

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2014 MTWCC 15

WCC No. 2013-3248

LAURIE NELSON

Petitioner

vs.

MONTANA SCHOOLS GROUP INSURANCE AUTHORITY

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Summary: After reaching MMI and being told by Respondent that all further treatment had to be preauthorized, Petitioner traveled to California in 2011 and 2012 for office visits with her surgeon without getting preauthorization. Respondent denies liability for the office visits and travel expenses because Petitioner failed to obtain preauthorization and failed to timely submit her travel expenses. Petitioner demands the ongoing right to see her California surgeon, and Respondent counters that it has not categorically denied Petitioner future treatment with her California surgeon; only that it reserves the right to determine if further treatment in California is medically necessary. Petitioner argues the Petition for Hearing was timely filed, while Respondent claims the petition is barred by the statute of limitations. Respondent denies liability for Petitioner's costs, attorney fees, and a penalty.

Held: Petitioner is not entitled to payment for the office visits to see her California surgeon in 2011 and 2012, and is not entitled to reimbursement for her travel. Petitioner was informed after reaching MMI that further treatment needed to be preauthorized. Petitioner failed to seek preauthorization, and failed to timely submit her travel receipts despite knowing the rules regarding travel reimbursement. Petitioner has the right to see her California surgeon in the future provided the treatment is medically necessary and related to her claim. The Petition for Hearing is not barred by the statute of limitations. Petitioner is not entitled to her attorney fees, costs, or a penalty.

Topics:

Equity: Equitable Estoppel. Where Respondent advised Petitioner in writing that she would need to seek preauthorization under ARM 24.29.1517(5)(d) for all future treatment with her out-of-state surgeon because she had reached MMI, Petitioner cannot meet the first element of equitable estoppel when she failed to seek preauthorization, since there was no “conduct, acts, language, or silence amounting to a representation or concealment of material facts” by Respondent.

Constitutions, Statutes, Regulations, and Rules: Administrative Rules of Montana: 24.29.1517. Where Respondent advised Petitioner in writing that she would need to seek preauthorization under ARM 24.29.1517(5)(d) for all future treatment with her out-of-state surgeon because she had reached MMI, Respondent had good cause to deny the surgeon’s charges when Petitioner failed to seek preauthorization. While Respondent’s claims adjuster had earlier advised Petitioner that she could not contact Respondent directly after she obtained legal representation, nothing prevented her attorney from doing so on her behalf.

Benefits: Medical Benefits: Liability. Where Respondent advised Petitioner in writing that she would need to seek preauthorization under ARM 24.29.1517(5)(d) for all future treatment with her out-of-state surgeon because she had reached MMI, Respondent had good cause to deny the surgeon’s charges when Petitioner failed to seek preauthorization. While Respondent’s claims adjuster had earlier advised Petitioner that she could not contact Respondent directly after she obtained legal representation, nothing prevented her attorney from doing so on her behalf.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-704. Where Petitioner never submitted a request for reimbursement for travel expenses for unauthorized treatment with her out-of-state surgeon in 2011 and 2012, she is not entitled to travel reimbursement pursuant to § 39-71-704(1)(d)(ii)(C), -704(1)(d)(ii)(D), MCA.

Benefits: Travel Expenses. Where Petitioner never submitted a request for reimbursement for travel expenses for unauthorized treatment with her out-of-state surgeon in 2011 and 2012, she is not entitled to travel reimbursement pursuant to § 39-71-704(1)(d)(ii)(C), -704(1)(d)(ii)(D), MCA.

Jurisdiction: Justiciability. At the time of trial, Petitioner did not have a current request to see her out-of-state physician that was being denied by Respondent. Absent an existent request and denial of such request, there is not a present justiciable controversy for the Court to decide, and the Court has no jurisdiction to offer a prospective finding of liability for future medical treatment.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-611. To be entitled to an award of costs, a claimant must be the prevailing party pursuant to § 39-71-611(1), MCA, where an insurer denies liability or terminates benefits and the claim is later adjudged compensable. Since Petitioner's claim for treatment with her out-of-state physician in 2011 and 2012 has not been adjudged compensable, she is not entitled to costs, attorney fees or a penalty.

¶ 1 Prior to trial, I granted Montana Schools Group Insurance Authority's (MSGIA) Motion for Summary Judgment on the issue of temporary partial disability (TPD) benefits, ruling that Petitioner Laurie Nelson did not suffer a wage loss as a result of her injury and therefore was not entitled to TPD benefits pursuant to § 39-71-712, MCA.¹ In the same Order, I denied MSGIA's summary judgment motion on the issue of the statute of limitations. Because I did not rule in favor of the non-moving party, I permitted MSGIA the opportunity to present evidence at trial that Nelson's claim for reimbursement for medical treatment and travel expenses was not timely filed in accordance with § 39-71-2905, MCA.

¶ 2 Trial in this matter was held on January 13, 2014, at Fisher Court Reporting, 2711 1st Avenue North, Billings, Montana. Nelson was present and represented by Patrick R. Sheehy. Oliver H. Goe and Morgan M. Weber represented MSGIA. Katy Howell, claims examiner for Montana School Board Association (MSBA), third party administrator (TPA) for MSGIA, also attended.

¹ Order Granting in Part and Denying in Part Respondent's Motion for Summary Judgment, 2014 MTWCC 1, Docket Item No. 28.

¶ 3 Exhibits: I admitted Exhibits 1 through 3 without objection. I overruled MSGIA's relevancy objections to Exhibits 4 and 5 and admitted Exhibit 5. I sustained MSGIA's hearsay objection to Exhibit 4 and did not admit Exhibit 4.

¶ 4 Stipulations: The parties stipulated that the 2005 version of the Workers' Compensation Act (WCA) applies to this case.

¶ 5 Witnesses and Depositions: Nelson and Howell were sworn and testified.

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

Issue One: Whether the insurer is liable for payment of Dr. Bugbee's medical bills for treatment rendered in 2011 and 2012, and for reimbursement of Petitioner's travel expenses for those two trips to get treatment from Dr. Bugbee.

Issue Two: Whether the insurer is liable for payment of Dr. Bugbee in the future for continued medical treatment to Petitioner's injured foot/ankle.

Issue Three: Whether Petitioner is entitled to costs, attorney fees, or a penalty.

Issue Four: Whether Petitioner's request for payment of medical and travel expenses associated with treatment with Dr. Bugbee is barred by § 39-71-2905, MCA.

FINDINGS OF FACT

¶ 7 On August 17, 2005, Nelson suffered an injury to her left ankle arising out of and in the course of her employment with Dawson County High School in Glendive, Montana.³

¶ 8 At the time of her injury, Nelson's employer was enrolled under Compensation Plan 1 of the WCA and was insured by MSGIA, which accepted liability for the claim.⁴

¶ 9 Nelson testified at trial. I found Nelson to be a credible witness. At the time of trial, Nelson was 44 years old and had been a teacher at Dawson County High School for 16 years. Nelson was also a softball and volleyball coach, but resigned both

² Pretrial Order at 6, Docket Item No. 29. The Pretrial Order listed an additional issue which was resolved by my Order dated January 9, 2014, and is not restated here. See *supra* ¶ 1 and note 1.

³ Pretrial Order at 1.

⁴ Pretrial Order at 1-2.

coaching positions in 2012 because she was advised by her doctor that being on her feet for extended periods was causing her ankle joint to rapidly deteriorate.⁵

¶ 10 Nelson badly fractured her ankle while teaching her volleyball team four-step approach shots to the net with the help of a plyometric box. When she turned to answer a question from on top of the box, Nelson's right foot left the box and she fell, twisting her left ankle to nearly ninety degrees. Nelson was transported to the hospital by ambulance.⁶

¶ 11 At the hospital, Nelson was put under anesthesia and the fracture was set. Nelson testified that the Glendive orthopedic physician, Gregory M. Behm, M.D., was out of town at the time of her injury so Nelson initially saw Sidney orthopedist Lotfi Ben-Youssef, M.D., on August 19, 2005.⁷ When Dr. Behm returned to town, Nelson began treating with him.⁸ Dr. Behm eventually performed arthroscopic surgery on Nelson's ankle on November 22, 2005.⁹

¶ 12 Nelson testified that the initial surgery did not improve her pain or the clicking sound in her ankle, and Dr. Behm performed a second surgery on her ankle on January 31, 2006, to insert artificial cartilage into her ankle joint.¹⁰ After that surgery also failed, Nelson's uncle, a Billings orthopedic surgeon, recommended she see Michael R. Yorgason, M.D.¹¹

¶ 13 Nelson received permission from MSGIA's Howell to see Dr. Yorgason, who accepted Nelson as a patient.¹² Dr. Yorgason eventually performed a third surgery on Nelson's ankle on July 20, 2006, by removing cartilage from Nelson's knee and implanting it in her ankle.¹³ According to Nelson, that surgery also proved unsuccessful, and her ankle joint started to shift, causing her foot to turn.¹⁴

¶ 14 At that point, Dr. Yorgason wrote to Howell on Nelson's behalf, explaining that Nelson had developed degenerative changes in her ankle and needed to be seen by a

⁵ Trial Test.

⁶ Trial Test.

⁷ Ex. 2 at 24.

⁸ Ex. 2 at 34-35.

⁹ Trial Test.; Ex. 2 at 46-48.

¹⁰ Trial Test.; Ex. 2 at 53-55.

¹¹ Trial Test.

¹² Trial Test.; Ex. 2 at 94-96.

¹³ Ex. 2 at 110-111.

¹⁴ Trial Test.

sub-specialist in ankle replacement surgery.¹⁵ Nelson testified that she spoke with her physician uncle, who had attended workshops conducted by a California ankle specialist, William D. Bugbee, M.D., and her uncle recommended that Nelson try to see Dr. Bugbee.¹⁶ Howell agreed to the referral,¹⁷ and Nelson saw Dr. Bugbee on January 12, 2007.¹⁸

¶ 15 Nelson testified that Dr. Bugbee diagnosed degenerative arthritis in her ankle and recommended surgery, which Dr. Bugbee performed in August 2007.¹⁹ Nelson underwent a partial allograft of the ankle, and Dr. Bugbee brought in Michael J. Botte, M.D., to repair an ankle ligament which apparently snapped in the initial injury.²⁰

¶ 16 Nelson testified that, except for some pain following this fourth surgery, she recovered and was able to play golf, walk, and do things she had not been able to do in some time. By July 2009, however, Nelson was again experiencing significant ankle pain, and Dr. Bugbee recommended a fifth surgery due to arthritis in Nelson's ankle.²¹

¶ 17 In July 2009, Dr. Bugbee performed a complete allograft of Nelson's ankle using a cadaver bone.²² Nelson explained that after three months post-surgery she stopped using crutches, and her ankle began to swell. Nelson sent a photo of her swollen ankle to Howell, who suggested she go to an emergency room and seek treatment.²³

¶ 18 Nelson travelled to Billings and was seen at the emergency room. An ultrasound was taken of her ankle, looking for a blood clot, but nothing was found. Nelson explained that she had travelled to Billings so she could be seen by Dr. Yorgason the following day.²⁴

¶ 19 Nelson next saw Dr. Bugbee in January 2010. Dr. Bugbee referred Nelson to Franklin Kozin, M.D., for her "dysfunctional nerve situation."²⁵ Dr. Kozin diagnosed a complex regional pain syndrome secondary to nerve injury, and he agreed with the

¹⁵ Trial Test.; Ex. 2 at 120.

¹⁶ Trial Test.

¹⁷ Ex. 3 at 2-3.

¹⁸ Trial Test.; Ex. 2 at 188-89.

¹⁹ Trial Test.; Ex. 2 at 191-93.

²⁰ Trial Test.; Ex. 2 at 194-96.

²¹ Trial Test.

²² Trial Test.; Ex. 2 at 205-07.

²³ Trial Test.

²⁴ Trial Test.

²⁵ Trial Test.; Ex. 2 at 215, 217-22.

recommendations of Michael H. Schabacker, M.D., Nelson's new treating physician, for prescription medications, neurological evaluation, and a neuropsychological evaluation.²⁶

¶ 20 Nelson again saw Dr. Bugbee for her one-year post-surgery follow-up in July 2010, when Dr. Bugbee noted that Nelson was happy with her ankle function, that it was a lot less swollen, and that she was golfing four times a week and walking three miles a day.²⁷

¶ 21 On September 15, 2010, Dr. Bugbee wrote a letter "To Whom It May Concern," indicating that Nelson was still under his care, she was not at maximum medical improvement (MMI), and she would require annual check-ups to follow her progress. That letter was stamped, "Received Oct 01 2010 MTSBA Insurance Services."²⁸ Similar letters addressed "To Whom It May Concern" dated March 2, 2011, and May 31, 2011, advising of up-coming post-operative visits did not bear similar MTSBA "Received" stamps.²⁹

¶ 22 Nelson explained that when she first saw Dr. Bugbee, she had to sign an agreement to return every year and be seen for post-surgical follow-up.³⁰ Nelson testified that her requests to be seen by Dr. Bugbee between 2007 and 2010 were granted by Howell without any problem. Nelson would simply phone Howell, tell her she needed to see Dr. Bugbee, and Howell would make the arrangements without requiring a doctor's referral.

¶ 23 Howell sent an open authorization dated June 29, 2007, to Dr. Bugbee for the treatment of Nelson's "[l]eft knee [sic] allograft" and ankle ligament surgery, together with necessary pre- and post-operative care.³¹ Howell authorized the second surgery by Dr. Bugbee in a fax dated April 22, 2009.³²

¶ 24 Nelson stated that she "fired" Dr. Schabacker as her treating physician in February 2011 after he found her to be at MMI with a 9% impairment rating.³³ Howell wrote to Nelson's attorney, Patrick Sheehy, on March 25, 2011, advising of

²⁶ Ex. 2 at 221.

²⁷ Trial Test.; Ex. 2 at 224.

²⁸ Ex. 2 at 227-28.

²⁹ Ex. 2 at 229-30.

³⁰ Trial Test.

³¹ Trial Test.; Ex. 3 at 3.

³² Trial Test.; Ex. 3 at 5.

³³ Trial Test.; Ex. 2 at 289.

Dr. Schabacker's MMI and impairment rating determination and further advising that because Nelson was at MMI, all future treatments had to be preauthorized by MSGIA.³⁴

¶ 25 Nelson testified that she returned to Dr. Bugbee on July 25, 2011, for her annual post-surgery follow-up. Nelson admitted that prior to that trip, despite Howell's letter of March 25, 2011, she did not contact Howell seeking preauthorization to see Dr. Bugbee or a travel advance.³⁵

¶ 26 During Nelson's July, 25, 2011, visit with Dr. Bugbee, he diagnosed Nelson with complex regional pain syndrome and reflex sympathetic dystrophy to the left foot, and probable neuroma or nerve entrapment of the superficial peroneal nerve and/or sural nerve. Dr. Bugbee's diagnoses included posttraumatic arthritis of the left ankle, status postallografting, with continued management of the ankle with braces, modified shoe wear, and modified activity.³⁶ Dr. Bugbee also noted chronic left ankle instability and recommended that Nelson continue with ketamine infusions to treat her complex regional pain syndrome. Finally, Dr. Bugbee noted that Nelson had not reached MMI for any of her conditions and that further treatment was warranted.³⁷

¶ 27 Nelson also saw Dr. Botte on July 25, 2011, at the suggestion of Dr. Bugbee, to evaluate Nelson's neuritis complaints. Dr. Botte diagnosed reflex sympathetic dystrophy, neuritis and/or neuroma of the lateral left foot, and recommended Nelson continue with the ketamine infusions and consider possible surgical exploration of the nerve in the area of her neuritic pain.³⁸

¶ 28 On September 20, 2011, Howell wrote to the Scripps Clinic where Dr. Bugbee and Dr. Botte both worked and denied the clinic's bills for Nelson's treatment of July 25, 2011, because prior authorization was neither requested nor provided. Nelson's attorney, Sheehy, was copied on the denial letter.³⁹

¶ 29 Nelson returned to Dr. Bugbee on August 9, 2012.⁴⁰ Nelson agreed, as with the 2011 visit, she did not contact MSGIA before returning to Dr. Bugbee.⁴¹ Nelson also

³⁴ Ex. 3 at 23.

³⁵ Trial Test.

³⁶ Ex 2 at 231-32.

³⁷ Ex. 2 at 233.

³⁸ Ex. 2 at 236-38.

³⁹ Ex. 3 at 24.

⁴⁰ Ex. 2 at 244-45.

⁴¹ Trial Test.

admitted that she has never submitted to Howell her travel expenses incurred for her 2011 and 2012 trips to be seen at the Scripps Clinic by Drs. Bugbee and Botte.⁴²

¶ 30 In his August 9, 2012, progress note, Dr. Bugbee noted there was no significant difference between Nelson's current x-ray and the 2011 x-ray, and that Nelson was not currently experiencing ankle pain.⁴³ Dr. Bugbee found Nelson's condition to be stable, and that she did not need further surgery "currently," but would need further surgery in the future. Dr. Bugbee noted Nelson was "permanent stationary with respect to her ankle joint and the arthritis." Dr. Bugbee also noted that Nelson was receiving active treatment for her nerve damage, "likely unrelated to her ankle disease and managed separately."⁴⁴

¶ 31 Nelson described the current condition of her ankle as very poor, as it feels like the ankle joint is rubbing bone on bone. Her ankle has very limited movement, and she wakes up in the morning in severe pain until she can hobble into the bathroom and get her ankle under hot water.⁴⁵ Nelson stated that she last saw Dr. Bugbee in 2012, but that she often speaks with him by phone about the condition of her ankle.⁴⁶

¶ 32 Nelson testified that she is unable to exercise with her ankle the way it is now. Nelson's foot is crooked, so when she tries to ride a stationary bicycle, the back of Nelson's heel hits the side of the bike as she pedals. Nelson testified her condition is getting progressively worse.⁴⁷

¶ 33 Nelson explained that she had an area on the arch of her left foot that was painful, and she believed it was related to the nerve pain, which is unrelated to her ankle injury. Nelson asked Dr. Bugbee if he could recommend someone in Montana, and Dr. Bugbee arranged for Nelson to see Timothy DuMontier, M.D., in Kalispell on September 16, 2013. Nelson asked Dr. DuMontier if he could take over the care and treatment of her ankle, but the doctor refused, recommending that Nelson continue to treat with Dr. Bugbee or find a tertiary care center.⁴⁸

¶ 34 Nelson testified that she has had no orthopedic care for two years, as she has been unable to afford to travel to California, and that MSGIA has not paid Dr. Bugbee's

⁴² Trial Test.

⁴³ Ex. 2 at 244.

⁴⁴ Ex. 2 at 245.

⁴⁵ Trial Test.

⁴⁶ Trial Test.

⁴⁷ Trial Test.

⁴⁸ Trial Test.; Ex. 2 at 392-93.

bills since 2010. Nelson testified that she had contacted a number of different physicians in Montana, trying to find someone to take over her care, without success.⁴⁹

¶ 35 Nelson stated that, prior to seeing Dr. DuMontier in Kalispell, the last orthopedic surgeon she had seen was Dr. Botte in California in August 2012, when Dr. Botte performed a tarsal tunnel release unrelated to Nelson's injury.⁵⁰ Nelson explained that her health insurer paid for Dr. Botte's surgery. Nelson did not ask Howell to approve her visit with Dr. DuMontier because that visit was related to Dr. Botte's treatment and unrelated to her ankle injury, and she also turned that bill over to her health insurer.⁵¹

¶ 36 Nelson last saw Dr. Schabacker in February 2011. In March 2011, Nelson wrote a letter to Dr. Schabacker, stating she no longer wished to see him. Nelson testified that after Dr. Schabacker found her to be at MMI and assigned her an impairment rating, she did not contact Howell to dispute the MMI finding or the impairment rating because Howell told her they could have no further contact with each other now that Nelson was represented by an attorney.⁵²

¶ 37 Howell testified at trial. I found Howell to be a credible witness. Howell has been a claims examiner for fourteen years, the last ten years of which have been with the MSBA, TPA for MSGIA. Howell explained that her duties include conducting the initial investigation on a claim, paying benefits, authorizing medical treatment, scheduling independent medical examinations (IMEs), and setting claim reserves. Howell has been the only claims examiner assigned to Nelson's claim.⁵³

¶ 38 Howell testified that she accepted Nelson's claim the day after she received the First Report of Injury and Occupational Disease.⁵⁴ Since Dr. Behm was away, MSGIA accepted orthopedist Dr. Ben-Youssef from Sidney as Nelson's initial treating physician. When Dr. Behm returned to Glendive, Howell authorized the change in treating physicians to Dr. Behm.⁵⁵

¶ 39 After Nelson's second surgery by Dr. Behm, Howell explained that Nelson was looking for a second medical opinion on her ankle treatment and specifically requested

⁴⁹ Trial Test.

⁵⁰ Trial Test.; Ex. 2 at 378-89.

⁵¹ Trial Test.

⁵² Trial Test.

⁵³ Trial Test.

⁵⁴ Trial Test.; Ex. 1 at 1.

⁵⁵ Trial Test.

Dr. Yorgason. Howell did some research, and agreed that Dr. Yorgason was an appropriate physician to take over Nelson's care.⁵⁶

¶ 40 Howell testified that, when the idea of an ankle replacement arose, Nelson brought up Dr. Bugbee's name. Howell researched Montana physicians and learned there were no in-state surgeons who were performing ankle replacements at that time. Therefore, Howell researched Dr. Bugbee's credentials, noted that Dr. Yorgason was recommending a referral to an ankle specialist,⁵⁷ and agreed to allow Nelson to see Dr. Bugbee.⁵⁸

¶ 41 Howell stated that Nelson contacted her prior to her first appointment with Dr. Bugbee to advise that Dr. Bugbee would require Nelson to maintain a local physician for follow-up care if he performed surgery. Nelson maintained Dr. Yorgason as her local physician up until her last surgery in 2009, when Nelson requested that Dr. Schabacker, a physiatrist and pain specialist, take over her local care.⁵⁹

¶ 42 Prior to Nelson's first visit with Dr. Bugbee in January 2007, Howell arranged a travel advance to cover Nelson's expenses. Howell testified that prior to that trip, Nelson had been informed of how to file for travel reimbursement. Howell provided Nelson a travel reimbursement form with the rules of travel reimbursement on it, including the need to have the form and travel receipts submitted within 90 days of travel. Howell testified that Nelson was familiar with the process, as Nelson submitted the form and her travel receipts for her trip to Sidney to see Dr. Ben-Youssef shortly after her injury.⁶⁰

¶ 43 In a letter to Dr. Yorgason following Nelson's visit in January 2007, Dr. Bugbee recommended an MRI, which Howell arranged when Nelson returned to Montana.⁶¹ Following the MRI, Howell testified that she received a written request from Dr. Bugbee's office to approve a partial allograft of Nelson's ankle. Howell approved the procedure and submitted an "open authorization" to Dr. Bugbee's office for all necessary pre- and post-operative care while Nelson was in California, since no Montana surgeon could perform that operation.⁶² Howell testified that she provided

⁵⁶ Trial Test.

⁵⁷ Ex. 2 at 120; Ex. 3 at 1.

⁵⁸ Trial Test.

⁵⁹ Trial Test.

⁶⁰ Trial Test.

⁶¹ Trial Test.; Ex. 2 at 188-89.

⁶² Trial Test.; Ex. 3 at 3.

another travel advance to Nelson, and Dr. Bugbee performed the surgery in August 2007.⁶³

¶ 44 Following surgery, Nelson's local treating physician, Dr. Yorgason, performed cast changes, arranged x-rays, and completed work status forms.⁶⁴ Howell testified that she preauthorized a follow-up visit for Nelson to see Dr. Bugbee on January 17, 2008. Howell stated that since this was not a surgical visit, she did not advance travel expenses for a family member to accompany Nelson.⁶⁵

¶ 45 Howell explained that Dr. Bugbee wanted to perform another surgery later in 2008 using a cadaver graft. Since the availability of the graft could occur at any time, Howell testified that she advanced the travel expenses to Nelson even before the operation was scheduled, since Nelson would have to make her travel plans quickly. When it turned out the graft was unavailable during the time Nelson could have the surgery, the procedure was postponed until 2009 and Nelson refunded the travel advance.⁶⁶

¶ 46 Howell testified that Dr. Bugbee's second surgery occurred on July 2, 2009,⁶⁷ and that she preauthorized the surgery in April with Dr. Bugbee's office since that was when Nelson went on the donor list. Howell understood that when the cadaver graft became available, there was a very limited time within which to perform the surgery.⁶⁸ Howell again preauthorized Nelson's travel, and Howell explained that it was open-ended because they did not know how long Nelson would need to be in California.⁶⁹

¶ 47 Following the July 2009 surgery, Howell testified that Nelson contacted her because of swelling in her ankle. Howell urged Nelson to seek immediate medical care, and learned that Nelson traveled to Billings and was seen there at the emergency room and then by Dr. Yorgason.⁷⁰

¶ 48 Howell believed that Nelson originally requested the referral to Dr. Schabacker for pain management due to Nelson's pain issues. Howell also received referrals from

⁶³ Trial Test.; Ex. 2 at 191-93.

⁶⁴ Trial Test.

⁶⁵ Trial Test.; Ex. 2 at 203.

⁶⁶ Trial Test.

⁶⁷ Ex. 2 at 205-07.

⁶⁸ Trial Test.; Ex. 3 at 5.

⁶⁹ Trial Test.

⁷⁰ Trial Test.

Drs. Yorgason⁷¹ and Douglas H. Cornelius, M.D.,⁷² for Nelson to be seen at the Northern Rockies Regional Pain Center, which is Dr. Schabacker's clinic. Howell explained that Dr. Schabacker is a physiatrist who specializes in complex pain issues. Howell approved the referral requests, and Dr. Schabacker took over the tasks of writing prescriptions and referring Nelson to specialists in the role of her treating physician.⁷³

¶ 49 Howell testified that Nelson apparently became unhappy with Dr. Schabacker and repeatedly requested that other doctors take over the role of her treating physician.⁷⁴ One of them was Steven Arbogast, D.O., who was willing to do a consultation but unwilling to be the treating physician. Another was Deric O. Weiss, M.D.; however, Howell learned Dr. Weiss was a specialist in hospice care so she denied the request. Nelson requested David Healow, M.D., but Howell learned Dr. Healow did not have hospital admitting privileges so she denied that request.⁷⁵

¶ 50 After receiving multiple emails from Nelson requesting opinions from other doctors or to have another doctor assume the role of treating physician, Howell wrote to Nelson on October 27, 2010, listing sixteen doctors who had rendered evaluations or opinions up to that date on Nelson's ankle injury.⁷⁶ Howell testified that she was becoming concerned about the large number of physicians involved in Nelson's care and feared that she was losing control over Nelson's case.⁷⁷

¶ 51 Howell's letter of October 27, 2010, went on to state that Dr. Schabacker had ordered a neuropsychological evaluation for Nelson, and that until Nelson completed that evaluation and Dr. Schabacker had provided his treatment recommendations based on the evaluation, Howell would not consider authorizing any further consultations or medical opinions.⁷⁸

¶ 52 Howell testified that she also wanted to remind Nelson once again that only Dr. Schabacker was her treating physician and the only medical provider who could make referrals, coordinate her care, and prescribe medication. Howell's concern followed emails between Howell and Nelson after Howell received a report of a ketamine infusion

⁷¹ Ex. 3 at 6.

⁷² Ex. 2 at 269.

⁷³ Trial Test.

⁷⁴ Trial Test.; Ex. 3 at 14-15.

⁷⁵ Trial Test.

⁷⁶ Ex. 3 at 16-17.

⁷⁷ Trial Test.

⁷⁸ Trial Test.; Ex. 3 at 16-17.

that listed Jeanine Brandt, R.N., as the medical practitioner who referred Nelson for the treatment.⁷⁹

¶ 53 In March 2011, after Dr. Schabacker had placed Nelson at MMI, Howell testified that she received a letter from Nelson stating that she was terminating her relationship with Dr. Schabacker.⁸⁰

¶ 54 Regarding Dr. Bugbee's March 2, 2011, and May 31, 2011, letters addressed "To Whom It May Concern," which advised of Nelson's upcoming office visits to check her progress, Howell testified that the first time she saw those letters was in December 2013.⁸¹

¶ 55 Howell testified that, on March 25, 2011, she wrote to Sheehy, addressing Dr. Schabacker's impairment rating and reminding him that since Nelson was now at MMI, she had to get all further medical treatment preauthorized.⁸²

¶ 56 Howell testified that neither Nelson nor her attorney contacted her prior to Nelson's travel to California to see Dr. Bugbee in July 2011. Howell stated that Nelson did not seek a travel advance or preauthorization to see Dr. Bugbee.⁸³

¶ 57 Howell denied Dr. Bugbee's July 25, 2011, bill for treatment of Nelson in a letter dated September 20, 2011, based on ARM 24.29.1517(5)(d) and Nelson's failure to seek prior authorization for the treatment. Sheehy was copied on the denial letter.⁸⁴

¶ 58 Howell testified that she has never seen a bill from Dr. Bugbee's office for Nelson's treatment on August 9, 2012, nor has she seen Dr. Bugbee's treatment notes for that visit. Howell testified that she has never received receipts from Nelson for reimbursement for travel for that visit. Howell testified that she first learned of that visit in a letter from Sheehy in July 2013.⁸⁵

¶ 59 Howell denied that she ever approved Dr. Bugbee as Nelson's treating physician, and testified that Nelson has always had a treating physician in Montana to direct her

⁷⁹ Trial Test.; Ex. 3 at 14-15.

⁸⁰ Trial Test.; Ex. 2 at 289A.

⁸¹ Trial Test.; see *supra* ¶ 21; Ex.2 at 229-30.

⁸² Trial Test.; Ex. 3 at 23.

⁸³ Trial Test.

⁸⁴ Trial Test.; Ex. 3 at 24.

⁸⁵ Trial Test.

treatment. Howell testified that she believed Nelson required a Montana physician to manage her post-operative care.⁸⁶

¶ 60 Howell testified that after Nelson's last allograft surgery in 2009 and post-operative check-up trip to California in 2010, she would have questioned the need for further trips to California for annual post-operative care. Howell testified that she would have inquired of Dr. Bugbee if such care could have been rendered by Dr. Schabacker, a physiatrist, or by Dr. Yorgason, an orthopedist, rather than Nelson incurring the expense of travel to California for just an office visit.⁸⁷

¶ 61 Howell stated that she has not denied Nelson all future treatment with Dr. Bugbee. If Dr. Bugbee indicated that Nelson needed more surgery, Howell testified that she might refer the case to MSGIA's orthopedic consultant, Ken Carpenter, M.D., or make inquiry directly with the surgeon to inquire as to the necessity for surgery. Howell testified that if the recommended surgery was related to the claim and medically necessary, she would approve it.⁸⁸

¶ 62 In a letter to Sheehy dated November 26, 2013, Dr. Schabacker wrote that in light of Dr. Bugbee's indication that Nelson required further ankle surgery, she was no longer at MMI.⁸⁹ Dr. Schabacker further wrote that "Dr. Bugbee should be considered the only viable surgeon to address [Nelson's] chronic ankle condition," given that other Montana physicians have deferred to his expertise in treating Nelson's ankle.⁹⁰

CONCLUSIONS OF LAW

¶ 63 This case is governed by the 2005 version of the WCA since that was the law in effect at the time of Nelson's industrial accident, and the version of the WCA that the parties stipulated to as applicable here.⁹¹

Issue One: Whether the insurer is liable for payment of Dr. Bugbee's medical bills for treatment rendered in 2011 and 2012, and for reimbursement of Petitioner's travel expenses for those two trips to get treatment from Dr. Bugbee.

⁸⁶ Trial Test.

⁸⁷ Trial Test.

⁸⁸ Trial Test.

⁸⁹ Ex. 2 at 289B-289C.

⁹⁰ *Id.*

⁹¹ *Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶ 32, 365 Mont. 405, 282 P.3d 687 (citing *Fleming v. International Paper Co.*, 2008 MT 327, ¶ 26, 346 Mont. 141, 194 P.3d 77); Pretrial Order at 6.

¶ 64 Nelson bears the burden of proving by a preponderance of the evidence that she is entitled to the benefits she seeks.⁹²

¶ 65 MSGIA argues that it clearly put Nelson and her attorney on notice that any further treatment after she had reached MMI had to be preauthorized, pursuant to claims examiner Howell's letter of March 27, 2011.⁹³ MSGIA then put Nelson and her attorney on notice that it denied liability for Dr. Bugbee's 2011 bill as not preauthorized pursuant to ARM 24.29.1517(5)(d).⁹⁴ Despite these forewarnings, Nelson subsequently incurred further charges with Bugbee's office in 2012, again without seeking preauthorization for treatment.

¶ 66 These visits were in contrast to the pattern established by Nelson for her treatment with Dr. Bugbee prior to 2011, which was to contact Howell, advise of the need to see Dr. Bugbee and of the upcoming travel, and receive a travel advance.

¶ 67 Nelson's position is that Dr. Bugbee is her treating physician, that MSGIA has paid for two surgeries and three years of treatment (2007-2010) by Dr. Bugbee that established a strong, doctor-patient relationship, and that MSGIA is now estopped from denying liability for Dr. Bugbee's 2011 and 2012 medical bills and reimbursement for Nelson's 2011 and 2012 travel.⁹⁵

¶ 68 In *Selley v. Liberty Northwest Ins. Corp.*, the Montana Supreme Court held:

As a general matter, estoppel arises when a party through its acts, conduct, or acquiescence, has caused another party in good faith to change its position for the worse. . . .

[S]ix elements are necessary in order to establish an equitable estoppel claim: (1) the existence of conduct, acts, language, or silence amounting to a representation or concealment of material facts; (2) the party estopped must have knowledge of these facts at the time of the representation or concealment, or the circumstances must be such that knowledge is necessarily imputed to that party; (3) the truth concerning these facts must be unknown to the other party at the time it was acted upon; (4) the conduct must be done with the intention or expectation that it will be acted upon by the other party, or have occurred under

⁹² *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).

⁹³ Montana Schools Group Insurance Authority Proposed Findings of Fact, Conclusions of Law and Judgment at 10, Docket Item No. 26; see *supra*, ¶¶ 24, 54, and note 34.

⁹⁴ See *supra* ¶¶ 28, 57.

⁹⁵ Petitioner's Trial Brief at 9-12, Docket Item No. 27.

circumstances showing it to be both natural and probable that it will be acted upon; (5) the conduct must be relied upon by the other party and lead that party to act; and (6) the other party must in fact act upon the conduct in such a manner as to change its position for the worse. A party must establish all six elements before the doctrine can be invoked. Equitable estoppel must be established by clear and convincing evidence.⁹⁶

¶ 69 MSGIA argues that Nelson cannot meet the first element of estoppel, as it never misrepresented to Nelson that preauthorization for treatment with Dr. Bugbee was not required. I agree.

¶ 70 While the Montana Supreme Court has repeatedly held that “a claimant’s failure to obtain the insurer’s authorization does not automatically absolve an insurer of liability for treatment rendered by unauthorized physicians,”⁹⁷ here Nelson was specifically told, through her attorney, that since she was at MMI, “all future treatment must be pre-authorized.”⁹⁸

¶ 71 ARM 24.29.1517(5), provides in pertinent part:

- (5) Prior authorization is required when:
 - (a) the provider to whom the referral is made is a consulting specialist; or
 - (b) there is a request for change of treating physician; or
 - (c) the claimant has not been treated for the injury (or occupational disease) within the past six months; or
 - (d) the claimant has been identified as having reached maximum medical improvement

¶ 72 It is not entirely clear why Nelson suddenly departed from her previous routine of contacting Howell prior to her trips to California to treat with Dr. Bugbee to at least seek a travel advance. While it is clear that Nelson was told not to contact Howell once she had legal representation, there was nothing to prevent her attorney from doing so on her behalf.

¶ 73 Having been found to be at MMI by Dr. Schabacker in February, 2011, MSGIA had good reason to require preauthorization for further treatment, particularly treatment in California. I therefore conclude that there was good cause for denying Dr. Bugbee’s bill for Nelson’s treatment in 2011. Since Nelson already knew that Dr. Bugbee’s bill for

⁹⁶ 2000 MT 76, ¶¶ 9-10, 299 Mont. 127, 998 P.2d 156. (Citations omitted.)

⁹⁷ *Wright v. Ace Am. Ins. Co.*, 2011 MT 43, ¶ 21, 359 Mont. 332, 249 P.3d 485.

⁹⁸ See *supra*, ¶ 24 and note 34.

her 2011 treatment was denied for lack of preauthorization, I can find no justification for her failure to contact Howell and seek preauthorization prior to her 2012 treatment with Dr. Bugbee. Therefore MSGIA is not liable for either the 2011 or 2012 treatment with Dr. Bugbee.

¶ 74 In regards to Nelson's claim for reimbursement for travel expenses incurred in 2011 and 2012, § 39-71-704(1)(d), MCA, reads, in pertinent part:

(d)(i) The insurer shall reimburse a worker for reasonable travel, lodging, meals, and miscellaneous expenses incurred in travel to a medical provider for treatment of an injury pursuant to rules adopted by the department. Reimbursement must be at the rates allowed for reimbursement for state employees.

(ii) Rules adopted under subsection (1)(d)(i) must provide for submission of claims, within 90 days from the date of travel, following notification to the claimant of reimbursement rules, must provide procedures for reimbursement receipts, and must require the use of the least costly form of travel unless the travel is not suitable for the worker's medical condition. The rules must exclude from reimbursement:

(A) 100 miles of automobile travel for each calendar month unless the travel is requested or required by the insurer pursuant to 39-71-605;

(B) travel to a medical provider within the community in which the worker resides;

(C) travel outside the community in which the worker resides if comparable medical treatment is available within the community in which the worker resides, unless the travel is requested by the insurer; and

(D) travel for unauthorized treatment or disallowed procedures.

¶ 75 The corresponding administrative rule required by § 39-71-704(1)(d), MCA, is found at ARM 24.29.1409(4).

¶ 76 Howell testified that Nelson was familiar with the rules for travel reimbursement, including the requirement for submitting the reimbursement form and receipts within 90 days of travel, since Nelson had submitted a reimbursement form that contained the travel reimbursement rules on it for her expenses to see Dr. Ben-Youssef in 2005. Yet Nelson has *never* submitted her travel expenses to MSGIA for reimbursement for her 2011 and 2012 trips.

¶ 77 Nelson is therefore not entitled to reimbursement from MSGIA for her travel to California in 2011 and 2012 pursuant to § 39-71-704(1)(d)(ii)(C)&(D), MCA.

Issue Two: Whether the insurer is liable for payment of Dr. Bugbee in the future for continued medical treatment to Petitioner's injured foot/ankle.

¶ 78 Howell denied that she had issued a categorical prohibition against Nelson treating with Dr. Bugbee in the future. Once Dr. Schabacker found Nelson to be at MMI, Howell simply required that all further medical treatment be preauthorized. As Howell testified, if Dr. Bugbee was recommending additional surgery, Howell might have MSGIA's consulting orthopedist, Dr. Carpenter, review the case. Alternatively, Howell might inquire directly of Dr. Bugbee regarding the need for additional surgery and its relation to the claim. Howell testified that if the additional surgery was shown to be medically necessary and related to the claim, she would approve it.

¶ 79 At the time of trial, Nelson did not have a current request to treat with Dr. Bugbee that was being denied by MSGIA. It may well be, as Howell acknowledged, that treatment with Dr. Bugbee would be appropriate in light of the doctor-patient relationship extant between Nelson and Dr. Bugbee. Absent an existent request and denial for such treatment, there likewise is not a present justiciable controversy for the Court to decide. The Court lacks the jurisdiction to offer a prospective finding of liability.

Issue Three: Whether Petitioner is entitled to costs, attorney fees, or a penalty.

¶ 80 To award attorney fees or a penalty, this Court must first find that the insurer's actions in denying liability or terminating benefits was unreasonable. Having found in MSGIA's favor on the preceding issues, there is no basis to award attorney fees or a penalty pursuant to §§ 39-71-611 and -2907, MCA.

¶ 81 To be entitled to an award of costs, Nelson must be the prevailing party pursuant to § 39-71-611(1)(a)&(b), MCA, where an insurer denies liability or terminates benefits and the claim is later adjudged compensable. Since Nelson's claim for payment of Dr. Bugbee's 2011 and 2012 treatment has not been adjudged compensable, she is not entitled to costs, attorney fees, or penalty.

Issue Four: Whether Petitioner's request for payment of medical and travel expenses associated with treatment with Dr. Bugbee is barred by § 39-71-2905, MCA.

¶ 82 As noted above, I denied MSGIA's summary judgment motion on the issue of the statute of limitations in my Order of January 9, 2014.⁹⁹ Because there was no cross-motion for summary judgment, however, I permitted MSGIA the opportunity to present

⁹⁹ See *supra* ¶ 1 and note 1.

evidence at trial that Nelson's claim for reimbursement for medical treatment and travel expenses was not timely filed.

¶ 83 In my Order denying MSGIA's motion for summary judgment on this issue, I concluded that Nelson's petition as it pertained to her treatment with Dr. Bugbee was timely filed. There was no argument nor any evidence presented at trial that persuades me this ruling was incorrect. For the reasons set forth in my January 9, 2014, Order, therefore, I conclude Nelson's request for payment of medical and travel expenses associated with her treatment with Dr. Bugbee is not barred by § 39-71-2905, MCA.

JUDGMENT

¶ 84 Respondent is not liable for Dr. Bugbee's medical bills for treatment of Petitioner in 2011 and 2012, and Respondent is not liable for reimbursing Petitioner for her travel expenses for her treatment with Dr. Bugbee in 2011 and 2012.

¶ 85 Respondent did not issue a categorical prohibition of Petitioner treating with Dr. Bugbee, and Petitioner may be entitled to treat with Dr. Bugbee for required and necessary medical treatment related to her claim in the future. However, there is presently no justiciable controversy before the Court on this issue.

¶ 86 Petitioner is not entitled to a penalty, attorney fees, or costs.

¶ 87 Petitioner's request for payment of medical and travel expenses associated with treatment with William D. Bugbee, M.D., is not barred by § 39-71-2905, MCA.

¶ 88 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 28th day of May, 2014.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Patrick R. Sheehy
Oliver H. Goe
Morgan M. Weber

Submitted: January 21, 2014