IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2007 MTWCC 37

WCC No. 2006-1622

HARRY E. VANBOUCHAUTE

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Petitioner petitioned the Court for a determination as to whether he was entitled to receive a lumbar fusion as recommended by his physician. Petitioner also sought attorney fees and a penalty.

Held: Respondent authorized surgery shortly after the conclusion of the hearing. Respondent's conduct in denying the surgery recommended by his treating physician based initially on a file review by the managed care organization's medical advisor and then the second opinion of an independent medical examiner was unreasonable. However, since Respondent authorized the surgery before the claim was adjudged compensable by this Court, Petitioner is not entitled to recover his attorney fees or costs. Petitioner is entitled to a penalty.

¶ 1 The trial in this matter was held on August 11, 2006, in Missoula, Montana. Petitioner Harry E. Vanbouchaute was present and represented by Eric Rasmusson. Respondent Montana State Fund was represented by Kevin Braun.

¶ 2 Exhibits: Exhibits 1 through 12 were admitted without objection.

¶ 3 Witnesses and Depositions: The deposition of Petitioner was taken and submitted to the Court. The Court attended the deposition of Dr. Richard A. Day at his office on the morning of trial. The parties agreed that Dr. Day's deposition may be considered part of the trial testimony instead of a separate deposition. Petitioner and Linda Robbins were sworn and testified at trial.

¶ 4 Issues Presented: The Court restates the following contested issues of law as set forth in the Pretrial Order:

¶ 4a Whether Petitioner is entitled to attorney fees and costs pursuant to § 39-71-611, MCA.

¶ 4b Whether Petitioner is entitled to a penalty on all delayed benefits pursuant to § 39-71-2907, MCA.

¶ 4c Any additional relief as the Court may deem just and equitable.[1]

FINDINGS OF FACT

¶ 5 Petitioner was a credible witness and the Court finds his testimony at trial credible.

¶ 6 Claims Examiner Linda Robbins was a credible witness and the Court finds her testimony at trial credible.

¶ 7 Dr. Day was a credible witness and the Court finds his testimony at trial credible.

¶ 8 On July 20, 2005, Petitioner suffered an injury arising out of and in the course of his employment with Kwa Taq Nuk Resort in Lake County, Montana.[2]

¶ 9 At the time of injury, Petitioner's employer was enrolled under Compensation Plan III of the Workers' Compensation Act and its insurer was Respondent.[3]

¶ 10 Respondent accepted liability for Petitioner's claim and paid indemnity and some medical benefits on the claim.[4]

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[1] Pretrial Order at 2. The Pretrial Order originally set forth Petitioner's entitlement to surgery and Petitioner's counsel's entitlement to a *Lockhart* lien as contested issues in addition to the issues of attorney fees, costs, and a penalty. At the conclusion of the trial, I advised the parties that I would be issuing a ruling in favor of the Petitioner on the issue of the back surgery. I further advised that I was not prepared to issue a bench ruling, however, because I had to consider the issue of Petitioner's request for attorney fees and penalty. The parties then agreed that a *Lockhart* lien is appropriate with respect to this additional procedure. (Minute Entry No. 3735) The Monday following trial, Respondent advised Dr. Brewington that it was authorizing surgery. (The letter from Linda Robbins to Dr. Brewington with the accompanying Provider Request For Authorization is attached as Exhibit A.) I, therefore, consider the issues of Petitioner's entitlement to surgery and his counsel's entitlement to a *Lockhart* lien to be resolved and will confine this Order to whether Petitioner is entitled to attorney fees and a penalty.

[2] Pretrial Order, Uncontested Facts at 1.

[3] Pretrial Order, Uncontested Facts at 2.

[4] *Id.*

¶ 11 Petitioner initially sought medical care for his injury on July 27, 2005, with Steven W. Palmieri, D.O. Dr. Palmieri prescribed medications and requested imaging studies. When Petitioner's condition did not resolve, Dr. Palmieri requested a neurosurgical consult.[5]

¶ 12 On October 20, 2005, Montana Health Systems (MHS) sent a letter to Dr. Palmieri advising him that Petitioner was subject to the terms and conditions of a managed care organization (MCO) contract between Respondent and MHS. Dr. Palmieri was further advised that, as a non-MHS provider, he may treat Petitioner provided he agreed to comply with all terms and conditions regarding service performed by the MCO and that he must refer Petitioner to the MCO for all specialized care that he was unable to provide. MHS also provided Dr. Palmieri with a questionnaire to complete in order to determine whether MHS would authorize him to act as a temporary provider for Petitioner.[6] On November 14, 2005, Dr. Palmieri was advised that he had been authorized by MHS to act as a temporary care provider for Petitioner.[7]

¶ 13 On October 26, 2005, MHS claims intake specialist Janel Sheppard sent a letter to Keith Brewington, M.D. advising him, "The MHS Medical Advisor has reviewed [Petitioner's] file and recommended transferring Mr. Van Bouchaute's care to you." Ms. Sheppard inquired whether Dr. Brewington would be willing to assume care for Petitioner's work injury and advised him that an appointment had been scheduled for him to evaluate Petitioner on November 2, 2005.[8]

¶ 14 Dr. Brewington first saw Petitioner on November 2, 2005.[9] He noted that the MRI scan of the lumbar spine on October 5, 2005, revealed multilevel lumbar degenerative disk disease from the L2-3 level down to the L5-S1 level. He opined that the most affected level was the L4-5 level where Petitioner had considerable loss of height and anterior spurring. Foraminal views at the L4-5 level showed that they were widely patent on the right.[10] Dr. Brewington opined that surgical indications for Petitioner's injury were "not overwhelming" and recommended conservative therapy, including physical therapy and an epidural injection.[11]

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[5] Ex. 6A-1 - 6A-7.

[6] Ex. 5-4 - 5-5.

[7] Ex. 5-9.

[8] Ex. 5-6.

[9] Ex. 6C-3 - 6C-5.

[10] Ex. 6C-4.

[11] Ex. 6C-5.

¶ 15 Petitioner discussed receiving an epidural injection with his family and decided against that procedure.[12] Later he inquired of Dr. Brewington about his surgical options. Dr. Brewington requested a lumbar bone scan to determine whether a surgical option would reduce Petitioner's back pain.[13]

¶ 16 Petitioner followed up with Dr. Brewington on January 30, 2006. At this time, Dr. Brewington noted that the lumbar bone scan revealed that Petitioner did "light up" at the L4-5 level. In light of the bone scan results and Petitioner's unresponsiveness to conservative therapy, Dr. Brewington recommended:

> I do believe that he is a candidate for surgery, specifically an L4 – L5 posterior lumbar interbody fusion. He requires a fusion due to the mechanical back pain that is coming from the L4 – L5 level that is debilitating and that also would allow a better decompression of the neural elements at surgery.[14]

¶ 17 Dr. Kenneth Carpenter, an orthopedic surgeon, is the MHS Medical Advisor.[15] He reviewed Dr. Brewington's request for surgery and recommended denying authorization for the procedure.[16] Ms. Robbins testified that she based her initial denial of the surgery on Dr. Carpenter's recommendation.[17]

¶ 18 On February 10, 2006, MHS sent a letter to Dr. Brewington disapproving his request for the L4-5 posterior lumbar interbody fusion. The letter stated that the surgery was being disapproved due to "several concerns." Specifically, the letter enumerated the following reasons for disapproval of the surgery request:

> It appears from the record that physical therapy/rehab has been minimal. I do not see where his expectations and what the expected outcome of the surgery have been addressed, specifically a less than 50% chance of improvement and the likelihood that he will not be able to return to his [time-of-injury] job.[18]

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[12] Trial Test.

[13] Ex. 6C-12.

[14] Ex. 6C-14.

[15] Trial Test.

[16] Trial Test.

[17] Trial Test.

[18] Ex. 5-10.

¶ 19 The letter disapproving the request for surgery included instructions by which Dr. Brewington could appeal MHS's decision. Dr. Brewington was advised that he had 30 days to request review of the denial. Otherwise, the request would be considered untimely.[19] By letter dated March 23, 2006, however, Ms. Robbins advised Dr. Brewington that, at her request, MHS had extended the appeal period to April 23, 2006, because of an oversight in responding to Dr. Brewington's Provider Request For Authorization form.[20] Ms. Robbins provided Dr. Brewington with the Provider Request For Authorization which noted that the requested surgery was being denied by Respondent "per attached MA advice," referencing the February 10, 2006, MHS disapproval letter.[21]

¶ 20 Dr. Brewington responded to Ms. Robbins's letter on April 3, 2006. In this letter, he also responded to MHS's disapproval letter of February 10, 2006. Dr. Brewington specifically took issue with the bases for disapproving the requested surgery noted in the disapproval letter by stating:

> I am not sure where someone is getting the idea that there is a less than 50% chance of improvement. Furthermore, the fact that the injury that he sustained while covered by Montana State Fund is significant enough that he would not be able to return to his time-of-injury job does not sound like a reasonable cause for denial either.[22]

¶ 21 After the surgery was denied, Petitioner retained Eric Rasmusson to be his attorney. On February 28, 2006, Mr. Rasmusson wrote to Respondent requesting that the treatment recommended by Dr. Brewington be authorized.[23] On March 23, 2006, Ms. Robbins wrote to Mr. Rasmusson, reiterating that Respondent was declining authorization for surgery at this time but noted that Dr. Brewington could request review of the denial per the terms of his MHS contract. Ms. Robbins also advised she had requested Petitioner be evaluated by a second neurosurgeon for an opinion on whether the surgery recommended by Dr. Brewington was appropriate.[24] This examination was scheduled through MHS with Richard Day, M.D., a neurosurgeon practicing in Missoula.[25]

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[19] *Id.*

[20] Ex. 2-26.

[21] Ex. 2-24 and 2-26.

[22] Ex. 6C-16.

[23] Ex. 3-1.

[24] Ex. 2-25.

[25] Ex. 5-13.

¶ 22 By letter dated April 27, 2006, Mr. Rasmusson advised Respondent he was objecting to the requested second opinion.[26] Respondent therefore sought and obtained an order from the Montana Department of Labor and Industry, Employment Relations Division directing Petitioner to attend the examination with Dr. Day pursuant to § 39-71-605, MCA.[27]

¶ 23 Dr. Day conducted an IME on June 1, 2006. He assessed a lumbar strain and lumbar spondylosis.[28] He recommended further evaluation including EMG testing and opined that he did not believe the benefits of a lumbar fusion would outweigh the risks. He recommended further conservative medical management.[29]

¶ 24 Ms. Robbins forwarded Dr. Day's report to Dr. Brewington on June 14, 2006. In her letter accompanying the report, she asked Dr. Brewington whether he agreed or disagreed with Dr. Day's recommendation that a right lower extremity EMG is indicated. She further asked if, after review of Dr. Day's report and the EMG study, whether Dr. Brewington would provide an opinion as to whether Petitioner's treatment plan should consist of fusion surgery or conservative medical management.[30]

¶ 25 Dr. Brewington responded to Ms. Robbins's letter, stating that he did not agree with Dr. Day's assessment. Dr. Brewington further opined that Petitioner "has a definite neural impingement and the added expense of recommending EMGs and, indeed, the discomfort that is provided by that test are not necessary in my opinion." Dr. Brewington concluded by noting that Petitioner had "maximized conservative therapy and remains in significant pain." He, therefore, reiterated his opinion that decompression and fusion surgery are warranted.[31]

¶ 26 Notwithstanding Dr. Brewington's opinion that EMG studies were not necessary, Petitioner was referred to Dr. Lennard Wilson for EMG nerve conduction studies for evaluation of right lower extremity radiculopathy. On July 11, 2006, Dr. Wilson reported that he found "no evidence of peripheral entrapment or polyneuropathy involving the right lower extremity." He further reported that he found "no evidence of acute or chronic

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[26] Ex. 3-3.

[27] Ex. 4-1.

[28] Ex. 6F-3.

[29] *Id.*

[30] Ex. 2-31.

[31] Ex. 6C-17.

denervation consistent with lumbosacral plexopathy or radiculopathy." Dr. Wilson further noted, however, that, "Clinical correlation is suggested."[32]

¶ 27 After reviewing the EMG studies, Dr. Brewington wrote to Ms. Robbins on August 2, 2006. He noted that, as he had suggested in his previous letter, he did not believe EMG studies would be "terribly useful" in Petitioner's case. He further noted that Dr. Wilson had concluded his report by noting that "clinical correlation is suggested" and that Petitioner had "clinical evidence of L4-L5 radiculopathies" as well as "radiographic evidence of L4 and L5 compression." In light of the clinical and radiographic evidence, Dr. Brewington reiterated his opinion that Petitioner's condition warranted surgery as he had previously stated.[33]

¶ 28 At trial, Ms. Robbins testified that MHS is a managed care organization with which Respondent contracts. Whenever a MHS physician makes a request to perform an invasive procedure, Respondent is required by this contract to have the MHS Medical Advisor review the request and recommend authorization or denial of the procedure.[34]

¶ 29 Ms. Robbins testified that her understanding of the treating physician rule is that when all else is equal, the treating physician basically has the final call on treatment. However, she also testified that after procuring a second opinion from another neurosurgeon with a conflicting opinion, she did not feel as a claims adjuster that she was going to make the call to authorize surgery. Ms. Robbins acknowledged that Dr. Brewington had maintained his position for some time that surgery was warranted in Petitioner's case and did not deviate from that position. However, she felt that once the Court proceeding had been initiated, this Court would be the best way to resolve the issue as to whether surgery should be authorized or denied.[35]

¶ 30 Respondent contracted with MHS to provide medical services for Petitioner's work-related injury. MHS initially designated Dr. Palmieri as a temporary care provider for purposes of treating Petitioner's injury. When Dr. Palmieri determined that Petitioner required a neurosurgical consult, Dr. Carpenter, as MHS medical advisor, referred Petitioner to Dr. Brewington for treatment. An injured worker may have more than one treating physician[36] and both Dr. Palmieri and Dr. Brewington were treating physicians. Dr.

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[32] Ex. 6G-1.

[33] Ex. 6C-18.

[34] Trial Test.

[35] Trial Test.

[36] *Anderson v. Albertson's Inc.,* 2004 MTWCC 59.

Day conducted an exam of Petitioner pursuant to § 39-71-605, MCA, and was not one of Petitioner's treating physicians.

¶ 31 With respect to Dr. Day's opinion that surgery was not indicated, Dr. Day testified at trial that, although he had a different opinion than Dr. Brewington, ultimately the decision of whether to perform surgery on Petitioner was a "judgment call." Dr. Day further testified that both he and Dr. Brewington made their best judgments and acknowledged that this was just one of those situations where different doctors had different opinions.[37]

CONCLUSIONS OF LAW

¶ 32 This case is governed by the 2005 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Petitioner's industrial accident.[38]

¶ 33 Petitioner bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.[39]

¶ 34 As a general rule, the opinion of a treating physician is accorded greater weight than the opinions of other expert witnesses.[40] However, a treating physician's opinion is not conclusive. To presume otherwise would quash the role of the fact finder in questions of an alleged injury. As the finder of fact, this Court remains in the best position to assess witnesses' credibility and testimony.[41] Previously, this Court has concluded that, at a minimum, the treating physician is the tiebreaker where there is evenly balanced, conflicting medical testimony.[42]

¶ 35 In this case, Dr. Brewington assumed care of Petitioner on November 2, 2005, after Petitioner was referred to him by MHS. Initially, Dr. Brewington pursued a course of conservative care. However, after pursuing a course of conservative care over the course of three months, Dr. Brewington obtained a bone scan to determine whether Petitioner was a surgical candidate. Based upon his experience treating Petitioner over the course of three months, his determination that Petitioner was unresponsive to conservative therapy, and his review of the bone scan, Dr. Brewington determined that Petitioner was a surgical

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[37] Trial Test.

[38] *Buckman v. Montana Deaconess Hosp.,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

[39] *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).

[40] *EBI/Orion Group v. Blythe*, 288 Mont. 356, ¶ 12, 957 P.2d 1134 (1998).

[41] *Id.* at ¶ 13.

[42] *Wall v. National Union Fire Ins. Co.* 1998 MTWCC 11, ¶ 67.

candidate and requested authorization for surgery on February 9, 2006. Based upon a review of Petitioner's file by Dr. Carpenter, Respondent disapproved Dr. Brewington's request for surgery.

¶ 36 Dr. Brewington steadfastly maintained his opinion that Petitioner's condition warranted surgery over the course of the next six months. Throughout this same period, Respondent refused to authorize the requested surgery based initially on a file review done by Dr. Carpenter and, later, based on the second opinion of Dr. Day. Neither Dr. Carpenter nor Dr. Day were treating physicians, however, and, ironically, it was Dr. Carpenter who first referred Petitioner to Dr. Brewington for treatment in the first place.

¶ 37 I find Respondent's denial of Petitioner's requested surgery to be unreasonable. As Respondent has conceded, the opinion of the treating physician is entitled to greater weight if all else is equal. Although the treating physician's opinion is not conclusive, none of the factors which would mitigate toward disregarding Dr. Brewington's opinion are present in this case. There were no issues of credibility as to any of the witnesses involved in this case nor was there any indication during the handling of this claim before trial that credibility was an issue. Put simply, this case boiled down to the opinion of the treating physician, who had been approved by MHS to treat Petitioner, being disregarded first in favor of the opinion of a non-treating physician who had done a file review and then in favor of the opinion of a physician who had conducted an independent medical exam pursuant to § 39-71-605, MCA.

¶ 38 As noted above in the Findings of Fact, I found Ms. Robbins to be a credible witness. In that regard, I doubt neither her sincerity nor veracity when she testified that, pursuant to the contract Respondent had with MHS, she was constrained from approving the surgery when it had been disapproved by MHS. This was a choice Respondent made, however, in contracting with MHS. For purposes of determining whether the denial of Petitioner's surgery was reasonable, though, the ultimate responsibility rests with Respondent as the insurer.

¶ 39 Notwithstanding my finding that Respondent's denial of Petitioner's surgery was unreasonable, I cannot award Petitioner his attorney fees or costs in this matter. In order to recover costs and attorney fees pursuant to § 39-71-611, MCA, the denial of the claim must be adjudged compensable by this Court. Both the Montana Supreme Court and this Court have consistently interpreted this statute as holding that, if benefits are paid prior to an adjudication by this Court, attorney fees and costs are not available.[43] In this case, I indicated to the parties at the conclusion of the evidence what my decision ***would be*** on the issue of surgery. However, I did not formally adjudge the compensability of Petitioner's claim before it was accepted and paid by Respondent. Although I had made my intent

[43] *See, e.g., Arneson v. Travelers Property Cas.*, 2006 MTWCC 7, for a discussion of the case history on this issue.

clear to the parties as to the issue of medical benefits, the record is equally clear that I was not issuing a bench ruling on this issue.[44] The first working day after trial, Respondent authorized Petitioner's surgery. Since Respondent authorized Petitioner's surgery before his claim was adjudged compensable by this Court, therefore, Petitioner cannot be awarded attorney fees or costs.

¶ 40 Unlike attorney fees and costs, an adjudication of compensability is not a prerequisite for a penalty. Having found for the reasons discussed above that Respondent's denial of Petitioner's surgery was unreasonable, I find that Petitioner is entitled to a penalty pursuant to § 39-71-2907, MCA.

JUDGMENT

¶ 41 Petitioner is not entitled to his costs and attorney fees.

¶ 42 Respondent shall pay to Petitioner a penalty of twenty percent of the medical bills in question.

¶ 43 This JUDGMENT is certified as final for purposes of appeal.

¶ 44 Any party to this dispute may have twenty days in which to request reconsideration from these FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT.

DATED in Helena, Montana, this _____ day of August, 2007.

(SEAL)

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JUDGE

c: Eric Rasmusson
Kevin Braun
Attachment: Exhibit A
Submitted: August 11, 2006

[44] Minute Entry No. 3735.