IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1997 MTWCC 67

WCC No. 9705-7746

DOUG LOCKHART

Petitioner

vs.

NEW HAMPSHIRE INSURANCE COMPANY

Respondent/Insurer for

LABOR CONTRACTORS

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: At the age of 15, claimant suffered a lunate necrosis of his right wrist, leading to implantation of a Silastic lunate implant. In the fifteen years since the procedure, physicians discovered that such implants almost inevitably fail. After completing high school, claimant worked in various capacities, principally in construction, without problems with the implant. In 1996, while hammering a nail, claimant experienced sudden onset of sharp pain in his right wrist. The pain continued, leading to medical treatment. A fragment was noted on x-rays. Claimant's treating physician, who performed the original surgery sixteen years earlier, gave the opinion a fragmentation occurring as the result of hammering on the day the wrist pain began. An IME physician, who performed hundreds of IMEs per year for insurance companies, examined claimant and testified his current medical condition results from deterioration of the implant, not from a single incident.

Held: Claimant's condition results from an injury while hammering. While the medical evidence is conflicting, the Court is persuaded by the evidence in claimant's favor, including: his credible testimony that he had no wrist pain until the incident at issue, the treating physician was more familiar with claimant's condition than the IME physician, another physician's reference to a "fragment" on an x-ray supports the treating physician's

analysis. Claim for penalty and attorneys fees denied where the insurer's denial of the claim was reasonable and based on medical evidence.

Topics:

Injury and Accident: Accident. Parties disputed whether claimant's wrist condition resulted entirely from deterioration of Silastic lunate implant he received fifteen years earlier, or whether his hammering in construction job caused fragmentation in implant or surrounding bone. WCC was persuaded an injury occurred, based upon: claimant's credible testimony that he had no wrist pain until the incident at issue, the treating physician was more familiar with claimant's condition than the IME physician (who performed hundreds of IMEs a year for insurance companies), and another physician's reference to a "fragment" on an x-ray supports the treating physician's analysis.

Physicians: Conflicting Evidence. Parties disputed whether claimant's wrist condition resulted entirely from deterioration of Silastic lunate implant he received fifteen years earlier, or whether his hammering in construction job caused fragmentation in implant or surrounding bone. WCC was persuaded an injury occurred, based upon: claimant's credible testimony that he had no wrist pain until the incident at issue, the treating physician was more familiar with claimant's condition than the IME physician (who performed hundreds of IMEs a year for insurance companies), and another physician's reference to a "fragment" on an x-ray supports the treating physician's analysis.

Physicians: Treating Physician: Weight of Opinion. Parties disputed whether claimant's wrist condition resulted entirely from deterioration of Silastic lunate implant he received fifteen years earlier, or whether his hammering in construction job caused fragmentation in implant or surrounding bone. WCC was persuaded an injury occurred, based upon: claimant's credible testimony that he had no wrist pain until the incident at issue, the treating physician was more familiar with claimant's condition than the IME physician (who performed hundreds of IMEs a year for insurance companies), and another physician's reference to a "fragment" on an x-ray supports the treating physician's analysis.

Proof: Conflicting Evidence: Medical. Parties disputed whether claimant's wrist condition resulted entirely from deterioration of Silastic lunate implant he received fifteen years earlier, or whether his hammering in construction job caused fragmentation in implant or surrounding bone. WCC was persuaded an injury occurred, based upon: claimant's credible testimony that

he had no wrist pain until the incident at issue, the treating physician was more familiar with claimant's condition than the IME physician (who performed hundreds of IMEs a year for insurance companies), and another physician's reference to a "fragment" on an x-ray supports the treating physician's analysis.

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-712, MCA (1995). Although section 39-71-712, MCA (1995) limits temporary partial disability benefits to 26 weeks, insurer was estopped from relying on 26 week limit where it had denied claim and caused claimant to delay surgery, meaning he could not undergo surgery and return to temporary total disability status before using up 26 weeks.

Benefits: Temporary Partial Disability Benefits. Although section 39-71-712, MCA (1995) limits temporary partial disability benefits to 26 weeks, insurer was estopped from relying on 26 week limit where it had denied claim and caused claimant to delay surgery, meaning he could not undergo surgery and return to temporary total disability status before using up 26 weeks.

Estoppel and Waiver: Equitable Estoppel. Although section 39-71-712, MCA (1995) limits temporary partial disability benefits to 26 weeks, insurer was estopped from relying on 26 week limit where it had denied claim and caused claimant to delay surgery, meaning he could not undergo surgery and return to temporary total disability status before using up 26 weeks.

The trial in this matter was held on Tuesday, September 16, 1997, in Kalispell, Montana. Petitioner, Doug Lockhart (claimant), was present and represented by Mr. Kenneth S. Thomas. Respondent, New Hampshire Insurance Company (New Hampshire), was represented by Mr. Donald R. Herndon.

Exhibits: Exhibits 1 through 7 were admitted without objection.

Witnesses and Depositions: Claimant and Bill Vergin were sworn and testified. Additionally, the parties submitted the depositions of Dr. Peter A. Nathan, Dr. James F. Brinkman, Bill Vergin and claimant to the Court for its consideration.

Issues: The parties have phrased the issues as follows:

1. Whether the Petitioner suffered a compensable industrial injury arising out of and in the course of his employment on or about October 3, 1996, while employed by Labor Contractors, Flathead County, Kalispell, Montana.

2. Whether the Petitioner is entitled to payment of temporary total disability benefits resulting from Petitioner's industrial injury.

3. Whether Petitioner is entitled to a 20% increase of award for unreasonable delay or refusal to pay benefits pursuant to section 39-71-2907, MCA.

4. Whether Petitioner is entitled to reasonable attorney fees and costs pursuant to section 39-71-611, MCA.

(PRETRIAL ORDER at 2-3.)

* * * * *

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

FINDINGS OF FACT

1. Claimant is presently 31 years old. He is a high school graduate.

2. When claimant was 15 years old he suffered a lunate necrosis of his right wrist. The condition involved the lunate bone of the wrist, which is one of eight bones of the wrist. Ben Pansky, REVIEW OF GROSS ANATOMY, (6th ed. 1996) at 286-89. The lunate bone is proximal to the radius and ulna bones of the arm. *Id.* "Necrosis" means the" death of living tissue," MEDICAL DICTIONARY, Merriam-Webster, Inc. (1997) [online at www.medscape.com.], hence claimant's condition involved the death of living bone. Dr. James F. Brinkman, who treated claimant's condition, testified as follows concerning claimant's condition:

> Q At the time that this lunate prosthesis was installed in Douglas Lockhart, what were the clinical indications for doing that?
>
> A What is called Keinbock's disease or collapsed or absorption or sclerosis of the lunate bone, posttraumatic, arthritic changes in the bone.
>
> Q Is it disease or trauma that caused the original problem?
>
> A Most likely trauma. For some reason or another there is a change in blood supply to the lunate, and it causes that type of alteration to it. What exactly causes this is still not definitely known.

(Brinkman Dep. at 7.)
Dr. Peter A. Nathan, who performed an independent medical examination (IME), described Keinbock's disease as follows:

> A. It's a terrible disease in which the lunate bone loses its vascularity, so it means --
>
> Q. Blood supply you mean?
>
> A. Blood supply.
>
> Q. All right.
>
> A. That means death of the bone. And it's virtually impossible to get that vascularity back into the bone once it occurs.

(Nathan Dep. at 15.)

3. As a result of lunate necrosis, claimant underwent at least two operations when he was 15 and 16 years old. One surgery involved a bone graft of the lunate bone. (Brinkman Dep. at 6.) The graft failed and thereafter the lunate bone was removed and replaced with a "Silastic lunate" which is a silicon prosthesis or replacement for the lunate. (*Id.* at 7.)

4. The Silastic lunate implant occurred approximately 15 years ago. At the time of claimant's surgery, the implant was a promising procedure. However, in the intervening 15 years, physicians have discovered that the implants almost inevitably fail. Dr. Brinkman, who performed the implant, testified:

> The long-term follow-up showed the lunate wouldn't hold up well and oftentimes would fragment, and so I don't know of anyone who is still using a lunate unless it is an exceptional case.

(*Id*. at 8.) Dr. Nathan concurred, testifying that the implants fail in 10 to 15 years. (Nathan Dep. at 30.)

5. The foregoing history is important because the question presented in this case is whether the onset of debilitating wrist pain which claimant suffered in October 1996 was due to natural failure of the Silastic lunate implant or whether some event at work accelerated the failure of the implant.

6. Following the implant, claimant completed high school and entered the labor market. In the 15-16 years since the implant, he has worked as a laborer. He worked for a time as

a stable hand for racehorses. For the 12 years preceding his alleged industrial accident, he worked construction, primarily doing concrete work and carpentry.

7. During those 15-16 years, there is only one documented instance of claimant seeking medical care with regard to his wrist. That instance was in 1984 and is reflected in a note of Dr. John W. Hilleboe, an orthopedic surgeon practicing in Kalispell. In a note of May 24, 1984, Dr. Hilleboe recorded:

> Doug came to the office, his cast was removed. I think he just had basically a tendinitis of his ulnar collateral ligament at the wrist. I reviewed his x-rays which came from Dr. Brinkman's office with those recently obtained here and do not see any subluxation of the wrist, nor do I see any real eburnation or loss of position of the lunate. Therefore, I think that this is strictly a connective tissue problem and that he should be treated as such.

(Ex. 2 at 1.) Claimant did not recall the visit or the problem. Dr. Hilleboe did not testify, so the only information available to the Court is reflected in the above office note. On its face the note expresses Dr. Hilleboe's impression that claimant was suffering "tendinitis of his ulnar collateral ligament at the wrist" which was "strictly a connective tissue problem."

8. Claimant testified that until October 3, 1996, he did not have wrist pain. As noted in the previous paragraph, he did not recall his treatment by Dr. Hilleboe in 1984. There is no evidence, other than the 1984 visit to Dr. Hilleboe, that he ever sought medical care for his wrist until 1996 or that he experienced pain in his wrist during the intervening years. Claimant's stepfather corroborated his testimony. Claimant was a credible witness and there is no direct evidence that between 1984 and October 1996 he suffered any pain attributable to the implant. This evidence is important to the resolution of the conflicting medical opinions discussed hereafter.

9. On October 3, 1996, claimant was an employee of Labor Contractors. Labor Contractors is a temporary employment agency which furnishes temporary employees to other employers.

10. On Thursday, October 3, 1996, claimant was working for Bill's Construction, which is a construction company operated by claimant's stepfather, Bill Vergin. Claimant was putting up trusses, nailing them with 16 penny nails (approximately 3¾ inch nails). At approximately 3:00 p.m., while hammering nails, he experienced an onset of sharp pain in his right wrist.

11. Since October 3, 1996, claimant has continued to have pain in his right wrist. He described the pain as located in the center of his wrist (the lunate is approximately in the

center of the wrist and just below the lateral side of the radius). He described the pain as "dull" and said that his wrist "aches."

12. Claimant worked on Friday, October 4, 1996, but his pain worsened, becoming sharper, and his wrist swelled. He had difficulty doing his job.

13. On Monday, October 7, 1996, the next scheduled day of work, claimant's stepfather told him that he should see a doctor about his wrist. Claimant then reported back to Labor Contractors and was told to contact Dr. Hilleboe for an appointment.

14. Claimant was seen by Dr. Hilleboe on October 8, 1996. Dr. Hilleboe took him off construction work and claimant has not worked construction since. (Ex. 2 at 2.) Dr. Hilleboe did, however, release claimant to "only do clerical work." (*Id*.)

15. Dr. Hilleboe's office note of his October 8 examination of claimant reported that claimant had worked without apparent difficulty from the time of his lunate implant until

> Fri. before this, the 5th [sic] of Oct. when he was working as a carpenter through Labor Contractor's, working for Bill's Contracting at Bitterroot Lake building a shop and started to have marked pain in his wrist and since then he can't grip, he can't grasp objects and has a lot of discomfort associated with the wrist. He has limitation of motion.

(Ex. 2 at 4.) Dr. Hilleboe x-rayed the wrist and reported, "X-RAYS show the Silastic implant looks like it's **delaminated or at least fallen apart**." (*Id.,* emphasis added.)

16. Dr. Hilleboe referred claimant to Dr. Bert Jones, another orthopedic surgeon practicing in Kalispell, noting "this is more in his area." (Ex. 2 at 4.)

17. Dr. Jones examined claimant on October 18, 1996. On examination he noted that claimant had tenderness in the lunate area of the wrist and swelling which had "resolved somewhat." (Ex. 4.) He reviewed claimant's x-rays and commented:

> I've reviewed his X-RAYS which show a Silastic lunate implant is in without an accompanying intercarpal fusion. There is, I think, involvement of the radial lunate fossa and the ulnar translocation of the entire carpus. The mid carpal row appears to be minimally involved with arthritic changes and there is also minimal involvement of the radioscaphoid articulation.

(*Id.*) The foregoing review does not mention any delamination of the implant; however, further in his note, Dr. Jones commented:

> This is a very difficult treatment problem but I think at a very minimum that he needs to have removal of the Silastic implant. I think it would go on to **further** fragmentation and also cause progressive synovitis and destruction in the wrist joint.

(*Id.,* emphasis added.) Although the Court cannot be sure of what Dr. Jones meant in referring to "further fragmentation," the quoted language suggests that Dr. Jones saw some existing fragmentation of the lunate implant.

18. Dr. Jones provided claimant with several surgical options but also suggested he obtain a second opinion concerning surgical intervention. (Ex. 4.)

19. Claimant thereafter returned to Dr. Brinkman, who had performed the lunate transplant. Dr. Brinkman examined claimant on November 14, 1996. He reviewed the x-rays taken by Dr. Hilleboe and commented:

> X-rays taken in October, 1996 show a lunate [S]ilastic prosthesis in place with some settling in the lunate/radial joint surface. **There is a small fragment.** It is difficult to say whether it is [S]ilastic or bone, ulnar to this lunate prosthesis. There are some degenerative changes noted in the surrounding carpal bones.

(Ex. 3 at 25, emphasis added.) Concerning the role of claimant's work of October 3, 1996, Dr. Brinkman wrote:

> Right wrist pain with history of lunate prosthesis 16 years ago and more recent injury of 10/3/96. Although he has had a preceding operation on the right wrist, he was essentially asymptomatic/healthy until the incident of 10/3/96 which aggravated/caused new injury to the preceding one.

(*Id*.)

20. On October 3, 1996, Labor Contractors was insured by New Hampshire Insurance Company (New Hampshire). Claimant submitted a claim for compensation to New Hampshire (Ex. 7), which denied the claim based on its determination that the "accident" definition, § 39-71-119(2), MCA (1995), had not been met (Ex. 5).

21. New Hampshire thereafter arranged for an IME by Dr. Peter A. Nathan, an orthopedic surgeon who specializes in hand surgery. (See Ex. 1 at 2.) Dr. Nathan practices in Portland, Oregon and the IME was conducted there on January 15, 1997.

22. Dr. Nathan reviewed the x-rays taken by Dr. Hilleboe and had a new series of x-rays taken for comparison. Concerning Dr. Hilleboe's x-rays, he commented:

> X-RAYS: X-rays in AP and lateral views of the right wrist, taken at Flathead Valley Orthopedic and Sports Medicine on October 8, 1996, are reviewed and demonstrate a [S]ilastic lunate implant in position, with some erosion of the distal radius. A small ossicle of bone is just ulnar to the lunate. There is a suggestion of cystic changes in the triquetrum and possibly in the scaphoid. A slight irregularity of the distal radio-ulnar joint on the right is also noted.

(Ex. 1 at 6.) Concerning the new x-rays, he said:

> X-rays in AP and lateral views of both wrists, for comparison, taken at this office on January 15, 1997, demonstrate the [S]ilastic implant in the right wrist. There is minimal distortion of the carpus as a reaction to the implant. There is some irregularity of the distal radius. There is a slight alteration in the distal radio-ulnar joint. The left wrist is entirely within normal limits.

(*Id.*)

23. Both Drs. Brinkman and Nathan testified by deposition.

24. Dr. Brinkman is a board certified plastic surgeon and has performed numerous Silastic lunate implants. As noted earlier, approximately 15 years ago he performed the implant on claimant.

25. Dr. Brinkman testified that the October 8, 1996 x-rays showed a Silastic fragment which had broken off the original implant. (Brinkman Dep. at 15.) He characterized the fragment as sharp and not worn, indicating that the fragment was recent. (*Id.* at 21-22.) He noted that the presence of a single fragment, as seen on the x-ray, was more consistent with an acute event rather than chronic, long-term degeneration. (*Id*. at 21.) While conceding that claimant's x-rays also showed long-term arthritic changes (*id.* at 30), and that the implant could have failed at any time (*id*. at 27), to a reasonable degree of medical probability it was his opinion that claimant's hammering on October 3, 1996, caused the fragment and caused claimant's previously asymptomatic wrist to become symptomatic. (*Id.* at 24, 29, 33-34, 37-38.) Hammering on October 3, 1996, was the "straw that broke the camel's back." (*Id*. at 38-39.)

26. Dr. Brinkman's opinion was based in part on the nature of the fragment – that it was sharp rather than worn and was a single fragment. (*See Finding 25*.) It was also based in part on claimant's medical history, especially the lack of symptomatology for many years. (Brinkman Dep. at 26.) He noted that fragmentation of the implant would cause swelling.

(*Id.* at 29.) One of claimant's symptoms following work on October 3, 1996, was swelling. (*See Finding 17.*)

27. Dr. Nathan is board certified in hand surgery. His deposition does not disclose how much hand surgery he currently does. It does disclose that he does several hundred IMEs a year, 75% of them for insurance companies. (Nathan Dep. at 49-50.) Asked if he did more than 200 a year, he replied yes. Asked if he did more than 250 a year, he replied:

> A. That I can't answer anymore. I do less IME's because I'm less available for them now because I'm traveling more. I do several hundreds of IME's a year and have done that for most of my professional career.

(*Id.* at 49.) He has done about a dozen Silastic implants. (*Id.* at 28.)

28. Dr. Nathan testified that in his opinion the claimant did not suffer a new injury or aggravation to his wrist on October 3, 1996. (Nathan Dep. at 23.) He testified that Silastic lunate implants inevitably fail. (*Id.* at 32-33.) He took a new set of x-rays of claimant's wrists and testified that the x-ray of the right wrist showed long-term arthritic degenerative changes, including an ossicle or bone spur on the radius, protruding "ulnarly, that is, towards the little finger side." (*Id.* at 12.) The x-rays also disclosed decalcification of the carpals (wrist bones). (*Id.*) Dr. Nathan disagreed that they disclosed any Silastic lunate fragment and testified that the feature identified as a fragment by Dr. Brinkman was probably the bone spur on the radius. (*Id.* at 16.) However, he agreed that doctors could reasonably differ in their interpretation of the x-rays. (*Id.* at 17.) He also conceded that a piece of bone or Silastic implant breaking off could trigger pain and swelling, but testified that a fragment was not present on the x-ray and, therefore, did not explain claimant's pain on October 3, 1996. (*Id*. at 24-25.)

29. Dr. Nathan expressed disbelief of claimant's asymptomatic medical history, testifying that it was not consistent with the typical history of lunate implant patients or with the arthritic changes seen radiologically. (*Id.* at 19-21.) It was also his opinion that the implant was the cause of claimant's wrist pain in 1984, perhaps as a result of the lunate implant shifting and causing an inflammatory reaction. (*Id*. at 37, 48.)

30. It is apparent from the foregoing recitation of the evidence that the medical opinions of Drs. Brinkman and Nathan conflict. They conflict over the reading of the x-rays, in particular whether the x-rays disclose a Silastic fragment. They conflict over whether claimant suffered a new wrist injury or aggravation on October 3, 1996. After carefully considering their opinions and qualifications, the other medical records in this case, and the history provided by claimant and his stepfather, I find that Dr. Brinkman's opinions are the more persuasive. In so finding, I have especially considered the following:

a. The evidence does not establish that Dr. Nathan is more qualified to render an opinion concerning Silastic implants. While he has done a number of implants, so has Dr. Brinkman.

b. A substantial amount of Dr. Nathan's medical practice is devoted to doing IME's for insurance companies.

c. Dr. Brinkman is claimant's treating physician with respect to the lunate implant.

d. Dr. Brinkman's interpretation of x-rays as disclosing a lunate fragment is supported by Dr. Hilleboe's own interpretation of x-rays. Dr. Jones' office note, while ambiguous, suggests that he too saw a fragment, at least he does not take issue with Dr. Hilleboe's prior reading.

e. Dr. Brinkman testified that the fragment was sharp, indicating that it had a recent, acute origin. Dr. Brinkman's testimony persuades me that the fragment was caused by claimant's hammering on October 3, 1996, and that the fragment caused the onset of claimant's pain.

f. Dr. Nathan's opinion that claimant must have had ongoing, increasing pain in his wrist over the years is unsupported by any other evidence in this case. Even if Dr. Nathan is correct in his opinion that the 1984 tendinitis was attributable to the lunate implant, there is no evidence that claimant suffered pain or difficulty with his right wrist during the following 12 years. The 1984 medical record establishes that claimant was willing to seek medical care when his wrist bothered him, and there is no evidence of any medical consultation or care between 1984 and 1996. Moreover, claimant's and his stepfather's testimony that he was asymptomatic over the years is uncontradicted with the one exception of the 1984 tendinitis.

g. Until October 3, 1996, claimant worked in construction and other laboring vocations without apparent problems when using his right hand and wrist. (Again there is the 1984 exception, but it is the only one in evidence and was 12 years prior to the October 3, 1996 incident.)

h. Claimant suffered an acute, disabling onset of wrist pain when hammering on October 3, 1996. No other disabling event has been identified and there is no evidence that prior to October 3, 1996, the claimant's wrist had become increasingly painful or that his ability to work had been deteriorating.

31. There is little question that claimant's Silastic implant would have ultimately failed, causing pain and disability. However, in this case the implant failed and disability ensued as an immediate and proximate result of claimant's hammering on October 3, 1996.

32. The failure of the Silastic implant and onset of disability is attributable to a single, identifiable incident on October 3, 1996. While claimant could not say specifically at what point in his swing of the hammer he felt the onset of pain, such precision is not required.

33. Claimant did not experience an immediate wage loss due to his October 3 injury. While Dr. Hilleboe took him off construction work as of October 8, 1996, claimant was assigned to light-duty, secretarial work for Labor Contractors at his regular hourly wage of $9.00 an hour. He continued doing secretarial work until February 1997, when New Hampshire indicated that it was finally denying his claim and Labor Contractors determined that, as a result, he was no longer eligible for its light-duty work program.

34. Claimant was off work for several days commencing October 7, 1996, and at least through the time he saw Dr. Jones on October 18, 1996. (Lockhart Dep. at 42.) He then returned to work in a temporary, secretarial position, as noted earlier. Following his termination by Labor Contractors, claimant was unemployed for two weeks. He then went to work for a pawn shop. He has continued working for the pawn shop four days a week, earning $25 a day.

35. Claimant has looked for other work but has not found other employment.

36. At the time of his injury, claimant was earning $9.00 an hour. He testified that he worked between 30 and 40 hours a week; however, the Court has not been provided with his actual wages for the four pay periods immediately preceding his injury or for any other period of time, *see §* 39-71-123(3), MCA (1995).

37. Claimant continues to experience pain in his wrist. He is also more prone to drop objects. (Exs. 1 and 3 at 24.)

38. Claimant has not reached maximum medical improvement. Drs. Jones, Brinkman and Nathan all recommend surgery, although they differ as to the specific surgery they prefer. (Exs. 1 at 8; 3 at 25; 4.)

39. New Hampshire's denial of this claim was not unreasonable. While I have found for claimant, the requirement for such finding is a bare preponderance of the evidence. The medical evidence in this case was conflicting and by no means so overwhelming that the insurer should have disregarded Dr. Nathan's opinion. Dr. Nathan is a qualified hand surgeon and experienced in lunate implants. His testimony cast doubt on claimant's history of his wrist as asymptomatic. It also conflicted with Dr. Brinkman's opinion concerning a

Silastic fragment. The medical evidence that the Silastic lunate implant would ultimately fail was overwhelming, and the issue presented is whether it failed on October 3, 1996, as a direct and proximate result of claimant's hammering at work. The evidence persuades me that reasonable doctors may disagree on that issue.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over this controversy. § 39-71-2401 and -2905, MCA.

2. The claimant's alleged injury occurred on October 3, 1996; therefore, the 1995 version of the Workers' Compensation Act applies. *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

3. To be compensable the claimant's alleged industrial accident must meet the accident and injury definitions set out in section 39-71-119, MCA (1995). The definitions are as follows:

> **39-71-119. Injury and accident defined.** (1) "Injury" or "injured" means
>
> (a) internal or external physical harm to the body that is established by objective medical findings;
>
> (b) damage to prosthetic devices or appliances, except for damage to eyeglasses, contact lenses, dentures, or hearing aids; or
>
> (c) death.
>
> (2) An injury is caused by an accident. An accident is:
>
> (a) an unexpected traumatic incident or unusual strain;
>
> (b) identifiable by time and place of occurrence;
>
> (c) identifiable by member or part of the body affected; and
>
> (d) caused by a specific event on a single day or during a single work shift.

4. Aggravations of preexisting conditions are covered under the Act. Section 39-71-407, MCA (1995), provides in relevant part:

> **39-71-407. Liability of insurers -- limitations.** (1) Each insurer is liable for the payment of compensation, in the manner and to the extent provided in this section, to an employee of an employer that it insures who receives an injury arising out of and in the course of employment or, in the case of death from the injury, to the employee's beneficiaries, if any.
>
> (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.

5. Claimant bears the burden of proving his case by a preponderance of evidence. *Ricks v. Teslow Consolidated,* 162 Mont. 469, 483-84, 512 P.2d 1304 (1973); *Dumont v. Aetna Fire Underwriters,* 183 Mont. 190, 201, 598 P.2d 1099 (1979).

6. Claimant has satisfied the statutory definitions and his burden of proof.

a. He has identified a specific incident on a specific workday as triggering a disabling condition.

b. There is objective medical evidence, by way of swelling and x-rays, that he suffered an injury or aggravation.

c. That his condition may have been inevitable does not relieve the insurer of liability for his condition. It has long been the law of Montana that employers take their workers as is, with all their underlying ailments, and that a traumatic event or unusual strain which lights up, accelerates or aggravates an underlying condition is compensable. *Birnie v. U.S. Gypsum Co.,* 134 Mont. 39, 45, 328 P.2d 133, 136 (1958) and *see Houts v. Kare-Mor,* 257 Mont. 65, 68, 847 P.2d 701, 703 (1992) and *Hash v. Montana Silversmith,* 248 Mont. 155, 158, 810 P.2d 1174, 1175 (1991). "The rule is that when preexisting diseases are aggravated by an injury and disabilities result, such disabilities are to be treated and considered as the result of the injury." *Strandberg v. Reber Co.,* 179 Mont. 173, 175, 587 P.2d 18, 19 (1978).

7. Claimant seeks a determination that he is entitled to temporary total disability benefits. His request is governed by section 39-71-701, MCA (1995), which provides in relevant part:

39-71-701. Compensation for temporary total disability -- exception. (1) Subject to the limitation in 39-71-736 and subsection (4) of this section, a worker is eligible for temporary total disability benefits:

(a) when the worker suffers a **total loss of wages** as a result of an injury and until the worker reaches maximum healing; or

(b) 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.

> (2) The determination of temporary total disability must be supported by a preponderance of objective medical findings.
>
> (3) Weekly compensation benefits for injury producing temporary total disability are 66 2/3% of the wages received at the time of the injury. The maximum weekly compensation benefits may not exceed the state's average weekly wage at the time of injury. Temporary total disability benefits must be paid for the duration of the worker's temporary disability. The weekly benefit amount may not be adjusted for cost of living as provided in 39-71-702(5).
>
> (4) If the treating physician releases a worker to return to the same, a modified, or an alternative position that the individual is able and qualified to perform with the same employer at an equivalent or higher wage than the individual received at the time of injury, the worker is no longer eligible for temporary total disability benefits even though the worker has not reached maximum healing. A worker requalifies for temporary total disability benefits if the modified or alternative position is no longer available for any reason to the worker and the worker continues to be temporarily totally disabled, as defined in 39-71-116. [Emphasis added.]

Claimant has not reached maximum healing and will not do so until he receives further treatment, probably in the form of surgery. A finding of temporary total disability is supported by a preponderance of objective medical findings (x-ray, swelling). With respect to the few days of work lost immediately following his injury and the two week interval between his termination of employment with Labor Contractors in February 1997, and his commencement of work for a pawn shop, claimant also suffered a loss of wages. Thus, for those times, claimant is entitled to temporary total disability benefits in an amount equal to 2/3 of his average weekly wage, subject to the maximum prescribed by section 39-71-701(3), MCA (1995). The benefits for these periods is also subject to the six-day waiting requirement. § 39-71-736, MCA (1995).

Although he testified that at the time of his injury he was averaging 30 to 40 hours a week of work, claimant has not provided the Court with the amount of his actual pay for the four pay periods immediately preceding his injury or for any other period. That information is required to calculate his actual benefits. § 39-71-123(3), MCA (1995). However, the PRETRIAL ORDER does not request to the Court to do the calculation; it requests that it only determine that he is entitled to temporary total disability benefits. The Court therefore makes no determination as to the actual amount of benefits due. It retains jurisdiction to make the calculation should the parties be unable to agree on the amount due.

8. The claimant would be entitled to temporary total disability benefits during the entire period following his termination of employment with Labor Contractors in mid-February

1997 but for the fact that he has secured part-time employment at a pawn shop and therefore has not had a "total loss of wages" since March 1997. While his receipt of wages disqualifies him from receiving temporary total disability benefits, claimant qualifies for temporary partial disability benefits under section 39-71-712, MCA (1995), which provides:

> **39-71-712. Temporary partial disability benefits.** (1) If, prior to maximum healing, an injured worker has a physical restriction and is approved to return to a modified or alternative employment that the worker is able and qualified to perform and the worker suffers an actual wage loss as a result of a temporary work restriction, the worker qualifies for temporary partial disability benefits.
>
> (2) An insurer's liability for temporary partial disability must be the difference between the injured worker's average weekly wage received at the time of the injury, subject to a maximum of 40 hours a week, and the actual weekly wages earned during the period that the claimant is temporarily partially disabled, not to exceed the injured worker's temporary total disability benefit rate.
>
> (3) Temporary partial disability benefits are limited to a total of 26 weeks. The insurer may extend the period of temporary partial disability payments.
>
> (4) A worker requalifies for temporary total disability benefits if the modified position is no longer available to the worker and the worker continues to be temporarily totally disabled as defined in 39-71-116.
>
> (5) Temporary partial disability may not be credited against any permanent partial disability award or settlement under 39-71-703.

Claimant satisfies the prerequisites for the benefits specified by the section. He has not reached maximum medical healing. He was released to perform "clerical work" and has been working. He appears to have suffered a wage loss.

Claimant is therefore entitled to the difference between the average weekly wage he was receiving at the time of his injury and the $100 a week he has been receiving since becoming employed by the pawn shop, subject to the cap specified in the section. The amount of the wage loss and the benefit remains to be determined. The Court retains jurisdiction to determine the amounts in the event the parties cannot agree.

Although temporary partial disability benefits are initially limited to a total of 26 weeks, section 39-71-712(3), MCA, provides that the insurer may agree to extend them. Under the circumstances of this case, I find that the insurer is estopped from asserting the 26-week limitation. Equitable estoppel requires proof of six elements:

> (1) there must be conduct, acts, language, or silence amounting to a representation or a concealment of material facts; (2) these facts must be known to the party estopped at the time of his conduct, or at least the circumstances must be such that knowledge of them is necessarily imputed to him; (3) the truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel at the time it was acted upon by him; (4) the conduct must be done with the intention, or at least with the expectation, that it will be acted upon by the other party, or under the circumstances that it is both natural and probable that it will be so acted upon; (5) the conduct must be relied upon by the other party, and, thus relying, he must be led to act upon it, and (6) he must in fact act upon it in such a manner as to change his position for the worse.

In re: Marriage of KEV, 267 Mont. 323, 331-32, 883 P.2d 1246, 1252 (1994) (quoting *Dagel v. City of Great Falls*, 250 Mont. 224, 234-35**,** 819 P.2d 186, 192 (1991)).

As applied to this case, (1) the insurer told claimant that he was not entitled to any benefits whatsoever; (2) knowledge concerning his entitlement must be imputed to the insurer as it was the one that made the specific representation; (3) the truth of the matter was unknown to claimant in that, whatever his belief concerning his entitlement, he could not obtain benefits except by judicial proceeding and was thus forced to abide by the representation until this Court held otherwise; (4) in denying the claim the insurer certainly intended claimant to rely on its position -- it was clearly foreseeable that claimant would have to find some other way to pay for necessary medical care and some other source of income to replace his lost wages; (5) in fact, lacking benefits, the claimant forewent medical care and sought alternate employment even though he had not reached maximum medical improvement; (6) the claimant changed his position for the worse with respect to his rights to temporary total and temporary partial disability benefits. New Hampshire cannot now insist that claimant fulfill technical requirements for receipt of benefits which its own conduct prevented him from fulfilling. Cf. *Davis v. Jones*, 203 Mont. 464, 468, 661 P.2d 859, 861 (1983). Had New Hampshire accepted the claim, the claimant could have undergone surgery within the 26-week period and returned to temporary total status during his convalescence. Since the claim has now been determined to be compensable, the 26-week period specified in section 39-71-712(3), MCA (1995), shall commence running on the date of this decision.

9. Claimant's request for a penalty and attorney fees are governed by sections 39-71-611 and 39-71-2907, MCA (1995). Both sections require proof of unreasonable conduct on the part of the insurer. I have found that New Hampshire's conduct was not unreasonable. New Hampshire relied on the medical opinions of a hand surgeon who challenged claimant's medical history and opined that claimant's pain was due to long term, inevitable degeneration of his wrist rather than any incident on October 3, 1996. While I have not

adopted the surgeon's opinions, I am unable to say that the opinions were fatuous or that the insurer New Hampshire was unreasonable in relying upon them.

JUDGMENT

1. On October 3, 1996, the claimant suffered a compensable industrial injury to his right wrist.

2. Accordingly, New Hampshire Insurance Company is liable for claimant's medical expenses he has incurred since October 3, 1996, with respect to his wrist injury. New Hampshire shall also pay for any reasonable surgery necessitated by claimant's current wrist condition. The Court makes no determination as to the amounts due or which may become due since those issues have not been submitted to it for decision. The Court retains continuing jurisdiction to decide what amounts are due in the event the parties cannot agree.

3. Claimant is entitled to temporary total disability benefits from October 7, 1996, until the date he returned to work for Labor Contractors in a secretarial position, and for the two-week period he was unemployed following his termination by Labor Contractors, subject the six-day waiting period, § 39-71-736, MCA (1995). The Court makes no determination as to the amounts due since that issue has not presented to it for decision; however, it reserves continuing jurisdiction to determine the amounts if the parties are unable to agree.

4. Claimant may requalify for temporary total disability benefits if he seeks further medical care, including surgery, and is unable to continue his current employment.

5. Claimant is entitled to temporary partial disability benefits under section 39-71-712, MCA (1995). His employment to date shall not be counted towards the 26-week limitation on those benefits. Such 26 weeks commence to run as of the date of this decision. The Court makes no determination concerning the amount of the benefit as it has not been requested to make benefit calculations. However, it reserves continuing jurisdiction to determine the amount in the event the parties are unable to agree.

6. The claimant is entitled to his costs, § 39-71-611, MCA, in an amount to be determined by the Court. He shall submit a memorandum of costs within 10 days following this decision. New Hampshire shall thereafter have 10 days in which to file its objections, if any, to the enumerated costs. The matter of costs will then be deemed submitted for decision.

7. The claimant is not entitled to attorney fees or a penalty.

8. This JUDGMENT is certified as final for purposes of appeal.

9. Any party to this dispute may have 20 days in which to request a rehearing from these FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT.

DATED in Helena, Montana, this 11th day of December, 1997.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. Kenneth S. Thomas
Mr. Donald R. Herndon
Submitted: September 16, 1997