, “I believe it would be hard to separate the two events with imaging this late after both events. I don’t think anyone could tell you with any certainty.”<sup>22</sup>

¶ 15 On October 4, 2012, counsel for Employers wrote to Dr. Roccisano in follow-up to Schrottenboer’s letter and asked, “Is it your opinion that whatever may be occurring at the T6 7 (or C6 7) level is also a consequence of [Koch’s] fall at work?” Dr. Roccisano replied, “It could be related.”<sup>23</sup>

¶ 16 On November 14, 2012, Dr. Roccisano saw Koch after she had received an epidural injection at T6-7. Koch reported that the injection had not helped much. She reported that she had obtained slight relief from the use of Skelaxin and that she also continued to use Celebrex.<sup>24</sup> Dr. Roccisano noted:

At this point in time still unsure exactly what the pain generator is for the patient. I recommend trying another injection at T8-9 to see if that helps.

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<sup>19</sup> Ex. 3 at 11.

<sup>20</sup> Ex. 3 at 12.

<sup>21</sup> Ex. 3 at 16.

<sup>22</sup> Ex. 3 at 28.

<sup>23</sup> Ex. 6.

<sup>24</sup> Ex. 3 at 18.

We've tried multiple treatments and without any real response to injections or other treatments I have a hard time recommending a surgery which would be quite extensive that may not benefit her. She understands and is willing to undergo the injection to see if she can gain any relief from that.<sup>25</sup>

¶ 17 On November 14, 2012, Schrotenboer again wrote to Dr. Roccisano and he wrote brief responses to each of her questions as follows:

[Q.] What is the current medical status following the T6-7 ESI?

[A.] She did not get significant relief[.]

[Q.] What future treatment is expected for Ms. Koch's 3/5/2010 work related injury?

[A.] We are going to try a T8-9 injection[.]

[Q.] Based on your findings from today's appointment, what is Ms. Koch's anticipated MMI date?

[A.] Still unsure not sure what is causing her symptoms[.]<sup>26</sup>

¶ 18 On November 15, 2012, Dr. Roccisano sent a Provider Request for Authorization to Brentwood WC (Brentwood), Employers' third-party adjuster. On November 27, 2012, a representative for Brentwood denied the authorization. A handwritten note on the denial stated, "need causation addressed. [T]he claim is low back and we are treating t-spine."<sup>27</sup> On November 29, 2012, Brentwood again denied the request for authorization.<sup>28</sup>

¶ 19 Employers has refused to pay for any medical treatment from Dr. Roccisano from and after November 27, 2012.<sup>29</sup>

¶ 20 On April 9, 2013, Dr. Roccisano saw Koch for a follow-up appointment. He noted that Koch was having "some difficulty with Worker's Compensation" and that she was "struggling to find treatment." He further noted:

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<sup>25</sup> Ex. 3 at 19.

<sup>26</sup> Ex. 7.

<sup>27</sup> Ex. 3 at 22. The handwritten note further stated, "see attached letter"; however, no letter was attached to this page in the exhibit binder submitted at trial.

<sup>28</sup> Ex. 3 at 23.

<sup>29</sup> Pretrial Order at 2.



We discussed how it is quite difficult that they have stopped our process of working up her spine and that I do not want her to undergo a procedure that I don't know [would] be beneficial. We have ordered [a] T8-9 epidural and they have canceled approval and this is really limiting my ability to treat this patient. We have not had tremendous results with other levels and I just want to rule out this as a cause of her pain. Without the injection I will never know. Many of the problems have been with me not being able to definitely say what causes her pain and without these tests I never will be able to know that. This is frustrating [to not] only the patient [but] myself as well.<sup>30</sup>

He further noted:

At this point . . . I am limited in what I can help her with because the process is denied. Hopefully they will be able to [approve] the T8-9 injections [so we] can go forward with my diagnostic evaluation and hopeful[ly] treatments. We've been dealing with this for 3 years and also the more roadblocks that are placed the harder this will become.<sup>31</sup>

¶ 21 On April 25, 2013, Dale M. Peterson, M.D., issued an IME report regarding Koch's condition. Dr. Peterson summarized Koch's medical history, including her treatment before and after her industrial injury.<sup>32</sup> He described Koch's current symptoms as reported to him by Koch, and conducted a physical examination.<sup>33</sup> He also wrote a chart review of Koch's medical records from October 24, 1993, through November 14, 2012, and a radiology review from October 4, 2009, through September 5, 2011.<sup>34</sup>

¶ 22 In response to questions from Schrottenboer, Dr. Peterson opined that Koch's post-industrial injury diagnosis is "[h]er report of thoracic and lumbar musculoskeletal pain without medical findings."<sup>35</sup> He further opined:

In the framework of findings of preexisting degenerative changes at Thoracic level12-Lumbar 1, Cervical level 6-7 noted in October 4, 2009, multiple disc protrusion on the MRI of September 5, 2012 and the absence of definite symptomatology reported during care giving prior to the March

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<sup>30</sup> Ex. 3 at 24.

<sup>31</sup> Ex. 3 at 25.

<sup>32</sup> Ex. 11 at 38-41.

<sup>33</sup> Ex. 11 at 41-44.

<sup>34</sup> Ex. 11 at 44-53.

<sup>35</sup> Ex. 11 at 33-34.

2010 fall at work and the absence of reported thoracic pain when she was seen by Dr. Ross on January 1, 2010 one can not say to a reasonable degree of medical certainty in this lady who has always done active work that the disk protrusions are directly related to the March 5, 2010 industrial injury.<sup>36</sup>

Dr. Peterson opined that Koch had reached maximum medical improvement (MMI) for her March 5, 2010, industrial injury.<sup>37</sup>

¶ 23 On June 12, 2013, counsel for Employers wrote to Koch's counsel and stated that Employers would not authorize any further prescriptions on Koch's claim.<sup>38</sup> On or around July 16, 2013, Employers ceased paying for medications prescribed by Dr. Roccisano.<sup>39</sup>

¶ 24 On September 4, 2013, Koch's counsel wrote to Dr. Roccisano and asked him to review the IME reports from Drs. Peterson and Joseph K. McElhinny, Psy.D., and to answer questions posed by counsel.<sup>40</sup> Dr. Roccisano responded that he was still trying to determine Koch's current diagnoses and that she had several disk herniations which could be related to her symptoms. Dr. Roccisano opined that Koch's disk herniations were permanent aggravations of a preexisting condition. He further opined that Koch had likely reached MMI but that he could not opine as to what was causing her pain.<sup>41</sup> The following exchange also occurred:

[Q.] Ms. Koch has been treating with you for instability of disc at T12-L1. In reviewing the medical history, please provide your professional opinion as to whether you believe the disc at T6-7 and T8-9 are directly or indirectly related to the March 5, 2010 industrial injury. Please provide supportive medical evidence.<sup>42</sup>

[A.] This is a[n] interesting question. Unfortunately the scans that we had initially to work with [are] only up to about the T12-L1 level. Unfortunately we just got information about T6-7 and T8-9 relatively recently. Injections there have not helped very much so I am unsure if they are related to the

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<sup>36</sup> Ex. 11 at 34.

<sup>37</sup> Ex. 11 at 36.

<sup>38</sup> Ex. 8.

<sup>39</sup> Pretrial Order at 2.

<sup>40</sup> Ex. 9.

<sup>41</sup> Ex. 10.

<sup>42</sup> Ex. 9.

initial claim. We are really still trying to figure out what is causing her pain though.<sup>43</sup>

¶ 25 Koch testified at trial. I found her to be a credible witness. Koch testified that she recalled that Dr. Roccisano prescribed Skelaxin for her on November 14, 2012. She had previously had a prescription for Flexeril, but it did not agree with her. Koch testified that the Skelaxin helped relieve the burning and tightness in her back.<sup>44</sup> Koch further testified that she has never been prescribed a pain reliever for her back pain and she prefers not to take any narcotic medications. However, she has gotten some relief from her symptoms through the use of Skelaxin and Celebrex and she would like to continue using those medications.<sup>45</sup> Koch further testified that to date, she has not received the epidural injection at T8-9.<sup>46</sup>

¶ 26 Dr. Peterson testified at trial. I found him to be a credible witness. Dr. Peterson is a neurologist who has practiced medicine in Billings since 1975. Dr. Peterson retired from regular practice in 2007. At that time, IMEs made up approximately 20% of his practice. After 2007, he remained on staff at the Billings Clinic but only conducts IMEs. He has not had a patient practice since December 2007.<sup>47</sup>

¶ 27 Dr. Peterson testified that he cannot tell whether Koch's current symptoms are related to the pathologic changes that were revealed on her 2012 MRI films.<sup>48</sup> Dr. Peterson testified that he cannot opine whether Koch's disk herniations at T6-7 and T8-9 were caused by her March 5, 2010, industrial accident. He stated that the calcification which he observed near those herniations told him only that they had occurred months or years previously and that they were not recent, but he could not opine what caused them. He further testified that he cannot opine whether any of Koch's symptoms are being caused by those herniated disks.<sup>49</sup> Dr. Peterson testified that he believed Koch was at MMI at the time that he examined her.<sup>50</sup>

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<sup>43</sup> Ex. 10.

<sup>44</sup> Trial Test.

<sup>45</sup> Trial Test.

<sup>46</sup> Trial Test.

<sup>47</sup> Trial Test.

<sup>48</sup> Trial Test.

<sup>49</sup> Trial Test.

<sup>50</sup> Trial Test.

¶ 28 Dr. Peterson testified that he believes epidural injections involve significant risks in the area of the thoracic spine and that he did not believe Koch's findings would cause him to pursue aggressive diagnosis and treatment.<sup>51</sup>

¶ 29 Dr. Peterson testified that he tested Koch's range of motion "by vision" and he did not measure it. Therefore, he had no findings of decreased range of motion.<sup>52</sup> Dr. Peterson testified that he did not include Koch's herniated disks as part of his diagnosis because they are a radiologic diagnosis and not a clinical diagnosis. He testified that he correctly stated that Koch had a report of thoracic and lumbar musculoskeletal pain without medical findings because the herniated disks which were apparent on her MRI were "x-ray findings" and "medical findings" are the findings a physician makes while examining a patient. He further testified that although Koch reported muscle spasms, he did not observe them personally and he considers muscle spasms to be a subjective complaint.<sup>53</sup>

### CONCLUSIONS OF LAW

¶ 30 This case is governed by the 2009 version of the Workers' Compensation Act (WCA) since that was the law in effect at the time of Koch's industrial accident.<sup>54</sup> Koch bears the burden of proving by a preponderance of the evidence that she is entitled to the benefits she seeks.<sup>55</sup> I have concluded that Koch has met her burden.

#### **ISSUE ONE: Whether Petitioner is entitled to ongoing medical benefits for medical treatment as prescribed by Dr. Roccisano.**

¶ 31 Koch argues that she already prevailed on this issue in her previous case before the Court and that Employers' actions have forced her to relitigate it. She argues that this Court previously ruled that she was entitled to medical treatment from Dr. Roccisano and that she then subsequently obtained some treatment from Dr. Roccisano before Employers decided it would no longer pay for it.<sup>56</sup> Koch argues that she need not prove that the herniation at T8-9 is definitively part of her industrial injury, but all she need prove is that this is the diagnosis and treatment which Dr.

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<sup>51</sup> Trial Test.

<sup>52</sup> Trial Test.

<sup>53</sup> Trial Test.

<sup>54</sup> See *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986). (Citations omitted.)

<sup>55</sup> *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).

<sup>56</sup> Petitioner's Trial Brief, Docket Item No. 20, at 1-3.

Roccisano has ordered as part of the treatment he was giving her for the industrial injury.<sup>57</sup>

¶ 32 Employers argues that since Dr. Roccisano has opined that he is unsure whether the T8-9 herniation is related to Koch's industrial injury, Employers is not liable for the diagnosis or treatment of it.<sup>58</sup> Employers argues that neither Dr. Roccisano nor Dr. Peterson were able to opine with any degree of medical certainty that Koch's disk herniation at T8-9 was caused or aggravated by her industrial accident.<sup>59</sup>

¶ 33 Employers argues that the present case is analogous to *Gary v. Montana State Fund*,<sup>60</sup> in which an insurer had accepted liability for problems with one disk and this Court held that the claimant failed to prove a causal relationship between that injury and a herniation in a different disk.

¶ 34 In *Gary*, the claimant suffered an injury in July 2005.<sup>61</sup> The insurer accepted liability.<sup>62</sup> In August 2005, an MRI revealed, among other findings, a minimal disk bulge at L4-5 and a disk herniation with nerve root compression at L5-S1.<sup>63</sup> In April 2006, surgery was performed at L5-S1.<sup>64</sup> The claimant's condition subsequently improved.<sup>65</sup> In November 2007, he was found at MMI and given an impairment rating.<sup>66</sup> In January 2008, the claimant underwent an MRI which revealed a slight progression of the narrowing of the neural foramina at L4-5 when compared with the August 2005 MRI films.<sup>67</sup> In September 2010, the claimant's treating physician reported that an August 2010 MRI revealed a new disk herniation with nerve root compression at L4-5.<sup>68</sup> After considering various medical opinions submitted into evidence, I concluded that the claimant had not met his burden of proof. I explained:

To sum up the pertinent medical evidence in this case, Dr. Schumpert opined that the L4-5 disk herniation is more likely than not related to the

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<sup>57</sup> Petitioner's Trial Brief at 1-2.

<sup>58</sup> [Respondent's] Trial Brief, Docket Item No. 22, at 1-2.

<sup>59</sup> [Respondent's] Trial Brief at 2.

<sup>60</sup> 2012 MTWCC 38.

<sup>61</sup> *Gary*, ¶ 5.

<sup>62</sup> *Gary*, ¶ 6.

<sup>63</sup> *Gary*, ¶ 8.

<sup>64</sup> *Gary*, ¶ 14.

<sup>65</sup> *Gary*, ¶ 15.

<sup>66</sup> *Gary*, ¶ 18.

<sup>67</sup> *Gary*, ¶ 19.

<sup>68</sup> *Gary*, ¶ 21.

natural progression of Gary's lumbar degeneration and unrelated to Gary's July 22, 2005, accident. Dr. VanGilder opined that the herniated L4-5 disk represented a progression of pre-existing degenerative changes but was silent as to any causal relationship between the L4-5 disk herniation and Gary's industrial accident. Although Dr. Eodice wrote that the L4-5 disk herniation represented "an aggravation of [Gary's] prior injury," he offered no explanation or elaboration as to how that may be the case.<sup>69</sup>

¶ 35 I then held:

A conclusory statement from a treating physician that there is a cause and effect relationship between an industrial accident and a condition occurring some five years later, without explaining the mechanism for that causation, is insufficient for this Court to conclude the two are related.<sup>70</sup>

¶ 36 *Gary* differs factually from the present case in significant ways. As set forth above, in *Gary*, the claimant had multiple radiological studies of the same part of his back, taken over the course of approximately five years, which documented the occurrence of a new disk herniation which his treating physician opined was related to his industrial injury for reasons unknown to the Court. In the present case, Koch did not have radiological studies done of the T6-7 and T8-9 disks until after this Court found Employers liable for her condition.

¶ 37 In this case, Employers initially denied liability for Koch's condition, and although I found Koch's injury compensable, I did not find this initial denial of liability unreasonable. However, Employers' denial of liability limited Dr. Roccisano's ability to fully diagnose and treat Koch. Based on the information available to him at the time, Dr. Roccisano focused on the objective medical findings at T12-L1 as the likely source of Koch's complaints. It was not until after this Court adjudged Koch's claim compensable that Dr. Roccisano was able to move forward with a more comprehensive diagnosis and treatment.

¶ 38 Once Dr. Roccisano was able to treat his patient, he soon discovered that T12-L1 was likely not the source of Koch's complaints. He then began, reasonably, to investigate further and discovered objective medical findings at T6-7 and T8-9 which he determined required further diagnostic tests. After ruling out T6-7, Dr. Roccisano sought to investigate whether Koch's problems originated from the T8-9 herniation. At that point, Employers suddenly pulled the plug on Dr. Roccisano's diagnosis and treatment. Not only did Employers refuse to allow Dr. Roccisano to continue

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<sup>69</sup> *Gary*, ¶ 36.

<sup>70</sup> *Gary*, ¶ 37.

investigating the exact source of Koch's complaints, but as will be discussed below, it also denied further coverage for the medications which it had been paying for since my ruling in Koch's favor after the previous trial in this matter.

¶ 39 Employers' has argued that my previous ruling in this case should not be viewed as a blank check written out to Dr. Roccisano. I agree. As I stated during the initial trial, and repeated above, "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 . . . ." <sup>71</sup> However, this is not a case where Dr. Roccisano followed an inexplicable path of inquiry or is attempting to connect distant body parts to Koch's industrial injury. Koch's symptoms have not changed. In fact, nothing has changed except that Dr. Roccisano was able, after I held Employers liable, to continue diagnosing and treating his patient. Dr. Roccisano was in the midst of a fairly standard diagnostic work-up when Employers decided to terminate the process for no discernible reason.

¶ 40 Employers has offered Dr. Peterson's IME report and testimony in its defense. I found several aspects of Dr. Peterson's testimony and IME report unpersuasive. First, Dr. Peterson clearly approached this IME without consideration of the fact that this Court had already concluded that it was more probable than not that Koch had suffered a compensable injury. While in the underlying case, Dr. Ross acknowledged that objective medical findings revealed by Koch's May 2010 MRI could explain her pain complaints, although he ultimately disregarded them due to alleged inconsistencies he found in his examination of Koch, <sup>72</sup> in the present case, Dr. Peterson opined that no objective medical findings supported Koch's claim and he thus concluded that Koch's back problems were not caused by her industrial accident. In response to questions posed at trial, Dr. Peterson offered the explanation that he did not consider radiological findings to be "medical findings" and further stated that he did not consider Koch's muscle spasms to be objective findings. He then avoided making findings regarding Koch's range of motion by failing to conduct appropriate testing, choosing instead to evaluate her range of motion "by vision."

¶ 41 Pursuant to § 39-71-116(19), MCA, objective medical findings means medical evidence, including range of motion, atrophy, muscle strength, muscle spasm, or other diagnostic evidence, substantiated by clinical findings. While I do not expect medical providers to know and apply the legal definition, in this Court's evaluation of the case, it does not matter if the provider calls muscle spasm an "objective medical finding." If a muscle spasm is documented, this Court will consider it to be an objective medical

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<sup>71</sup> Koch, ¶ 43.

<sup>72</sup> Koch, ¶¶ 29-30.

finding under the WCA because the WCA considers it to be an objective medical finding.

¶ 42 After I ruled in Koch's favor in the previous case, Employers had two viable options: it could accept the fact that it was now liable for Koch's medical treatment, or it could appeal this Court's decision. Employers did neither. Instead, it arbitrarily ceased paying for Dr. Roccisano's treatment while he was in the middle of investigating Koch's condition in an attempt to accurately diagnose – and therefore be able to treat – the source of her symptoms. Had Employers allowed Dr. Roccisano to finish his inquiry, ruling out some potential diagnoses and hopefully arriving at a definitive diagnosis, Dr. Roccisano would then have been in the position to opine whether Koch's industrial accident was more probably than not the cause of Koch's ongoing problems. It is certainly conceivable that Dr. Roccisano could ultimately find that Koch's problems stem from something unrelated to her industrial accident, and at that point Employers would rightfully be relieved of further liability. Instead, Employers has blocked Dr. Roccisano's ability to properly diagnose and treat Koch – even after this Court ruled otherwise.

¶ 43 As I held in the previous case, Koch is entitled to ongoing medical benefits for medical treatment as prescribed by Dr. Roccisano, and Employers remains liable for that care.

**Issue Two: Whether Petitioner is entitled to medications prescribed by Dr. Roccisano for treatment of her injuries related to her workers' compensation claim.**

¶ 44 Koch argues that under the previous decision this Court made in her case, Employers is liable for the cost of the prescription medications ordered by Dr. Roccisano for the treatment of her back condition. She argues that once liability was established, Employers had no medical basis to stop paying for her prescriptions.

¶ 45 In its defense, Employers offers only that it believes Koch's prescription medications are palliative care because she is at MMI.<sup>73</sup> As set forth above, on June 13, 2013, Employers notified Koch's counsel that it intended to stop paying for Koch's prescription medications, and on July 16, 2013, it did so. It appears that Employers reached this decision because of Dr. Peterson's opinion, expressed in his April 25, 2013, IME report, that Koch had reached MMI.

¶ 46 Assuming *arguendo* that Koch is at MMI – although from the facts presented, I would be hard-pressed to conclude that she is – the principal case addressing the issue of whether prescription medications constitute palliative care is *Hiett v. Missoula County*

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<sup>73</sup> Opening statement.



*Public Schools*.<sup>74</sup> In *Hiett*, the Montana Supreme Court held that a claimant who had reached MMI but had not returned to work was nonetheless entitled to coverage for her prescription medications which allowed her to sustain medical stability.<sup>75</sup>

¶ 47 At trial, Koch testified that the anti-inflammatory and muscle relaxant medications which she took relieved her symptoms. Although I question whether Koch has indeed reached MMI, Employers does not explain how, even if Koch has reached MMI, it is justified, under *Hiett*, in refusing to pay for her prescriptions. I therefore conclude Employers is liable to Koch for the medications Dr. Roccisano prescribes for treatment of her injuries relating to her workers' compensation claim.

**Issue Three: Whether a penalty and attorney fees should be awarded to Petitioner.**

¶ 48 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. Pursuant to § 39-71-2907, MCA, the Court may increase by 20% the full amount of benefits due a claimant during the period of delay or refusal to pay if the insurer's delay or refusal to pay is unreasonable.

¶ 49 Koch argues that Employers denied Dr. Roccisano's authorization request for the T8-9 injection on November 27, 2012, even though Drs. Peterson and McElhinny did not conduct their panel IME until April 2013. Therefore, Employers refused to authorize the treatment requested by Koch's treating physician without even a medical opinion on which to base the denial.<sup>76</sup>

¶ 50 Koch further argues that Employers acted unreasonably in adjusting her claim because it sought a second IME from an unqualified physician who offered no new medical analysis instead of following the previous decision of this Court. Koch argues that her medical treatment has been significantly delayed and that Employers' actions may have permanently worsened her condition.<sup>77</sup>

¶ 51 Koch further argues that Employers acted unreasonably when it ceased authorizing her prescription medication. Koch contends that Employers had previously

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<sup>74</sup> 2003 MT 213, 317 Mont. 95, 75 P.3d 341.

<sup>75</sup> *Hiett*, ¶¶ 35, 38.

<sup>76</sup> Petitioner's Trial Brief at 3.

<sup>77</sup> Petitioner's Trial Brief at 3-4.

authorized and paid for medications to alleviate her back pain, and it was unreasonable for it to decide otherwise.<sup>78</sup>

¶ 52 Employers maintains that its conduct has been reasonable in all respects.<sup>79</sup>

¶ 53 Although, as I noted above, I can envision some circumstances in which Employers could justifiably refuse to authorize certain treatment for Koch on the grounds of causation, the present circumstances are not those. Employers arbitrarily halted Dr. Roccisano's treatment plan in the middle of his diagnosis, and it did so without any medical evidence to the contrary. It later ceased authorizing Koch's prescription medicines because she had allegedly reached MMI without any consideration of whether, under *Hiatt*, it was appropriate to do so.

¶ 54 Once Koch's claim was adjudged compensable, Employers became liable for it. For Employers to reasonably terminate liability after that ruling, it must have some clear justification to do so. Employers has not convinced me that such justification existed in the present case.

¶ 55 I conclude Koch is entitled to a penalty and attorney fees, subject to the applicable statutes.

### JUDGMENT

¶ 56 Petitioner is entitled to ongoing medical benefits for medical treatment as prescribed by Dr. Roccisano.

¶ 57 Petitioner is entitled to medications prescribed by Dr. Roccisano for treatment of her injuries related to her workers' compensation claim.

¶ 58 Petitioner is entitled to a penalty and attorney fees.

¶ 59 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.

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<sup>78</sup> Petitioner's Trial Brief at 3.

<sup>79</sup> Pretrial Order at 4.

DATED in Helena, Montana, this 19<sup>th</sup> day of May, 2014.

(SEAL)

/s/ JAMES JEREMIAH SHEA  
JUDGE

c: Richard J. Martin  
Charles G. Adams

Submitted: April 15, 2014