IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2012 MTWCC 37

WCC No. 2011-2727

WENDY TUTTLE

Petitioner

vs.

FIRST LIBERTY INSURANCE CORP.

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT APPEALED TO MONTANA SUPREME COURT - 11/19/12

JUDGMENT VACATED AND WITHDRAWN PURSUANT TO STIPULATION OF PARTIES

Summary: Petitioner alleges her current disability is a result of her September 2008 industrial accident, entitling her to reinstatement of disability benefits retroactive to the time her benefits were terminated in December 2008 and payment of medical expenses. Respondent counters that Petitioner was placed at MMI with a 0% impairment rating three and a half months post-injury, and that a temporal relationship between Petitioner's industrial accident and the herniated disks discovered over two years post-MMI is insufficient proof of causation.

Held: Respondent is correct that a temporal relationship between Petitioner's current disability and her industrial accident, without more, is insufficient to meet her burden of proof. However, there is ample factual and historical evidence in this case that correlate the objective medical findings of the two herniated disks to Petitioner's work-related injury. Petitioner has therefore met her burden of proof in establishing on a more probable than not basis that the herniated disks in her thoracic and lumbar spine, and her current disability for which she seeks benefits, are causally related to her September 2008 industrial accident. Petitioner has not demonstrated an entitlement to benefits retroactive to the time her benefits were terminated in December 2008. Petitioner is entitled to temporary total disability benefits as of April 27, 2011, the date on which her doctor issued a report stating she could no longer perform her duties.

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-407. While it is true that a temporal relationship between an injury and herniated disks appearing two years later is insufficient to sustain Petitioner's burden, Petitioner sustained her burden under § 39-71-407(7), MCA, by showing a direct causal link between her injury and her immediate complaints of low- and mid-back pain with positive sciatic tests noted by her post-injury providers, and the same clinical findings seen two years later by her treating physician who correlated those findings to herniated disks discovered on an MRI of her thoracic and lumbar spine.

Causation: Medical Condition. While it is true that a temporal relationship between an injury and symptoms appearing two years later is insufficient to sustain Petitioner's burden, Petitioner sustained her burden under § 39-71-407(7), MCA, by showing a direct causal link between her injury and her immediate complaints of low- and mid-back pain with positive sciatic tests noted by her post-injury providers, and the same clinical findings seen two years later by her treating physician who correlated those findings to herniated disks discovered on an MRI of her thoracic and lumbar spine.

Maximum Medical Improvement: General. Although Petitioner's treating physician found her at MMI, the Court disagreed. It can hardly be said that a definitive determination of Petitioner's condition had been made, with no investigation of the cause of her lumbar pain and sciatic complaints.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: Montana: 39-71-407. The Court concluded Petitioner had met her burden of proof regarding her entitlement to benefits. The Court found that Petitioner offered ample factual and historical information to correlate the objective medical findings of two herniated disks to Petitioner's work-related injury.

Benefits: Temporary Total Disability Benefits. The Court held that, although Petitioner's treating physician found her at MMI, it could hardly be said that a definitive determination of her condition had been made since the cause of her lumbar pain and sciatic complaints were not investigated. However, because Petitioner was engaged as a home

health care nurse for several months post-MMI, she was not entitled to reinstatement of her TTD benefits until her treating physician made it clear that her disability caused her inability to perform her time-of-injury job.

¶ 1 Trial in this matter was held March 16, 2012, in the Workers' Compensation Court in Helena, Montana. Petitioner Wendy Tuttle was present and represented by John C. Doubek. Respondent First Liberty Insurance Corp. (Liberty) was represented by Larry W. Jones.

¶ 2 **Exhibits**: I admitted Exhibits 1 through 5 and 7 through 10 without objection.¹ During the course of trial, additional Exhibits 11 and 12 were identified and admitted without objection.

¶ 3 **<u>Stipulations</u>**: The parties stipulated to the filing of post-trial briefs.

¶ 4 <u>Witnesses and Depositions</u>: The parties agreed that Tuttle's deposition can be considered part of the record. Tuttle and Mark Ibsen, M.D., were sworn and testified.

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

Issue One: Whether the Insurer should be required to pay Petitioner temporary total disability and/or permanent total disability benefits retroactively from the time she was cut off.

Issue Two: Whether the Insurer should be required to continue to pay Petitioner temporary total disability and/or permanent total disability benefits.

Issue Three: Whether the Insurer should be required to pay medical benefits for treatment bills incurred by Petitioner.

FINDINGS OF FACT

¶ 6 On September 2, 2008, Tuttle suffered an industrial injury arising from her employment with Rocky Mountain Care Center (RMCC) in Helena, Montana.³

 \P 7 At the time of Tuttle's injury, Liberty insured RMCC under Compensation Plan No. 2.⁴

¹ Exhibit 6 was missing from the Court's Exhibit Book and will therefore not be considered.

² Pretrial Order at 2-3, Docket Item No. 14.

³ Statement of Uncontested Facts, Pretrial Order at 1.

¶ 8 Tuttle testified at trial. I found Tuttle to be a credible witness. Tuttle testified that she received her Registered Nurse (RN) diploma following a three-year program in Minnesota. She has held a number of nursing positions in pediatrics, geriatrics, and home care.

¶ 9 In December 2007, Tuttle began working for RMCC in Helena as a full-time RN, caring for patients and supervising nurses' aides.⁵

¶ 10 Tuttle explained that her first report of injury references only the second of two incidents that occurred during the evening and early morning hours of her 12-hour shift on September 1-2, 2008.⁶ She testified that the first incident occurred when a large male patient in a walker grabbed her left arm when she attempted to give him an insulin injection. The patient pulled Tuttle over his walker, restraining her, and she "[felt] something give," injuring her back and shoulder. When the patient finally released her, Tuttle stated she was in a lot of pain in her left shoulder and down her back. She took some non-prescription pain medication after the incident and continued her rounds.⁷

¶ 11 The injury report regarding the second incident indicates Tuttle injured her mid left and low back while reaching across a resident in bed to draw blood.⁸ Tuttle testified that she needed to draw blood from the patient's arm that was against the wall. Because she was unable to pull the bed away from the wall, she had to crawl over the patient and "felt [her] back just give." When she was done, she had difficulty straightening up and had pain from the middle of her back on down.⁹

¶ 12 Following these incidents, Tuttle went to a massage therapist on September 6, 2008,¹⁰ and then began treating with Mary Eckmann, D.C., on September 10, 2008.¹¹ Dr. Eckmann's initial treatment notes show that Tuttle complained of constant lower thoracic pain with muscle spasms, worse on the left, with "[f]requent (51 to 75% of awake time) lumbar region pain," and headaches.¹² Dr. Eckmann performed an "Orthopedic Evaluation" during her initial treatment of Tuttle and noted on a sitting

⁴ *Id.*⁵ Trial Test; Ex. 5.
⁶ *Id.*⁷ Trial Test.; Tuttle Dep. 18:18 - 19:8.
⁸ Ex. 5.
⁹ Trial Test.; Tuttle Dep. 19:8-17.

¹⁰ Tuttle Dep. Ex. 1(B), Tuttle Dep. In the Matter of Human Rights Bureau Case No. 0091013656 (HRB Dep.) 51:15-21.

¹¹ Trial Test.

¹² Ex. 3 at 1.

straight leg raise (SLR) test for sciatica: "positive on the left producing moderate pain."¹³ Dr. Eckmann assigned Tuttle work restrictions following her evaluation.¹⁴

¶ 13 Dr. Eckmann noted only slight improvement to Tuttle's thoracic and lumbar pain during her next several treatments.¹⁵ On October 21, 2008, Dr. Eckmann noted that the severity of Tuttle's lumbar pain increased significantly the night before to a level of 10 out of 10. She restricted Tuttle to no more than a four-hour shift that day.¹⁶ In her last visit on November 3, 2008, Tuttle complained to Dr. Eckmann that she was being asked to do more at work and had increasing pain after her shifts. Dr. Eckmann restricted Tuttle to light duty with shifts of no more than eight hours per day and no more than thirty hours in a week.¹⁷

¶ 14 Throughout Tuttle's treatment with Dr. Eckmann, her back complaints and muscle spasms were consistently located on the left side.¹⁸

¶ 15 Upon referral from Dr. Eckmann,¹⁹ Tuttle was seen by Paul Eodice, D.O., on September 26, 2008. Dr. Eodice found Tuttle suffering from mid-thoracic pain localized on the left with occasional lumbar pain. He assigned her lifting restrictions of no more than 20 pounds, no bending or stooping, and ordered her to decrease her work day, initially, to no more than 4-6 hours per day.²⁰ Tuttle normally worked a 12-hour shift three days a week.²¹

¶ 16 Tuttle attended physical therapy sessions with Matthew S. Fischer, MSPT, at Fischer Physical Therapy, where he noted on her initial exam that she was "very tender" over her left thoracic and lower lumbar area.²²

¶ 17 Tuttle testified that despite being given light-duty restrictions by Drs. Eodice and Eckmann, including reducing the number of hours she worked per shift, her employer did not fully honor those restrictions.²³ According to Tuttle, Bill Powell, the RMCC

¹³ Ex. 3 at 2.
¹⁴ Ex. 3 at 2-3.
¹⁵ Ex. 3 at 3-5.
¹⁶ Ex. 3 at 5.
¹⁷ Ex. 3 at 7.
¹⁸ Ex. 3 at 1-7.
¹⁹ Trial Test.
²⁰ Trial Test.; Ex. 4 at 1-2.
²¹ Trial Test.
²² Ex. 12 at 2.
²³ Trial Test.

administrator, informed her that she needed to work a minimum of 32 hours a week in order to maintain her employer-sponsored health insurance. As a single parent, Tuttle needed to maintain her health insurance, so she worked the required hours.²⁴

¶ 18 Tuttle stated she began to feel hounded and harassed at work, particularly when the new head of nursing, Gayle Hanks, started at RMCC in early October 2008. Tuttle complained to Powell about the harassment.²⁵ Tuttle testified she felt Hanks singled her out for disciplinary action because of her back injury.²⁶ At one point, Tuttle stated she was told by Hanks to wash wheelchairs, which required bending and stooping, activities that were contrary to Tuttle's restrictions.²⁷ Dr. Eodice restricted Tuttle from pushing the med cart, which was very heavy; but she found even the task of pulling out the drawers on the cart aggravated her back. Tuttle testified that when she asked for assistance with the cart, she was ridiculed.²⁸

¶ 19 Tuttle received a less-than-favorable annual performance evaluation from Hanks on December 4, 2008.²⁹ Tuttle decided after her evaluation that she would resign her position. She testified that she quit because of Hanks' harassment³⁰ and because Tuttle did not believe she could physically continue to do the work.³¹ After turning in her resignation letter on the 9th of December, 2008, giving her employer a 14-day notice, Tuttle was informed by Hanks that her resignation was accepted as of that day, and December 9, 2008, was her last day of employment at RMCC.³²

¶ 20 At the time Tuttle gave her notice, she was aware that Dr. Eodice intended to release her with no work restrictions at the end of December 2008.³³

¶ 21 When Tuttle saw Dr. Eodice the last time on December 22, 2008, she had been off of work for two weeks. Tuttle testified her back felt rested and she was not having a lot of symptomology.³⁴ On that date, Dr. Eodice found Tuttle to be much improved with

- ²⁸ HRB Dep. 114:2 116:9.
- ²⁹ Trial Test.; HRB Dep. 172:17 173:8; 180:25 181:15.
- ³⁰ HRB Dep. 182:4-18.
- ³¹ Trial Test.; Tuttle Dep. 38:9 39:18.
- ³² Trial Test.; HRB Dep. 185:21 186:10.
- ³³ HRB Dep. 183:6-17.
- ³⁴ Tuttle Dep. 8:21 9:2.

²⁴ HRB Dep. 62:17 - 63:23; 76:24 - 77:23; 78:4-19.

²⁵ Trial Test.; HRB Dep. 133:20-23; 136:3-15.

²⁶ Trial Test.; HRB Dep. 170:11-16; 174:24 - 175:24.

²⁷ Trial Test.; HRB Dep. 178:11 - 179:16.

her pain level down to a 1 out of 10. He determined that Tuttle was at maximum medical improvement (MMI), and assigned her a 0% impairment rating.³⁵ A month later, however, Tuttle was again taking muscle relaxants as her back was spasming with normal daily activities.³⁶

¶ 22 Tuttle testified that after being declared at MMI and receiving her last check for temporary partial benefits, she received a letter from Liberty's claims adjuster, Amy Fredrickson, stating her claim was closed. Tuttle believed that meant that Liberty would no longer pay for medical care related to her injury. Tuttle stated that she has been responsible for her medical bills since January 2009.³⁷

¶ 23 After leaving RMCC, Tuttle was hired as a home health nurse with Big Sky Home Care, where she worked in a private home, caring for a disabled child.³⁸ She found the physical aspects of the work difficult to perform, and she was let go after three months.³⁹ The only other work she has performed was as a bell ringer for the Salvation Army in December 2011.⁴⁰

¶ 24 In December 2009, Tuttle filed a charge against RMCC with the Department of Labor and Industry's Human Rights Bureau (HRB) for "discrimination based on disability or perception of disability."⁴¹ In June 2010, HRB granted summary judgment in favor of RMCC on the basis that Tuttle's disability was temporary and non-chronic and that therefore "there was no disability upon which discriminatory conduct was based."⁴² Liberty maintains that by asking for up to four years front and back pay in her HRB charging document, Tuttle admitted that she was capable of physically performing the work at her time of injury job.⁴³

¶ 25 In August 2010, Tuttle was grocery shopping when she reached for a five-pound bag of sugar and suffered a severe back spasm.⁴⁴ Tuttle explained that activities of daily living, such as sweeping the floor or reaching for dishes, would cause her back to

- ³⁷ Trial Test.
- ³⁸ Trial Test.; HRB Dep. 205:7-14.
- ³⁹ Trial Test.; HRB Dep. 206:21 207:11.
- ⁴⁰ Trial Test.
- ⁴¹ Tuttle Dep. Ex. 1(C) at 3.
- ⁴² Tuttle Dep. Ex. 1(A) at 3.
- ⁴³ Liberty's Post-Trial Brief (Liberty's Brief) at 2-3, Docket Item No. 17.
- ⁴⁴ Trial Test.; Tuttle Dep. 22:20 23:10; 24:14-17.

³⁵ Ex. 4 at 10.

³⁶ Tuttle Dep. 21:12-15.

spasm,⁴⁵ but the episode at the grocery store was enough to make her seek medical attention with Mark Ibsen, M.D., at the Helena Urgent Care Plus center.⁴⁶ Tuttle had heard from neighbors that Dr. Ibsen was a good physician, and she did not seek a referral from Dr. Eodice before seeing Dr. Ibsen as she believed Dr. Eodice would not approve the referral. She also believed it was an emergency.⁴⁷

¶ 26 Dr. Ibsen testified at trial. I found Dr. Ibsen to be a credible witness. Dr. Ibsen testified that he is board certified in emergency medicine and has worked for many years in emergency rooms in various hospitals, including 12 years at St. Peter's Hospital in Helena. Two years ago, he opened the Urgent Care Plus center in Helena.⁴⁸

¶ 27 Dr. Ibsen first saw Tuttle on August 19, 2010, following her episode of back pain at the grocery store.⁴⁹ On the Patient Registration Form, Tuttle related her back pain and spasms to her workers' compensation injury of September 2008 at RMCC.⁵⁰ Dr. Ibsen prescribed pain medication for Tuttle during that visit.⁵¹ In a follow-up courtesy call by his office to Tuttle on August 23, 2010, Tuttle requested a referral for an MRI as she "cont[inues] to have numbness in feet.³² However, the Patient Phone Call Record shows Tuttle was told she would need "more work-up" before an MRI would be requested.⁵³

¶ 28 Dr. Ibsen next saw Tuttle on March 31, 2011, when she was again complaining of back spasms and numbness in her leg and feet.⁵⁴ Dr. Ibsen ordered an MRI of Tuttle's lumbar spine that revealed herniated disks at L5-S1 and T11-T12.⁵⁵ Notably, the report references "left paracentral extruded L5-S1 disc herniation" that "may be affecting the origin of the left S1 nerve root sleeve. Clinical correlation for the possibility

⁴⁵ Trial Test.; Tuttle Dep. 25:16-19.

⁴⁶ Trial Test.; Tuttle Dep. 22:20 - 23:10; 32:10-17; Ex. 1 at 2-7.

⁴⁷ Trial Test.

⁴⁸ Trial Test.

⁴⁹ Ex. 1 at 4-7.

⁵⁰ Trial Test.; Ex. 1 at 2.

⁵¹ Trial Test.; Ex. 1 at 8.

⁵² Ex. 1 at 9.

⁵³ Id.

⁵⁴ Ex. 1 at 11.

⁵⁵ Trial Test; Ex. 1 at 12-13; Ex. 2 at 1-2.

of left S1 radiculopathy is recommended.³⁵⁶ Dr. Ibsen testified that the MRI report was consistent with his clinical findings, including a positive SLR on the left.⁵⁷

¶ 29 Dr. Ibsen reviewed Dr. Eodice's notes on his treatment of Tuttle and concluded that Dr. Eodice considered ordering an MRI but apparently determined it was not warranted. Dr. Ibsen also did not see where Dr. Eodice performed any lumbar tests on Tuttle, such as straight leg raises to check for sciatica, apparently concentrating only on Tuttle's thoracic complaints.⁵⁸

¶ 30 After reviewing the MRI results, Dr. Ibsen referred Tuttle to orthopedic surgeon B. Max Iverson, M.D. Dr. Iverson saw Tuttle on April 12, 2011, recommending conservative treatment of Tuttle's herniated lumbar disk, including epidural steroid injections. Dr. Iverson also discussed with Tuttle the possibility of surgery.⁵⁹

¶ 31 Dr. Ibsen testified that Dr. Eodice had closed his practice and was now working at the Veteran's Administration Hospital at Fort Harrison, leaving Tuttle without a primary care doctor.⁶⁰ Tuttle continued to treat with Dr. Ibsen pending approval by her workers' compensation insurer for a new primary care physician.⁶¹ On July 21, 2011, Tuttle was seen at Urgent Care Plus complaining of back pain down into her left leg while sweeping, feeling like her leg was going to "give out."⁶² Tuttle was last seen at Urgent Care Plus on September 28, 2011, still complaining of lower back pain, made worse by sitting and climbing stairs.⁶³ Throughout the time Dr. Ibsen treated Tuttle she had not improved and, if anything, her condition had worsened.⁶⁴

¶ 32 Dr. Ibsen testified that radiculopathy can develop over time and back pain can get worse over time.⁶⁵

¶ 33 In a note dated April 27, 2011,⁶⁶ Dr. Ibsen states that, given the history that Tuttle related to him, it was apparent that her original injury "has progressed to the point where

- ⁵⁶ Ex. 2 at 1.
- ⁵⁷ Trial Test. Ex. 1 at 12.
 ⁵⁸ Trial Test.
 ⁵⁹ Ex. 2 at 3-4.
 ⁶⁰ Trial Test.
 ⁶¹ Trial Test.; Ex. 1 at 17.
 ⁶² Ex. 1 at 18.
 ⁶³ Ex. 11 at 1.
 ⁶⁴ Trial Test.
 ⁶⁵ Trial Test.
 ⁶⁶ Ex. 1 at 1.

she is now unable to engage in substantial work activity as a registered nurse." Dr. Ibsen's note states that Tuttle needs the "essential medical care" prescribed by Dr. Iverson of epidural steroid injections before it is determined whether surgery will be necessary. Dr. Ibsen testified that the opinions expressed in his April 27, 2011, note remain the same today, and that Tuttle requires further medical care before she can ever expect to return to work.⁶⁷

¶ 34 Dr. Ibsen opined that Tuttle's herniated disk and resulting pain were related by history to her workers' compensation injury, and that her condition continued to deteriorate as a result of that injury. The doctor clarified on cross-examination that his opinion was based on a temporal relationship between Tuttle's work-related injury and her current symptoms of back pain, sciatica, and herniated disks.⁶⁸

CONCLUSIONS OF LAW

¶ 35 This case is governed by the 2007 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Tuttle's alleged injury.⁶⁹

ISSUE ONE: Whether the Insurer should be required to pay Petitioner temporary total disability and/or permanent total disability benefits retroactively from the time she was cut off.

¶ 36 The injured worker bears the burden of proving by a preponderance of the evidence that she is entitled to the benefits she seeks.⁷⁰ I find that Tuttle has met her burden of proving she is entitled to temporary total disability benefits; however, she has not shown an entitlement to benefits retroactive to the time her benefits were terminated in December 2008. Tuttle is entitled to temporary total disability benefits as of the date of Dr. Ibsen's April 27, 2011, report.

¶ 37 Causation is an essential element to an entitlement to benefits and the claimant has the burden of proving a causal connection by a preponderance of the evidence.⁷¹

¶ 38 Although Tuttle's complaints of thoracic pain were the predominant reason for her seeking medical care following her injury, Tuttle also complained of low-back pain

⁶⁷ Trial Test.

⁶⁸ Trial Test.

⁶⁹ Buckman v. Montana Deaconess Hosp., 224 Mont. 318, 321, 730 P.2d 380, 382 (1986); § 1-2-201, MCA.

⁷⁰ 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).

⁷¹ Taylor v. Montana State Fund, 2012 MTWCC 17, ¶ 70, citing Grenz v. Fire and Cas. of Conn., 250 Mont. 373, 380, 820 P.2d 742, 746 (1991).

immediately after the September 2, 2008, incident at work. Dr. Eckmann noted Tuttle's complaint of frequent lumbar pain in her initial treatment records of September 10, 2008, with a positive straight leg raise test on the left side causing moderate pain. Physical therapist Matthew Fischer noted a tender area in Tuttle's lumbar spine during Tuttle's first visit. Dr. Eodice, who became Tuttle's treating physician, noted on his initial workup her complaints of lumbar pain. Tuttle's first report of injury references the part of the body affected as: "Low Back Area."⁷²

¶ 39 Believing Liberty closed her workers' compensation claim without continuing medical benefits, out of work and unable to afford medical attention, Tuttle stopped seeking medical care after Dr. Eodice placed her at MMI in December 2008. However, Tuttle testified credibly to continuing pain in her mid- and low-back areas in the following months, eventually seeking medical treatment from Dr. Ibsen after the incident in August 2010 when she reached for a package of sugar in a grocery store.

 \P 40 Under § 39-71-407(2)(a)(i), MCA, an insurer is liable for an injury if the injury is established by objective medical findings, and if the injured worker establishes that it is more probable than not that the claimed injury occurred.

¶ 41 Dr. Ibsen admitted under cross-examination that his opinion that Tuttle's accident caused the herniated disks in her back was based on a temporal relationship between her reported injury and what he perceived to be the resulting symptoms that he began treating nearly two years post-accident. This Court has held previously that a temporal relationship between an injury and symptoms that follow the injury, without more, is insufficient to sustain an injured workers' burden. In *Pasha v. Nat'l Union Fire of Pittsburgh*, the opinion of the claimant's treating physician was discounted where he was unable to provide a medical explanation for the claimant's symptoms of lower extremity pain, "only that there seemed to be a temporal relationship between the onset of those symptoms and her involvement in the accident."⁷³ This Court found that, where a medical opinion is based solely on a temporal relationship between an accident and eventual symptoms, the doctor is in no better position than this Court to judge cause and effect.⁷⁴

⁷² Ex. 5 at 1.

⁷³ 1997 MTWCC 5, ¶ 56.

⁷⁴ *Id*., ¶ 63.

¶ 42 Similarly, in *Stewart v. Liberty Northwest Ins. Corp.*,⁷⁵ I denied Stewart's request for an increase in her impairment rating when her treating physician was unable to express how her surgeries and subsequent pain were related, other than to note that Stewart did not exhibit the same pain symptoms prior to her surgery. However, that is not the situation in the case at bar. In this case, there is more than a mere temporal relationship between Tuttle's accident and the herniated disks in her thoracic and lumbar spine; there is a direct causal link, demonstrated by her immediate complaints of low- and mid-back pain post-injury written into the treatment notes of various medical providers. Notably, these include a positive left side SLR test elicited by Dr. Eckmann in her initial treatment of Tuttle -- the same clinical findings that Dr. Ibsen testified correlated to the left-side nerve root impingement found on Tuttle's MRI two and a half years later.

¶ 43 According to Tuttle's unrefuted testimony, her pain continued from the date of her injury up to and beyond the date she first saw Dr. Ibsen in August 2010 when she related the cause of her pain and spasms back to her work injury of September 2008.⁷⁶ The herniated disks revealed on the MRI of April 2011 can be traced to no other injury than that occurring during Tuttle's shift on September 2, 2008.

¶ 44 I also am not persuaded, despite Dr. Eodice's determination of MMI with a 0% impairment rating in December 2008, that Tuttle was in fact at MMI at that time. Dr. Eodice's treatment of Tuttle concentrated on her lower thoracic complaints, and he conducted no lumbar tests despite Tuttle's testimony that she informed Dr. Eodice of a significant episode of sciatic pain down her leg in September or October of 2008. This testimony comports with Dr. Eckmann's office note of October 21, 2008, when Tuttle complained of increased lumbar and lower thoracic pain, to a level of 10 on a scale of 1-10.⁷⁷

¶ 45 In the past, this Court has declined to find a claimant at MMI where it was determined that further beneficial treatment had not been offered. In *Thompson v. Liberty Northwest Ins. Corp.*,⁷⁸ this Court explained:

⁷⁵ 2007 MTWCC 41.

⁷⁶ Ex. 1 at 2.

⁷⁷ Ex. 3 at 5.

⁷⁸ 2002 MTWCC 34.

A determination of MMI requires, in the first instance, an accurate evaluation and diagnosis of the medical conditions caused by the industrial injury. Without a definitive determination of the claimant's condition, how can proper treatment be prescribed? Lacking evaluation and diagnosis, and at least an opportunity to pursue further treatment, how can it be said that "further material improvement would not be reasonably expected from primary medical treatment?"

¶ 46 When the determination of MMI was made, Tuttle had been off work for two weeks. Her back was rested and she had few symptoms. Within a short time later, she testified she was again suffering from muscle spasms and was back on muscle relaxants. Under the facts here, it can hardly be said that a definitive determination of Tuttle's condition had been made, with no investigation by her treating physician of the cause of her lumbar pain and sciatic complaints.

¶ 47 Pursuant to § 39-71-407(7), MCA, "[a]n employee is not eligible for benefits payable under this chapter unless the entitlement to benefits is established by objective medical findings that contain sufficient factual and historical information concerning the relationship of the worker's condition to the original injury." Based on the totality of the evidence presented, there is ample factual and historical information in this case that correlate the objective medical findings of the two herniated disks to Tuttle's work-related injury. I therefore conclude that Tuttle has met her burden of proof in establishing on a more probable than not basis that the cause of the herniated disks in her thoracic and lumbar spine was the injury she incurred while working for RMCC on September 2, 2008, entitling her to benefits.

¶ 48 I further conclude that Tuttle's claim for back and future wages with the Human Rights Bureau does not bar her claim for benefits in this proceeding. In its post-trial brief,⁸⁰ Liberty cites the Court to a portion of Tuttle's deposition in which it claims Tuttle made "admissions that she could physically do the work at Rocky Mountain." Specifically, Tuttle testified:

Q. You were claiming, were you not, that had you not been discriminated against you could have continued working at Rocky Mountain Care Center?

A. I'm a little confused.

Q. You terminated your employment from Rocky Mountain Care Center; correct?

⁷⁹ *Thompson,* ¶ 48.

⁸⁰ Liberty's Brief at 3, *citing* Tuttle Dep. at 6-8.

A. I terminated my employment at Rocky Mountain Care Center under duress.

. . . .

Q. And then you were suing Rocky Mountain Care Center because had you not resigned and had they not booted you out that day, you claim you would have continued to work there; correct?

A. I wasn't sure. I guess what I'm trying to say is I would assume that I would have tried to do what I normally did.⁸¹

¶ 49 Tuttle testified at trial that she attempted to perform her nursing duties at RMCC despite those duties often being at odds with her medical restrictions. She further testified that she resigned her position because she did not believe she could physically continue to do the work.⁸² As noted above at ¶ 36, I have concluded that Tuttle is entitled to benefits as of Dr. Ibsen's April 27, 2011, note stating that she could no longer perform her duties. Even assuming that Tuttle could continue to perform her duties in some capacity at the time she resigned her position in December 2008, this does not constitute an admission that she remained able to work contrary to Dr. Ibsen's opinion in April 2011.

¶ 50 After her injury, Tuttle was engaged as a home health care nurse for three months in 2009. Although she testified the work was physically difficult for her, picking up the child for whom she cared during her period of employment, she was physically able to perform the tasks of that job. She did not voluntarily resign her position, but rather, was terminated. It was not until Dr. Ibsen's report of April 27, 2011,⁸³ that Tuttle's disability and inability to continue to work as a registered nurse became manifest.

¶ 51 I conclude that Tuttle is entitled to temporary total disability benefits as of the date of Dr. Ibsen's report of April 27, 2011. As Dr. Ibsen's report suggests, Tuttle is in need of treatment for her lumbar disk if she is to return to work as a nurse. Accordingly, Tuttle has not proven an entitlement to permanent total disability benefits, as her condition may improve with treatment.

⁸¹ Tuttle Dep. 7:3-21.

⁸² Trial Test.; Tuttle Dep. 38:9 - 39:18.

⁸³ Ex. 1.

ISSUE TWO: Whether the Insurer should be required to continue to pay Petitioner temporary total disability and/or permanent total disability benefits.

¶ 52 For the reasons discussed above, Tuttle has demonstrated by a preponderance of the evidence that she has been temporarily totally disabled as of the date of Dr. Ibsen's report, April 27, 2011. She is entitled to continuing temporary total disability benefits while she undergoes the medical treatment suggested by Dr. Ibsen and Dr. Iverson, and until such time as she no longer meets the definition of temporarily and totally disabled.⁸⁴

ISSUE THREE: Whether the Insurer should be required to pay medical benefits for treatment bills incurred by Petitioner.

¶ 53 Under § 39-71-704(1)(a), MCA, after a compensable injury has occurred, an insurer shall furnish reasonable primary medical services for conditions resulting from the injury for those periods as the nature of the injury or the process of recovery requires. Having concluded that Tuttle met her burden in showing that it is more probable than not her herniated disks are a direct result of the injuries she sustained at work on September 2, 2008, she is entitled to medical care for her back condition. This includes the bills for medical treatment already provided to her by Dr. Ibsen and Dr. Iverson.⁸⁵

JUDGMENT

¶ 54 Petitioner has met her burden in demonstrating an entitlement to temporary total disability benefits retroactive to the date she was determined by her treating physician to be disabled from her injury, April 27, 2011.

¶ 55 Petitioner is entitled to on-going temporary total disability benefits until such time as she completes the medical treatment recommended by her physicians and is no longer temporarily and totally disabled.

¶ 56 Petitioner is entitled to payment by Respondent of past and future medical benefits for treatment of her back condition.

⁸⁴ § 39-71-116(35), MCA.

⁸⁵ Liberty did not raise the issue of Tuttle's failure to seek prior authorization as the reason for denying the medical bills of Drs. Ibsen and Iverson. It only maintained in its Response to Petition for Hearing and in the Pretrial Order that it had paid all appropriate medical benefits to which Tuttle was entitled. I therefore decline to address the issue here, noting only in passing that: "[u]ndisputedly necessary medical treatment arising from a work-related injury is compensable irrespective of prior authorization." *Hart v. Hartford Ins. Co. of the Midwest*, 2010 MTWCC 8, ¶ 69.

¶ 57 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 23rd day of October, 2012.

(SEAL)

/s/ JAMES JEREMIAH SHEA

JUDGE

c: John C. Doubek Larry W. Jones (First Liberty Ins. Corp.) Submitted: April 19, 2012