

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWCC 38

WCC No. 9501-7213

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TEDDY A. O'CONNOR

Petitioner

vs.

NATIONAL UNION FIRE INSURANCE/ALEXSIS

Respondent.

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DECISION AND JUDGMENT

**Summary:** The parties disputed whether claimant's current lower back condition, involving pain radiating into her right leg and foot, is related to her 1993 industrial accident or results from a 1975 gunshot wound or a 1987 industrial injury.

**Held:** Where a neurosurgeon testified on a more probable than not basis that claimant's current symptoms result from a disk fragment attributable to the 1993 injury, she has carried her burden of proving entitlement to medical and indemnity benefits relating to her current condition. Surgery recommended by neurosurgeon is reasonable and necessary and must be covered by the insurer.

**Topics:**

**Causation: Medical Condition.** Where a neurosurgeon testified on a more probable than not basis that claimant's current symptoms result from a disk fragment attributable to the 1993 injury, she has carried her burden of proving entitlement to medical and indemnity benefits relating to her current condition.

**Injury and Accident: Causation.** Where a neurosurgeon testified on a more probable than not basis that claimant's current symptoms result from a disk fragment attributable to the 1993 injury, she has carried her burden of proving entitlement to medical and indemnity benefits relating to her current condition.

**Benefits: Temporary Total Disability Benefits.** Where Court was persuaded claimant would have been unable to work after certain date due to painful back condition, she is entitled to receive temporary total disability benefits from that date, irrespective of insurer's contention that she was terminated from employment following accusation of shoplifting not proven to the Court.

**Witnesses: Credibility.** Where Court was persuaded claimant would have been unable to work after certain date due to painful back condition, she is entitled to receive temporary total disability benefits from that date, irrespective of insurer's contention that she was terminated from employment following accusation of shoplifting not proven to the Court.

The trial in this matter was held on May 15, 1995, in Billings, Montana. Petitioner, Teddy A. O'Connor (claimant), was present and represented by Mr. Don Edgar Burris. Respondents were represented by Mr. Joe Seifert.

Witnesses at trial and by deposition: Claimant testified on her own behalf. Dr. Fred G. McMurry and Karen Wiles also testified. The parties agreed that the deposition of the claimant can be considered part of the record.

Exhibits: Exhibits 1 and 3 were admitted by stipulation. Exhibit 2 was admitted over the objection of Mr. Burris, who objected to pages 4 and 5 of the exhibit. The pages in question were admittedly solely to show that claimant was involuntarily terminated from Buttrey Food and Drug (Buttrey). The reasons expressed therein for the termination are given no weight.

Issues presented: The issues to be decided by the Court are whether the claimant's current complaints are causally related to her compensable industrial accident on August 22, 1993 or whether they resulted from a noncompensable cause and what benefits she is entitled to, if any. Attorney fees and a twenty (20%) percent penalty are also at issue.

Bench Ruling: At the close of the evidence the Court made a bench ruling in favor of claimant. That bench ruling is reflected in the following findings of fact, conclusions of law and judgment.

Having considered the PRETRIAL CONFERENCE ORDER, the testimony presented at trial, the demeanor and credibility of the witnesses, the deposition and exhibits, the Court makes the following:

### Findings of Fact

1. On August 22, 1993, claimant fell in a puddle of water while working in the course and scope of her employment with Wal-Mart Stores in Billings, Montana. She hurt her back.
2. At the time of claimant's 1993 industrial accident, Wal-Mart was insured by National Union Fire Insurance (National Union). The insurer employed Alexis to adjust the claim.
3. National Union accepted the claim for the August 22, 1993 injury.
4. Following her August 22, 1993 industrial injury, the claimant was off work for five (5) weeks. During that time National Union paid temporary total disability benefits.
5. Claimant's symptoms following her injury and continuing until the present time consist of severe pain in the calf of her lower right leg and outer part of her right foot. Claimant describes her pain as "unbearable" when she sneezes, coughs or strains. (Ex. 1K at 31.) As a result of her pain, she limps.
6. Claimant initially received medical care for her injury at the emergency room of the Deaconess Medical Center. (Ex. 1D at 11-12.) Her emergency room visit was on August 22, 1993, the same day as her injury.
7. Claimant was thereafter treated by Dr. Dale M. Peterson, a neurologist. Dr. Peterson continued to care for claimant into December 1993. (Ex. 1G at 20.) During that time claimant was also seen on referral of Dr. Peterson by Robert C. Wood, a neurosurgeon. An MRI with contrast dye was also done on November 3, 1993.
8. Unhappy with the recommendations of Drs. Peterson and Wood, on March 1, 1994, claimant sought a second opinion regarding her condition from Dr. Richard A. Nelson, a neurologist. (Ex. 1K at 46-47.) Dr. Nelson referred claimant to Dr. Fred McMurry, a neurosurgeon. (Ex. 1K at 45.)
9. Claimant contacted Alexis and asked for permission to treat with Dr. McMurry. Alexis denied her request.
10. Despite the denial, claimant went ahead and sought care from Dr. McMurry. She first saw him on March 16, 1994, and has seen him on several other occasions. He continues to be her treating physician.
11. As early as March 1994, Dr. McMurry recommended back surgery to decompress the S1 nerve root. (Ex. 1K at 33.)

12. National Union denies that claimant's current symptoms are related to her August 1993 fall and alleges that they are the result of a 1975 gun shot wound and a 1987 industrial injury. It has denied liability for the proposed surgery, denied payment for approximately \$200 in prescription drugs and denied payment for treatment by Drs. Nelson and McMurry. It has also denied liability for any further temporary total disability benefits.

13. This case is complicated by claimant's prior injuries. The 1975 gunshot and the 1987 industrial accident damaged the S1 nerve root. On both occasions claimant suffered leg and foot pain similar to what she is now suffering. Her 1987 injury led to back surgery at the L5-S1 level, which disclosed "marked scarring around the S-1 [nerve] root." (Ex. 1B at 7.) The nerve root was freed and a neurolysis performed. (*Id.*) A neurolysis is the "release of a nerve sheath by cutting it longitudinally" or the "operative breaking up of perineural adhesions." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY (27TH ED. 1988).

14. Following her recovery from the gunshot wound until 1987, and following recovery from her surgery in 1988 until August 22, 1993, claimant did not need medical care for her back condition or for leg pain. She worked during those intervals. She testified that her leg and foot pain totally subsided during the intervals. While I am not completely persuaded that she was ever symptom free, I am persuaded that if she had pain it was not to the severity she has experienced following her 1993 fall. It certainly was not debilitating, whereas it is now.

15. Dr. McMurry testified at trial. No other physician testified, although the medical records and letters of other physicians were presented to the Court through Exhibit 1.

16. Dr. McMurry's testimony was clear, his opinions reasoned, objectively supported and persuasive. On March 17, 1994, he and a radiologist carefully went over claimant's enhanced MRI which had been taken in November 1993. They concluded to a reasonable degree of medical certainty that a disk fragment of recent origin was compressing claimant's S1 nerve root. National Union suggests that the material disclosed by the MRI is nothing more than old scar tissue. However, Dr. McMurry contradicted that theory. He pointed out that the dye used to enhance the MRI is taken up by old scar tissue, causing the tissue to appear white on an MRI, whereas a new fragment does not absorb as much dye, and would appear dark on the MRI. The material identified as a disk fragment appeared to be dark and was consistent with a recently ejected disk fragment. Based on the MRI and the severity of claimant's symptoms, Dr. McMurry recommended that surgery be done to decompress the nerve root.

17. The longer the delay, the less likely surgery will be successful. Delay has already significantly reduced the prospects of success, which are now down to fifty-fifty according to Dr. McMurry. Dr. McMurry still believes that the prospects of success are sufficient to warrant the surgery and continues to recommend it.

18. Concerning the causal relation between claimant's present condition, and her need for surgery, Dr. McMurry testified that on a more probable than not basis:

- a.) The disk fragment imaged by the MRI was of recent origin and was contributing to a compression of the S1 nerve root.
- b.) The compression of the S1 nerve root is causing claimant's leg and foot pain.
- c.) The disk fragment is the result of claimant's fall on August 22, 1993. Dr. McMurry's opinion in this regard was based on the recency of the fragment and the fact that after claimant's gunshot wound in 1975, and her back surgery in 1988, she had functioned reasonably well in her daily life, including employment, but has had significant difficulties since her 1993 fall.

19. Dr. Peterson was asked by letter about "what portion" of claimant's symptoms are due to her August 22, 1993 injury. In his reply he wrote:

What portion of her symptoms have to do with her injury on August 22, 1993, are difficult to fathom. She had a pre-existing disorder which you are well aware of. She felt, however, that her symptoms got worse after her fall. It seems like she did have some neurologic deficit left over from the previous injury so that I would think that perhaps half of her symptomatology was pre-existing and half perhaps related to her fall, but this is just on the basis of best guess.

(Ex. 1G at 23.) National Union reads this letter as saying that it would be guesswork to conclude that claimant's 1993 fall resulted in a new injury or aggravated her preexisting condition. I do not read the letter so broadly. Dr. Peterson merely said that any apportionment between her preexisting injury and the 1993 fall would be guesswork. Moreover, as I have already stated, I find Dr. McMurry's opinions persuasive.

20. National Union also relies on a recommendation by Dr. Wood that she undergo a sympathetic block to see if that would reduce her pain. In this regard, I am again persuaded by Dr. McMurry, who recommends against the procedure. He testified that claimant's symptoms are clearly in the S1 nerve distribution and that it is unlikely that a sympathetic nerve block would alleviate her pain. In light of her diabetes he cautioned against unnecessary invasive procedures.

21. Claimant never returned to work at Wal-Mart. However, in October 1993, she began working for Buttrey.

22. Claimant continued to work for Buttrey until March 14, 1994, at which time she was suspended after being accused of shoplifting. Her employment was terminated effective March 23, 1994.
23. The accusation of shoplifting is unproven and will not be considered by the Court. The only fact considered is that claimant was suspended and fired from her job.
24. Claimant testified that at the time of her termination she was unable to continue working due to her condition anyway. National Union suggests that this testimony is untrue and that she went to Dr. McMurry only after she was suspended.
25. The evidence shows that following her injury on August 22, 1993, claimant continued to go back for medical care and that her condition did not resolve. She was sufficiently dissatisfied with her treatment and progress that she sought care from Dr. Nelson on March 1, 1994. Dr. Nelson referred her to Dr. McMurry and she testified that she was actually scheduled to see Dr. McMurry on March 14, 1994, the day of her suspension, but that Dr. McMurry's office notified her that the appointment had to be rescheduled. Considering a written referral by Dr. Nelson on March 2, 1994, (Ex. 1K at 45), and the time it usually takes to get an appointment with a specialist, her testimony rings true and I accept her explanation.
26. On March 16, 1994, Dr. McMurry recommended to claimant that she take off work until her "current situation is better resolved." (Ex. 1K at 33 and Trial Testimony.)
27. Dr. McMurry has not released claimant to return to work and it is still his recommendation that she undergo surgery.
28. I am persuaded that on account of her painful condition, and irrespective of her termination on March 23, 1994, claimant would have been unable to work much after March 16, 1994. Therefore, I find that she has been temporary totally disabled since that date.
29. Claimant also seeks reimbursement for psychological counseling she received for depression. She relates her depression to her pain. However, Dr. McMurry testified that he did not recommend counseling and there was no evidence presented at trial indicating that any other physician recommended psychological counseling or that she obtained approval from Alexsis.
30. The insurer's denial of further liability in this case was not unreasonable. Claimant's history of the same symptoms in 1975 and 1987 through 1988, and the fact that the 1988 surgery disclosed scar tissue on her S1 nerve root, raised a legitimate issue as to whether claimant's current condition is attributable to her 1993 fall. The fact that she claims she

became unable to work at almost the exact time she was fired from her job at Buttrey, as well as a crossed-out word on her Buttrey application suggesting that she may have been fired from Wal-Mart as well, raised legitimate questions concerning her credibility and the reliability of her assertion that her leg and foot pain totally resolved in 1988. Also lacking was any written medical opinion specifically stating that her condition was the result of a new injury or that the 1993 fall permanently aggravated an underlying condition.

### Conclusions of Law

1. Claimant has the burden of proving by a preponderance of the evidence that she is entitled to compensation. *Ricks v. Teslow Consolidated*, 162 Mont. 469, 483-484, 512 P.2d 1304 (1973); *Dumont v. Wicken Bros. Construction*, 183 Mont. 190, 201, 598 P.2d 1099 (1979). She must show that her condition and her need for further medical treatment is the result of a new injury she suffered on August 22, 1993, or that her fall on that date resulted in a permanent aggravation of her preexisting condition. See *EBI/Orion v. State Fund*, 249 Mont. 449, 816 P.2d 1070 (1991) and *Walker v. UPS*, 262 Mont. 450, 456, 865 P.2d 1113 (1993).
2. Claimant has sustained her burden of proof. Dr. McMurry's testimony relating her current condition to her fall was persuasive.
3. Claimant has not reached maximum healing. Dr. McMurry recommends surgery to ameliorate her symptoms.
4. Since claimant has not reached maximum healing and has suffered a wage loss since March 16, 1994, due to her inability to work, she is entitled to temporary total disability benefits retroactive to March 16, 1994. §§ 39-71-116(28) and 39-71-701, MCA.
5. The surgery proposed by Dr. McMurry is reasonable and necessary for achieving medical stability and, therefore, constitutes primary care. § 39-71-116(21), MCA. Should claimant choose to proceed with the surgery, the insurer shall pay for the surgery. § 39-71-704(1)(a), MCA.
6. Since the insurer denied further liability for claimant's condition, it was not entitled to restrict claimant's decision to change physicians. Dr. McMurry shall now be deemed to be claimant's treating physician.
7. After rendering a bench ruling in this case, I ascertained that the amount of the outstanding bills for prescription medication and for Drs. Nelson and McMurry is approximately \$800 to \$900. I asked counsel for National Union and the Alexis representative present at trial whether they wished to continue to contest payment of these bills in light of my rulings on the other issues. They indicated they did not, so I will not

address those bills. I note, however, that my understanding of their concession in this regard does not represent acquiescence to my other rulings or any waiver of a right of appeal. Rather it represents an agreement that if my judgment on other matters is not appealed or is affirmed on appeal, these medical bills will be paid along with the other amounts ordered.

8. Since the insurer's conduct in this case was not unreasonable, claimant is not entitled to either attorney fees or a penalty. §§ 39-71-611 and 39-71-2907, MCA (1993).

#### Judgment

1. National Union Fire Insurance Company is liable for claimant's current condition involving an injury to her lower back and radiating pain in her right leg and right foot.

2. If claimant chooses to undergo surgery to decompress the S1 nerve root, National Union shall pay for the surgery.

3. National Union shall reinstate claimant's temporary total disability benefits retroactive to March 16, 1994.

4. National Union shall pay the outstanding bills of Drs. Nelson and McMurry and the pharmacy bills identified at trial.

5. Claimant is not entitled to reimbursement for bills incurred for psychological counseling.

6. Claimant is not entitled to attorney fees or a penalty.

7. Claimant is entitled to costs in an amount to be determined by the Court. She shall submit a verified bill of costs within twenty (20) days of this decision. National Union shall have ten (10) days thereafter in which to file its objections, if any.

8. Any party to this dispute may have twenty (20) days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.



9. The JUDGMENT in this case is certified as final for purposes of appeal pursuant to ARM 24.5.348.

Dated in Helena, Montana, this 19th day of May, 1995.

(SEAL)

/s/ Mike McCarter  
JUDGE

c: Mr. Don Edgar Burris  
Mr. Joe Seifert