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IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

LUCY OSBORNE,

Petitioner, **WCC No. 9307-6842**

vs.

PLANET INSURANCE COMPANY,

Respondent/Insurer for

RHONE-POULENC BASIC CHEMICAL CO.,

Employer.

AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The trial in this matter was held on February 17 and 18, 1994, in Butte, Montana. Petitioner, Lucy Osborne (claimant), was present and represented by Mr. Leonard J. Haxby. Respondent, Planet Insurance Company (Planet), was represented by Mr. Brendon J. Rohan. Claimant testified on her own behalf. James M. Montgomery, Mike Anderson and Dr. Bruce Knutsen also testified. The depositions of Bruce E. Knutsen, M.D., George M. Gilboy, M.D., Richard C. Dewey, M.D., and James P. Murphy, M.D., were filed with the Court for its consideration in reaching its decision. Exhibits 1 through 10, and 22 through 26 were admitted into evidence by stipulation of the parties. Exhibits 11 through 19 were admitted with respect to the reasonableness of the insurer's conduct, but not for other purposes. Exhibits 20 and 21, which are attached to the deposition of William Goodrich, were not admitted.

Nature of the dispute: The dispute in this case involves the application of section 39-71-701 (4), MCA (1991), which provides for the termination of temporary total disability benefits where the worker's treating physician releases the worker to return to work in a modified or alternative position with the same or greater pay as the worker's time-of-injury job even though the worker has not reached maximum medical healing. The principal issue in this case is whether the insurer improperly terminated claimant's temporary total disability benefits under section 39-71-710 (4), MCA (1991), and if so, the extent of the insurer's liability for temporary total disability benefits. The Court must also determine whether claimant's current physical complaints are attributable to her industrial accident.

Bench Ruling: At the close of trial, the Court issued a partial bench ruling, holding:

1. Dr. Gilboy's November 19, 1992, note stating that "Lucy has a Herniated Disc and cannot return to work at this time" rescinded any release to return to work that he had previously given for the claimant.

2. Dr. Knutsen contacted claimant's treating physicians in October of 1992 and obtained their approval for claimant to return to light duty work.

3. Under section 39-71-701(4), MCA, a detailed job analysis was unnecessary in this case.

Issues withdrawn at trial: At the conclusion of trial the claimant withdrew her contention that the insurer wrongfully refused payment for necessary and reasonably incurred medical expenses.

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

FINDINGS OF FACT

1. On the date of her injury claimant was 41 years old and had been employed by Rhone-Poulenc for over 17 years.

2. Claimant was injured on September 23, 1992, when she fell down some metal stairs at work. Her claim for compensation was accepted by Planet Insurance Company, which insured Rhone-Poulenc.

3. Following her fall claimant was examined at the emergency room of St. James Community Hospital in Butte. The examining physician found there was no evidence of a "fracture, dislocation or other significant bone or joint abnormality." The ER report indicated that claimant sprained her wrists and suffered contusions of the left shoulder and right elbow. A splint was applied to her right wrist and Tylenol was prescribed for pain.

4. Dr. George Gilboy, who has been the claimant's personal physician since 1974, examined claimant on September 28, 1992. At that time he noted that she had pulled muscles, was complaining of pain in both rib cages, had pain in her abdominal muscles, the recti, obliques, thighs, trapezius muscle of the neck, the left deltoid muscle and the musculature in her left forearm. He diagnosed multiple pulled muscles and recommended moist heat and an anti-inflammatory medication. (Gilboy Dep. at 6 & 7.)

5. Rhone-Poulenc has a policy of returning injured workers to work as soon as possible after their injuries. The policy is premised on the idea that an early return to work benefits both the company and the employee. Rhone-Poulenc provides modified, light duty jobs to injured workers at their full pay. It consults with its medical director to determine the types of jobs an injured worker is capable of performing. The medical director also monitors each employee's return to work.

6. Rhone-Poulenc employs Dr. Bruce Knutsen, a family practitioner, as its medical director for the Butte area.

7. On September 30, 1992, Dr. Knutsen examined claimant and reviewed emergency room records and x-rays of claimant. He concluded that claimant could return to light-duty work notwithstanding her injuries. He informed claimant of his conclusion, however, claimant told him that she preferred to rely on the opinion of her personal physician.

8. The claimant returned to Dr. Gilboy on October 6, 1992, complaining that she hurt all over and that the anti-inflammatory medications were not working. Dr. Gilboy prescribed physical therapy. He did not release her to return to work at that time.

9. On October 13, 1992, Dr. Gilboy referred the claimant to Dr. James Murphy, an orthopedic surgeon, for consultation.

10. Dr. Knutsen re-examined the claimant on October 14, 1992. He again encouraged her to return to light-duty work, however, claimant indicated she did not feel capable of returning to work at that time. Later that day Dr. Knutsen spoke with Dr. Gilboy, who "felt [it] would also be safe for Lucy to go to light duty, at least several hours per day." (Ex. 10 at 99.)

11. Pursuant to the referral made by Dr. Gilboy on October 13, 1992, Dr. Murphy examined the claimant on October 14, 1992. At that time he provided claimant with a written statement excusing her from work until October 26, 1992. (Ex. 3 at 59.)

12. On October 19, 1994, Dr. Knutsen told Rhone-Poulenc's workers' compensation insurance adjuster that the claimant had been released to work for at least two hours of light-duty work a day. (Ex. 10 at 99.)

13. Jack E. Clary, Operations Manager for Rhone-Poulenc, wrote to the claimant on October 19, 1992, "confirm[ing] Mike Brown's telephone conversation with you on Friday evening October 16, 1992. " The letter stated that claimant had been advised that she had been released to return to light-duty work. It stated in relevant part:

> You have been released for light duty work such as answering telephones and other light office tasks. According to the Company physician he has advised you of this, although you expressed your dissatisfaction to him about returning to work and your desire to recuperate at home. **Dr. Knutsen has been in contact with your personal physician who concurred with your release for light duty.**

(Ex. 11, emphasis added.) The letter also warned claimant that her failure to report for light-duty work on October 19, 1992 "will be considered grounds for dismissal."

14. However, on the following day, October 20, 1992, Dr. Gilboy issued a written statement saying:

> Lucy has **not** been released to return to work. On 10/13/92 she was referred to J. P. Murphy, M.D."

(Ex. 1 at 2; emphasis added.)

15. On October 22, 1992, claimant was seen by Dr. Rory Wood, a Missoula orthopedic surgeon, for a "2nd opinion." Dr. Wood diagnosed chronic cervical strain and recommended continued physical therapy, a cardiovascular exercise program, and a soft cervical collar to be worn at night. He advised her to return to the care of her regular physician. (Ex. 7.)

16. Dr. Murphy re-examined claimant on October 26, 1992. She continued to complain of multiple pains in the left shoulder, right wrist, and left wrist. Dr. Murphy found no motor or sensory deficit or any other "pathology." The claimant asked to be referred to another doctor and Dr. Murphy advised her to talk to Dr. Knutsen for a referral. (Ex. 3 at 55.)

17. Dr. Murphy did not give claimant a written release to return to work but in a conversation with Dr. Knutsen on October 26, 1992, he told Dr. Knutsen that claimant could return to work without restriction. (Ex. 10 at 100; Ex. 22 at 134; Knutsen Trial Testimony; Murphy Dep. at 13-15.)

18. Dr. Knutsen talked with Dr. Gilboy on November 2, 1992. Dr. Gilboy told Dr. Knutsen that he would rely on Dr. Murphy's opinion concerning claimant's ability to return to work. (Knutsen Trial Testimony; Ex. 23; and see Gilboy Dep. at 17-18.)

19. With regard to his testimony concerning his conversations with Drs. Murphy and Gilboy, as well as his testimony on other matters, I found Dr. Knutsen credible.

20. Based on his October 26, 1992 and November 2, 1992 conversations with Dr. Murphy and Dr. Gilboy, respectively, Dr. Knutsen reasonably believed that claimant's treating physicians had released her to return to work. Though oral, the statements made by Drs. Murphy and Gilboy to Dr. Knutsen amounted to their releases for claimant to return to at least light-duty work. Dr. Gilboy and Dr. Murphy never gave claimant a release to return to work on October 26, 1992, nor did they ever tell her that she was released to return to work on that date. (Gilboy Dep. at 12-13; Murphy Dep. at 6-7, 18.)

21. On November 3, 1992, Rhone-Poulenc's attorney sent claimant's attorney a check for temporary total disability benefits for the period up to October 26, 1992. The cover letter stated, however:

> Rhone-Poulenc continues to maintain that your client was physically capable of returning to work on October 26, 1992. I will await your immediate response regarding whether your client intends to return to her employment at Rhone-Poulenc.

(Ex. 18.)

22. Based on claimant's October 26, 1992 request to Dr. Murphy that she be referred to another physician, Dr. Murphy felt that claimant was no longer his patient. (Murphy Dep. at 12-15.)

23. On November 12, 1992, Rhone-Poulenc's attorney wrote to claimant's attorney advising him that "it continues to be Rhone-Poulenc's position that Ms. Osborne is absent from work without justification and is now subject to termination." The letter related the conversations between Dr. Knutsen and Drs. Gilboy and Murphy, and warned that "[i]f Ms. Osborne does not return to work at 8:00 a.m. on Monday, November 16, 1992, her employment will be terminated . . . ." (Ex. 17.)

24. Claimant did not return to work on November 16, 1992.

25. Claimant returned to Dr. Gilboy on November 16, 1992, at which time she was still complaining of pain, primarily in her left neck and shoulder, with burning down her left arm. (Gilboy Dep. at 20-21.) An MRI performed that same day revealed a C6-7 herniated disc causing Dr. Gilboy to refer the claimant to Dr. Richard Dewey, a neurosurgeon, for consultation. (Id. at 21.)

26. On November 19, 1992, Dr. Gilboy issued a second written excuse taking claimant off work, stating "**Lucy has a Herniated Disc and cannot return to work at this time.**" (Gilboy Dep. Ex. 2, emphasis added.) This note effectively rescinded any release to return to work previously given.

27. On November 20, 1992, Dr. Knutsen recommended that Dr. Gilboy refer claimant to Dr. Cooney, a neurologist, for further evaluation of her herniated disc. A referral was in fact made and on December 3, 1992, Dr. Cooney conducted an electromyography study to determine if she was suffering cervical radiculopathy related to her herniated disc. The study, however, was normal.

28. Dr. Dewey also examined the claimant on December 3, 1992. Based on this examination he concluded that "[m]ost of her [claimant's] pain is muscular and there is nothing that is discernible which is related to the C6-7 disc." He recommended a good stretching program coupled with some muscle relaxants and heat. Dr. Dewey testified during his deposition that the herniated disc wasn't related to all of the claimant's problems and that her major problems tended to be very migratory, "pretty much all over her body." (Dewey Dep. at 41.) Commenting further he stated, "Right or wrong, my interpretation is that the ruptured disc was not the cause of this patient's primary problems." (Id. at 42.)

29. As of December 3, 1992, Dr. Dewey assumed claimant's care. He again examined claimant on January 21, 1993, March 4, 1993 and April 15, 1993.

30. Dr. Dewey characterized claimant's physical complaints as muscular in nature and migratory. She has muscle spasm and pain similar to that of a "charley horse." While her initial complaints were in her neck, arms, ribs and shoulder area (Ex. 2 at 31), other muscles have since been affected, including those in back and legs. (Ex. 2 at 13, 25.)

31. As diagnosed by Dr. Dewey, claimant is suffering from a myofascial pain disorder. Dr. Dewey described the disorder as follows:

> Myofascial syndrome is a generic title applied to a pain problem that involves migratory muscle spasm; that is, spasms that occur both on the left and then on the right side, both sides up and down. They tend to have very limited relief of pain.
>
> The pain is very characteristic in some respects of a charley horse in the leg, which we're all familiar with. There can be an underlying aching-type of pain, such as the kind of pain one experiences with the flu after it has went into the muscles. But it is very persistent with periods of migration within one side then moving to the other, from the coccyx to the base of the skull.

(Dewey Dep. at 12.) According to Dr. Dewey, the condition is more common in women than in men and is usually caused by stress, hostility, anger or other psychological factors, although the pain and spasm is real. *(Id. at 14-15, 19, 27.)* The condition can be "triggered" by physical trauma, including

a fall down the stairs. (*Id. at 14.*) Dr. Dewey described the cause and genuineness of claimant's condition as follows:

> Well, if you want me to address if she's a malingerer, no; I think she's got pain. If you want to know if I think that the problem is real for her, yes, I think it is. I don't think the injury caused it. I think it precipitated it, but I think the cause is something else.
>
> I think that the cause is something underlying in her emotional or psychophysiologic background, which instead of filtering out the stress, it magnifies it. I want to make it clear that it is real to her. I don't think she's a malingerer. I don't think she's faking the disability.

(*Id. at 27.*)

32. Dr. Dewey prescribed frequent stretching exercises (hourly), massage and heat as treatment for claimant's condition. His records indicate that claimant did not comply with his exercise recommendations. (Ex. 2 at 13, 29.)

33. On January 26, 1993, Dr. Knutsen contacted Dr. Dewey by telephone to ask if the claimant could return to light-duty work such as desk work or answering the telephone. (Knutsen trial testimony and Knutsen Dep. at 23.) Dr. Knutsen testified that Dr. Dewey said that "[h]e didn't see any reason why she couldn't go back to a light-duty status such as desk work, doing paperwork, answering the telephone." (Knutsen Dep. at 23.) While Dr. Dewey did not specifically recall what he said during the conversation, he testified that he would have responded "If she can tolerate it, then there is no medical reason why she should not [return to light duty work]." (Dewey Dep. at 51.)

34. On January 29, 1993, Rhone-Poulenc's attorney wrote to claimant's attorney. Among other things, the letter informed claimant's attorney of Dr. Knutsen's contact with Dr. Dewey. The letter stated that "it was Dr. Dewey's opinion that she [claimant] was capable of returning to light duty work at the Rhone-Poulenc plant." The letter went on to state that "it is the position of Rhone-Poulenc that Ms. Osborne has been released to return to work" and demanded that she report to work for "available light duty work activities" on February 1, 1993. Finally, the letter warned that claimant's failure to report to work on February 1st would result in termination of her employment. (Ex. 12.)

35. Claimant did not return to work on February 1, 1993.

36. In his office note of his March 4, 1993 examination of claimant, Dr. Dewey said:

> I think Lucy is truly having significant enough pain that she would not be able to work at any position, although I have no restrictions on her should she like to return to a telephone operating position with Rhone-Poulenc.

(Ex. 2 at 25.)

37. Dr. Dewey's complete file for claimant, which is Exhibit 2 to his deposition and is republished as trial Exhibit 2, contains five return to work questionnaires. It is unclear who initiated the questionnaires. On January 29, 1993, Dr. Dewey completed the first return to work questionnaire, which asked, "IS PATIENT TOTALLY DISABLED FROM ENGAGING IN ANY OCCUPATION OR FROM PERFORMING ANY WORK FOR COMPENSATION OR PROFIT?" He checked the response, "YES." He made identical responses on forms dated March 4, 1993, April 5, 1993, May 6, 1993 and May 27, 1993, each time responding "YES" to the question of whether claimant was totally disabled. The form also asked, "On what date _____ did you (or will you) release patient to perform regular duties?" On each of the forms except the last two, Dr. Dewey responded, "UNKNOWN." On the last two forms he replied "patient referred back to Dr. George Gilboy." (Ex. 2 at 45, 46, 48, 49, and 51, emphasis added.)

38. On March 1, 1993, claimant's attorney wrote to Dr. Dewey asking him if he had released claimant to return to work. The letter stated, in full:

> I have been advised by counsel for Rhone-Poulenc that you have conferred with Dr. Bruce Knutsen with regard your evaluation and treatment of my client, Lucy Osborne. Did you tell Dr. Bruce Knutsen, and Lucy, that she could return to "light-duty" work, and, if so, were you provided a job description to specifically approve.
>
> Awaiting your timely reply, I remain,
>
> Sincerely,
>
> LEONARD J. HAXBY

(Ex. 2 at 23.) Apparently, Dr. Dewey never responded to the letter.

39. In his deposition, Dr. Dewey testified that there was no medical reason claimant could not return to light-duty work. However, he also testified that he expected that due to her pain claimant would be unsuccessful in attempting to return to work. On the other hand, he encouraged claimant's

return to work and indicated that her ability to work could only be determined by an actual work trial. (Dewy Dep. at 22-24, 30-32.)

40. The primary limiting factor in claimant's return to work is her ability to cope with pain and muscle spasm. Dr. Dewy's testimony is informative concerning the dilemma presented by those factors. I therefore quote his testimony liberally:

> Q Doctor, getting into your examination, treatment, and continued observation of Ms. Osbourne [sic], I'm going to advise you that she was being advised by her employer that they had a modified position for her as a telephone operator.
>
> This is a position where she would be in a controlled environment inside the company, and she would sit at a console and answer the company's telephone and do this type of work.
>
> Now, is that the type of position -- when I say position, I'm not talking about a physical position, but a job position -- that would be good for a patient such as Lucy -- when I say good, I mean a physically positive position for a patient such as Lucy, from your observations?
>
> A Well, again, I can't answer that specifically for Lucy because we don't know how she would do until she attempts to function in that role. We wouldn't know, if she's never tried it. Patients with muscle spasm have pain at rest. So an active position is more likely to be tolerated by someone with myofascial problems.
>
> On the other hand, I had given Lucy some very specific exercises for her to perform every hour in a sitting position. So a job such as that would give her the opportunity to do those exercises. Unfortunately, Lucy never understood the role of her performing her own exercises in any of this. So I don't know. The only way to really answer your problem [sic] is to put her in the job and see how well she tolerates it.
>
> My prediction is she wouldn't tolerate it well. Most of the patients who I see who have this migratory muscle spasm, myofascial syndrome, or any kind of muscle spasm require movement to be free

of symptoms. And the worst jobs that I see are those in front of a CDT or typing on a stenographer's typewriter or sitting at a desk.

Even though those positions are labor nonintensive, physically nonintensive positions, and give the impression that they can be tolerated better, patients don't tolerate them real well when in muscle spasm primarily. The only other comment I would make is that patients who are in spasm and do nothing are going to have pain, so they might as well work and earn money because they're going to have the pain anyway. I tell them that a lot.

I'm not saying that that is the right answer, but most patients who have this spasming also have it if they sit and do nothing or sit watching television or go to a movie or have to drive in the car.

And it's also very, very uncomfortable. They're uncomfortable from morning to night. Lack of movement is related to lack of movement, rather than to movement itself. So I tell them, "If you are going to be uncomfortable, then why don't you find a job and at least earn some money while you're being uncomfortable."

Q Doctor, I'm going to ask you some questions in the same vein. Are there certain programs such as work-hardening or the physical therapy -- I shouldn't say that -- or programs run by physical therapy clinics, such as to determine your ability to work, that would be beneficial to try to find out the employability of a patient like Lucy Osbourne [sic]?

A Well, there are a lot of places that do what is called a work evaluation, where they put a patient through a fairly prolonged series of movements and maneuvers and try to evaluate as best they can whether a patient can function in the workplace. In my opinion, they don't work as well as -- Nothing works as well as putting the patient in the workplace and seeing how they will tolerate the work.

. . . .

Q The only thing that my records indicated from your records is, I believe, whether or not she should go into the job of the telephone operator. And I believe you already answered that question; is that correct?

A Yes. Again, I think that would be up to Lucy. My feeling is that if she's going to hurt, she ought to find out where she hurts the least. If she can return to the job market, only she will be able to determine that. I quite doubt that that would be determinable by a work evaluation or altered by a work-hardening program.

. . . .

Q Would it then be fair to say that the only restricting provisions of your examination of Ms. Osbourne [sic] would be the restrictions that the pain that she feels would put upon herself?

A There are two answers to that. You're correct, the patient is limited by her own pain tolerance. The second thing is that the only restriction I placed on her medically is that she perform the specific exercises every hour. That is a restriction against her time, but I told her that she must do these stretching exercises frequently throughout the day if she wants to optimize her ability to tolerate activities.

(Dewey Dep. at 21-24, 30, 32.)

41. Dr. Dewey endorsed the idea of an early return to work and encourages his patients to do so. He characterized the program at Rhone-Poulenc as an "ideal program." (Dewey Dep. at 45.)

42. Claimant last saw Dr. Dewey on April 15, 1993. He reported: "After three months and $3000 worth of physical therapy, Ms. Osborne is no different than she was before." He made the following recommendations concerning future treatment:

> We'll request that a six-month membership be authorized for the Butte YMCA and that the patient, at least once or twice a day, goes to the YMCA for a hot tub, Jacuzzi, sauna, etc. Heat is the only thing which helps her and is certainly doing a better job than physical therapy. This would be considerably less expensive, the patient could do this several times a day. I don't think there is anything further that I can add. Stretching is important. She is still only doing them four or five times a day, when I would like to see her stretch hourly. I have shown her a little different way to stretch so that she does not get spasm of her abdominal muscles and that she can even stretch some of these at the same time. If she is not stretching she will be uncomfortable.

(Ex. 2 at 13.) Dr. Dewey also concluded that "[i]t would be more appropriate for her to be followed by someone in Butte since the trip to Missoula is inconvenient." With that closing note, Dr. Dewey's care of claimant ended.

43. Some two months later, on June 22, 1993, claimant contacted Dr. Gilboy. At that time she requested Dr. Gilboy to refer her to a chiropractor. The doctor did not examine claimant but honored her request for referral. (Gilboy Dep. at 22-23.)

44. The final medical record available to the Court shows that claimant again saw Dr. Gilboy on October 19, 1993, when she complained that the chiropractic care was "making it [her condition] worse." Dr. Gilboy prescribed muscle relaxants and anti-inflammatories and suggested she go back to see Dr. Dewey. (Gilboy Dep. at 24-25.)

45. Based on the medical records in this case, as well as my personal observation of claimant at trial, I find that claimant is unmotivated to return to work and resisted all suggestions and recommendations that she attempt to do so.

46. Had claimant returned to work she would have received her full wages even if she had worked only part-time. Her return to work would have been carefully monitored by Dr. Knutsen, and her job would have been further modified to accommodate her.

47. The duties and physical requirements of the light duty jobs offered to claimant by Rhone-Poulenc (receptionist, telephone operator) are not unique or beyond the common understanding of physicians or this Court. A detailed job analysis was unnecessary to a release for claimant to return to work.

48. Claimant is presently on indefinite leave status with Rhone-Poulenc. Her employment has not been terminated.

49. From all of this, I make the following ultimate findings of fact:

a. As of November 2, 1992, the claimant was released by her treating physicians to return to work in at least a light-duty position. However, the physicians never effectively communicated the release to the claimant.

b. Between the time of her injury and February 1, 1993, Rhone-Poulenc had a light-duty position available to claimant and was willing to tailor her job and hours of work to help her successfully return to work. Had claimant returned to work she would have received her full wages.

c. The claimant's release to return to work was rescinded on November 19, 1992.

d. Dr. Dewey became claimant's treating physician on December 3, 1992.

e. As of January 26, 1993, Dr. Dewey released claimant to return to work in a light-duty position. However, his release was equivocal in that he left it up to claimant to determine whether she could cope with her pain.

f. In light of the equivocal nature of Dr. Dewey's release and the lack of any prior legal precedent, the effect of the release was reasonably debatable.

g. Claimant has resisted all attempts to return her to work and has not followed Dr. Dewey's exercise recommendations. Claimant does not want to even attempt to return to work.

h. As of late January 1993, there was no medical reason preventing claimant's return to work in a light-duty position at Rhone-Poulenc. Dr. Dewey's testimony clearly established that a return to work would not have harmed claimant nor caused her condition to worsen.

i. Claimant's condition, and her ability to return to work in a light-duty position or any other position, has not been medically evaluated since April 15, 1993.

j. Claimant received temporary total disability benefits through October 26, 1992.

50. Rhone-Poulenc's termination of benefits as of October 26, 1992, was not unreasonable. Its failure to reinstate and pay temporary total disability benefits upon receipt of Dr. Gilboy's note of November 19, 1992, also was not unreasonable since it took reasonable steps to determine whether the herniated cervical disc diagnosed by Dr. Gilboy was related to claimant's industrial accident. That inquiry later became moot in light of Dr. Dewey's opinion that "there is nothing that is discernible which is related to the C6-7 disc" (Ex. 2 at 32.) Rhone-Poulenc's continued refusal to pay benefits after Dr. Knutsen communicated with Dr. Dewey on January 26, 1993, was not unreasonable since Dr. Dewey's statements could reasonably be construed as a release to return to work and claimant was notified of this.

CONCLUSIONS OF LAW

1. Claimant suffers from a myofascial pain disorder which was triggered by her September 23, 1992, injury while working for Rhone-Poulenc. An employer "takes the employee as he finds him." ***Houts v. Kare-Mor,*** *257 Mont. 65, 68, 847 P.2d 701 (1992).* Although a preexisting condition may be substantially responsible for a claimant's medical condition, the insurer is liable for the condition where the preexisting disease or condition is "**lit up, aggravated or accelerated** by an industrial injury." ***Birnie v. U.S. Gypsum Co.,*** *134 Mont. 39, 45, 328 P.2d 133 (1958).* Claimant's disorder is a consequence of her industrial accident and is compensable.

2. The present controversy involves the interpretation and application of section 39-17-701 (4), MCA (1991), which was enacted in 1991 (1991 Montana Laws, ch. 52, § 1) as an exception to the general rule that a claimant who is unable to return to work at his or her time-of-injury job as the result of an industrial injury is entitled to temporary total disability benefits until he or she reaches maximum healing. The statute applies in this case since the injury occurred after its adoption. 1991 Montana Laws, ch.52, § 2; ***Buckman v. Montana Deaconess Hospital,*** *224 Mont. 318, 730 P.2d 380 (1986).* It provides:

> **39-71-701. Compensation for temporary total disability - exception. . . .**
>
> . . . .
>
> (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 he received at the time of injury, the worker is no longer eligible for temporary total disability benefits even though he 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.]

Rhone-Poulenc invoked the section in terminating claimant's temporary total disability benefits, and contends here that all of the statutory criteria for termination of benefits were met.

Rhone-Poulenc offered claimant a light-duty job at her time-of-injury wage. It did so pursuant to a program which encourages injured workers to return to work as early as possible and which provides medical monitoring of the worker. The program also provides flexibility in the number of hours of work and specific job duties so that the worker's physical restrictions and needs can be accommodated. It is consistent with the obvious purpose of the statute, and was endorsed by Dr. Dewey.

As an initial matter, however, the section requires that the "treating physician" release the worker to return to work. Dr. Knutsen was not claimant's treating physician, and his opinion that claimant could return to work was insufficient to invoke the section. The propriety of the termination of claimant's benefits therefore depends on whether she was released to return to work by her treating physicians.

On November 2, 1992, claimant's treating physician was Dr. Gilboy. By concurring with Dr. Murphy's October 26, 1992 opinion, which was the claimant was capable of returning to any type

of work, Dr. Gilboy approved claimant's return to work the light-duty position offered by her employer. While the approval was not in writing, the statute does not require a written release or any specific wording. However, as illustrated in this case, and in light of fading memories and imperfect recollections, employers and insurers would be well advised to obtain a written release directly from the treating physician. At minimum a release to return to work must be clearly and effectively communicated to the claimant.

The November 2, 1992 release was short-lived. On November 19, 1992, Dr. Gilboy, who was still claimant's treating physician, issued a note stating that "Lucy has a Herniated Disc and cannot return to work at this time." That note rescinded the prior approval for her return to work.

Rhone-Poulenc argues, however, that claimant was not entitled to reinstatement of her benefits because Dr. Gilboy's work restriction was based on a herniated disk and the herniated disc was not the specific cause of claimant's continued symptoms. Rhone-Poulenc's logic is flawed. The correctness of a physician's medical diagnosis is not the gauge of an insurer's liability. Claimant was entitled to a reinstatement of her temporary total disability benefits so long as the work restriction was related to a physician's efforts to diagnose and treat the claimant's injury. Claimant's myofacial pain syndrome, which **was** triggered by the accident, existed on November 19, 1992, and her physician was merely trying to determine the specific medical condition which was producing her symptoms.

Finally, the Court must determine whether Dr. Dewey's January 26, 1993 conversation with Dr. Knutsen, or his office note of March 4, 1993, amounted to a new release to work, thereby ending claimant's entitlement to benefits. Based on Dr. Dewey's deposition it is now clear that he in fact approved claimant's return to work. He found no medical reason why she could not return. His comment in his March 4, 1993 office note that "Lucy is truly having significant enough pain that she would not be able to work at any position" reflected his pessimism that ultimately any return to work would be successful. But that pessimism was based on his perception that claimant would not adequately deal with her pain in a job setting. He testified that there was no medical reason claimant could not attempt to return to work and that she would not be harmed by working. He also acknowledged that the only way to determine whether claimant could return to work was for her to try to do so. "Nothing works as well as putting the patient in the workplace and seeing how they will tolerate the work." (Dewey Dep. at 24.) Finally, he indicated, "The only other comment I would make is that patients who are in spasm and do nothing are going to have pain, so they might as well work and earn money because they're going to have the pain anyway. I tell them that a lot." (Dewey Dep. at 23.)

The clear purpose of section 39-71-710 (4), MCA, is to return the worker to employment as soon as possible. To promote that purpose the legislature made a specific provision for termination of temporary total disability benefits where the employer offers the injured worker a modified or

alternative job at full wages and the worker's treating physician approves the worker's return to work. The statute does not excuse a worker from returning to work even though the worker believes that he or she is unable to work. While the worker may refuse to return to work, the consequence of such refusal is no job and no benefits. The worker who attempts to return to work and who genuinely cannot perform the job because of his or her injury can of course seek reevaluation by his or her treating physician, who may then determine that the worker is not capable of doing the job and thereby rescind the release.

Dr. Dewey has approved claimant's return to work in a light-duty position. His pessimism concerning claimant's probable success in any return to work is not a restriction precluding her return to work but is warning that her return to work may ultimately prove unsuccessful. His approval imposes on claimant at least the burden to try the job offered by Rhone-Poulenc and make a good faith, bona fide effort to do the job. She also has an obligation to follow the exercise regime and other medical advice prescribed by Dr. Dewey to ameliorate her condition. If in doing so she is ultimately unable to work then her treating physician may rescind the release and again take her off work.

Although we have found that Dr. Dewey has released claimant to return to work in a light-duty position, the release was not effectively and unequivocally communicated to the claimant. Dr. Dewey initially did not communicate the approval to claimant but rather to Dr. Knutsen and it is not apparent that he ever informed claimant that she could and should attempt to return to work. Dr. Dewey did not reply to claimant's attorney's March 1, 1993 letter asking him if he told Dr. Knutsen that claimant could return to work. On several questionnaires which are part of Dr. Dewey's file, he also responded "yes" to a question asking whether claimant was totally disabled.

Since Dr. Dewey's release was not effectively and unequivocally communicated to claimant, and since neither Dr. Murphy and Dr. Gilboy gave claimant a written release to return to work on October 26, 1992, and did not orally tell her she could return to work at that time, claimant is entitled to temporary total disability benefits from October 26, 1992, to the present.

However, it is the Court's further determination that if claimant's condition is unchanged or has improved, her benefits may be prospectively terminated pursuant to section 39-71-701 (4), MCA (1991) unless Dr. Dewey's release is affirmatively rescinded. Claimant was last examined by Dr. Gilboy on October 19, 1993, but Dr. Gilboy recommended that claimant be reexamined by Dr. Dewey. That recommendation appears especially appropriate and would provide an opportunity for a current assessment of claimant's ability to return to work. The Court will therefore order claimant to submit to a further examination and evaluation by Dr. Dewey, or another specialist recommended by Dr. Gilboy, to determine if she is currently able to return to light-duty work on at least a trial basis. If she is then released to do so, and an appropriate light-duty job is offered to her by Rhone-Poulenc, her temporary total disability benefits may then be terminated pursuant to section 39-71-

701 (4), MCA (1991).

3. An award of attorney fees and/or a penalty requires a finding of unreasonableness on the part of the insurer. §§ 39-71-611 and -2907, MCA (1991).

Rhone-Poulenc reasonably relied on the conversations between its medical advisor and Drs. Murphy, Gilboy and Dewey with regard to claimant's ability to return to light-duty work. This case arises because of a break-down in communications among the doctors, Rhone-Poulenc's medical advisor, and the claimant, not because Rhone-Poulenc took an unreasonable position concerning claimant's ability to return to work.

The only period for which there was a note clearly taking claimant off work was the period of November 19, 1992 until late January. Dr Gilboy's November 19th note took claimant off work on account of a herniated cervical disc. Upon receipt of the note, Rhone-Poulenc requested confirmation that the herniation was in fact related to claimant's industrial accident and it arranged to have claimant evaluated by Dr. Gary Cooney, a neurologist. Dr. Cooney examined claimant and referred her to Dr. Dewey. Pending Dr. Dewey's examination, on December 7, 1992, Rhone-Poulenc advised claimant's attorney that if Dr. Dewey established a causal connection between the herniated disc and the accident, it would accept liability for that condition. (Ex. 14.) Rhone-Poulenc was then provided with a December 3, 1992 medical report from Dr. Dewey stating, "Most of her pain is muscular and there is nothing that is discernible which is related to the C6-7 disc." (Ex. 2 at 32.) Ultimately, Dr. Dewey concluded that the claimant's symptoms (principally pain) were unrelated to the herniated disc. (Dewey Dep. at 42.)

Dr. Dewey did not comment on the relationship of claimant's muscular pain to her accident when he examined her on December 3rd. (Ex. 2 at 32.) He scheduled a further examination for January 21, 1993.

Rhone-Poulenc continued to seek a release for claimant to return to work, and contacted Dr. Dewey through Dr. Knutsen. That contact, in late January 1993, resulted in yet another stage of the saga, i.e., the controversy over whether Dr. Dewey released claimant to return to work at that time.

It was not unreasonable for Rhone-Poulenc to question whether the herniated disc discovered in November 1992 was related to the industrial accident and to request verification that it was. Verification was not forthcoming, rather the matter appeared moot after Dr. Dewey's examination. Thus, at the time, Rhone-Poulenc's denial was not unreasonable.

Rhone-Poulenc's failure later on to pay benefits retroactive to November 19th was also not unreasonable. The primary focus of attention was on getting claimant back to work in a light-duty position. In conversations with Rhone-Poulenc's medical advisor, claimant's physician's appeared

to release her for such work, but did not effectively communicate that release to claimant. Claimant on her part transmitted a clear message of resistance to any return to work. Frankly, the situation as presented to the Court at hearing was a mess.

The requests for a penalty and attorney fees are denied.

JUDGMENT

1. The insurer shall reinstate claimant's temporary total disability benefits retroactively to October 26, 1992.

2. Claimant shall within two months of this judgment submit to a reexamination and reevaluation by Dr. Dewey, or other specialist recommended by Dr. Gilboy, to determine whether she is presently able to return to work in a light-duty job, even if on only a trial basis.

3. Claimant is not entitled to a penalty.

4. Claimant is entitled to her costs but not to an attorney fee.

5. The Court retains continuing jurisdiction over this case.

6. The JUDGMENT herein is certified as final for purposes of appeal pursuant to ARM 24.5.348.

7. 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 19th day of December, 1994.

(SEAL)

JUDGE

c: Mr. Leonard J. Haxby
Mr. Brendon J. Rohan

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

LUCY OSBORNE,

Petitioner, **WCC No. 9307-6842**

vs.

PLANET INSURANCE COMPANY,

Respondent/Insurer for

RHONE-POULENC BASIC CHEMICAL CO.,

Employer.

ORDER NUNC PRO TUNC

On December 14, 1994, this Court issued its AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT. Conclusion of Law 3 was amended, therein denying requests for a penalty and attorney fees. The original Conclusion of Law 4 which awarded attorney fees should have been deleted in the amended findings. Therefore Conclusion of Law 4 is deemed deleted and a revised copy of the AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT is substituted.

DATED in Helena, Montana this 19th of December, 1994.

(SEAL)

JUDGE

Enclosure
c: Mr. Leonard J. Haxby
Mr. Brendon J. Rohan