

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2015 MTWCC 20

WCC No. 2014-3342

KELLEEN VONFELDT

Petitioner

vs.

COSTCO WHOLESALE CORP.

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Summary: Petitioner claimed an occupational disease to her wrists, arms, shoulders, and neck as a result of repetitive heavy lifting. Respondent accepted liability for her bilateral tenosynovitis, which caused the pain in her forearms and wrists. Respondent also accepted liability for her myofascial pain syndrome, which caused the pain in her upper back, shoulders, neck, and arms, but only as a temporary aggravation of a preexisting condition. Respondent maintains that it is no longer liable for Petitioner's myofascial pain syndrome on the grounds that she returned to her baseline.

Held: Petitioner's myofascial pain syndrome is compensable as an occupational disease. Petitioner's treating physician and the IME panel agree that she has myofascial pain syndrome and that her work aggravated it. Petitioner's treating physician opined that her work was the leading cause of her myofascial pain syndrome. Although the IME panel anticipated that Petitioner's condition would subside when she changed to a less physically-demanding position, she has not returned to her baseline, which was having no pain in her upper back, shoulders, neck, and arms.

Topics:

Physicians: Treating Physician: Weight of Opinions. Treating physician's opinion that claimant's bakery job was the major contributing cause of her myofascial pain syndrome was more persuasive than the IME panel's opinion that her work was a temporary aggravation of a pre-existing condition for three reasons: (1) claimant's physician is a board-certified pain medicine specialist who has treated the claimant for years; (2) the panel's

opinion that claimant's pre-existing myofascial pain syndrome was only temporarily aggravated by her heavy work as a baker is refuted by the evidence, as she had no neck and upper-back pain when she started as a baker and years later she continues to be in pain despite changing jobs; and (3) the treating physician's opinion that claimant's job was the major contributing cause of her pain syndrome is uncontroverted, since the panel physicians were never asked to compare other contributing causes and offer an opinion as to the leading cause.

Injury and Accident: Aggravation: Occupational Disease. Treating physician's opinion that claimant's bakery job was the major contributing cause of her myofascial pain syndrome was more persuasive than the IME panel's opinion that her work was a temporary aggravation of a pre-existing condition for three reasons: (1) claimant's physician is a board-certified pain medicine specialist who has treated the claimant for years; (2) the panel's opinion that claimant's pre-existing myofascial pain syndrome was only temporarily aggravated by her heavy work as a baker is refuted by the evidence, as she had no neck and upper-back pain when she started as a baker and years later she continues to be in pain despite changing jobs; and (3) the treating physician's opinion that claimant's job was the major contributing cause of her pain syndrome is uncontroverted, since the panel physicians were never asked to compare other contributing causes and offer an opinion as to the leading cause.

Proof: Conflicting Evidence: Medical. Treating physician's opinion that claimant's bakery job was the major contributing cause of her myofascial pain syndrome was more persuasive than the IME panel's opinion that her work was a temporary aggravation of a pre-existing condition for three reasons: (1) claimant's physician is a board-certified pain medicine specialist who has treated the claimant for years; (2) the panel's opinion that claimant's pre-existing myofascial pain syndrome was only temporarily aggravated by her heavy work as a baker is refuted by the evidence, as she had no neck and upper-back pain when she started as a baker and years later she continues to be in pain despite changing jobs; and (3) the treating physician's opinion that claimant's job was the major contributing cause of her pain syndrome is uncontroverted, since the panel physicians were never asked to compare other contributing causes and offer an opinion as to the leading cause.

Causation: Medical Condition. The IME panel's opinion that claimant's symptoms would subside if she changed jobs and no longer did heavy lifting

is an indication that they thought the heavy lifting significantly contributed to her myofascial pain syndrome.

Medical Conditions: Myofascial Pain Syndrome. The IME panel's opinion that claimant's symptoms would subside if she changed jobs and no longer did heavy lifting is an indication that they thought the heavy lifting significantly contributed to her myofascial pain syndrome.

Occupational Disease: Causation. Claimant's myofascial pain syndrome is a compensable OD because her work was the leading cause of the onset of her pain, and while her treating physician and the IME panel agree that her work aggravated her myofascial pain syndrome, the panel incorrectly believed that it was only a temporary aggravation. The Court concluded that the aggravation was not "temporary" since claimant was still suffering from it more than four years after its onset.

Injury and Accident: Aggravation: Occupational Disease.

Claimant's myofascial pain syndrome is a compensable OD because her work was the leading cause of the onset of her pain, and while her treating physician and the IME panel agree that her work aggravated her myofascial pain syndrome, the panel incorrectly believed that it was only a temporary aggravation. The Court concluded that the aggravation was not "temporary" since claimant was still suffering from it more than four years after its onset.

Medical Evidence: Objective Medical Findings. Claimant is entitled to acceptance of liability for her myofascial pain syndrome as an OD, as the physicians identified trigger points, which claimant's treating physician defined as a "band of isolated muscle spasm[s]," and decreased range of motion, both of which are specifically included in the definition of "objective medical findings."

Attorney Fees: Cases Denied. The employer relied on the IME report which stated claimant's injuries were only temporary, that she had reached MMI with no permanent impairment, that one of the claimant's treating physicians agreed with the IME report, and her other treating physician said it was difficult to assign percentages to the contributing causes. Under these facts, the employer's continuing denial of liability for claimant's myofascial pain syndrome was reasonable.

¶ 1 The trial in this matter was held on February 26, 2015, in Kalispell, Montana. Petitioner Kelleen Vonfeldt was present and represented by Michael A. Bliven. Ronald W. Atwood represented Respondent Costco Wholesale Corp. (Costco).

¶ 2 Exhibits: This Court admitted Exhibits A through I, K, M, Q, DD-1 through DD-8, DD-12 through DD-14, and DD-17 through DD-38 without objection. This Court overruled objections to Exhibits J-2, J-3, V through Y, AA, CC, DD-9 through DD-11, DD-15, and DD-16, and they were admitted. Vonfeldt withdrew Exhibits L and P. This Court sustained objections to Exhibits J-1, N, O, R through U, Z, and BB, and they were not admitted.

¶ 3 Witnesses and Depositions: The depositions of Lennard Wilson, MD, Robert Vincent, MD, Scott Jahnke, DO, and Vonfeldt were admitted without objection and are considered part of the record. Vonfeldt and Wendy Persinger were sworn and testified.

¶ 4 Issues Presented: This Court restates the following issues set forth in the Pretrial Order:¹

Issue One: Whether Petitioner is entitled to acceptance of liability for her myofascial pain syndrome in her upper back, shoulders, neck, and arms as an occupational disease.

Issue Two: Whether Respondent is required to pay reasonable costs and attorney fees under §§ 39-71-611 and -612, MCA, and a penalty under § 39-71-2907, MCA.

FINDINGS OF FACT²

¶ 5 Vonfeldt testified at trial. This Court found her to be a credible witness. Persinger, one of Vonfeldt's coworkers at Costco, also testified at trial. This Court found her to be a credible witness.

¶ 6 Vonfeldt has worked in various positions for Costco in Kalispell since 1999.³

¹ Pretrial Order at 3, Docket Item No. 43. In the Pretrial Order, the parties state, as an uncontested fact, that Vonfeldt suffered an injury on August 26, 2011. However, at trial, the parties agreed that Vonfeldt did not suffer an injury and that the issue in this case is actually whether Costco is liable for an occupational disease.

² All Findings herein are taken from trial testimony unless otherwise noted.

³ Vonfeldt Dep. 10:11 – 12:18.

¶ 7 In 2001, Vonfeldt was in a motor vehicle accident that caused her to suffer neck, shoulder, and low-back pain.⁴ Vonfeldt was unable to work for a period of time. She returned to work at Costco in a light-duty position.

¶ 8 In 2004, Vonfeldt started working in the Costco bakery. She did not have any problems with neck, shoulder, or arm pain when she started, nor did she have any numbness or tingling in her arms and hands.

¶ 9 The bakery job is physically demanding, requiring frequent lifting of items weighing more than 50 pounds. The bakery workers frequently have to lift heavy racks to and above shoulder height. The bakery job is also fast paced, as the bakers are on a tight schedule to get products baked and on the shelves. Vonfeldt was a hard worker and frequently worked in the bakery alone, as she was on an early morning shift.

¶ 10 In the fall of 2005, Vonfeldt experienced low-back pain, which her doctor attributed to her 2001 motor vehicle accident and a November 2005 fall at her home.⁵ On a pain diagram that Vonfeldt filled out on March 21, 2006, she indicated that she had sharp pain and dull, achy pain in her low back, and a burning sensation.⁶ She did not indicate that she was experiencing any pain in her upper back, shoulders, neck, or arms.⁷ On May 8, 2006, Vonfeldt underwent an L4-S1 spinal fusion.⁸

¶ 11 Vonfeldt returned to work, but then developed left-foot pain due to a fracture that was surgically repaired on May 11, 2009.⁹

¶ 12 Vonfeldt returned to work in the bakery. In 2010, she began experiencing numbness in her fingers and burning in her elbows that caused her to drop things. Vonfeldt also started developing pain in her wrists, neck, and shoulders. At trial, Vonfeldt testified that she had sharp pains in her wrists, burning in her elbows and between her shoulder blades, and aching in her neck. Persinger observed Vonfeldt having trouble lifting the heavy items. The pain and burning gradually worsened. By September of 2011, her pain progressed to the point that she sought medical treatment.¹⁰

⁴ See, e.g., Ex. DD17-1.

⁵ Ex. DD18-1; see also Ex. DD17-1 to 2 (medical record from January 13, 2006, indicating that Vonfeldt reported low-back pain but no mid- or upper-back pain).

⁶ Ex. DD18-3.

⁷ *Id.*

⁸ Ex. DD18-4 to 6.

⁹ Ex. DD23-10 to 11.

¹⁰ Ex. A; Ex. B.

¶ 13 On September 16, 2011, Vonfeldt went to the Columbia Falls Clinic and completed a form entitled “Injured Worker First Report Form,” claiming an injury on August 26, 2011, to her wrist, neck, and shoulder, which she attributed to “over use” from working in the Costco bakery.¹¹

¶ 14 Vonfeldt was initially seen by Dirk Gillette, PA, who noted that, “[o]ver the past year she notes increase[d] thoracic back, shoulder and arm pain. . . . The superior thoracic back pain between her shoulder blades is directly related with the repetitive work she performs in the [Costco] bakery.”¹² Gillette diagnosed Vonfeldt with carpal tunnel syndrome and back pain.¹³ Gillette prescribed pain medication and told Vonfeldt to wear wrist splints and to use “ice, heat, and stretching only.”¹⁴

¶ 15 Vonfeldt reported her claim to the human resources department at work. A First Report of Injury or Illness form was completed for her, also giving the date of injury of August 26, 2011, mentioning only “wrist” as the affected body part.¹⁵ However, the report goes on to reference “pain in both wrist [sic] and a burning between the shoulder blades at the end of the d[ay].”¹⁶

¶ 16 Costco accepted liability for Vonfeldt’s wrist conditions.¹⁷

¶ 17 Vonfeldt saw P. Kurt Thorderson, MD, for treatment of her wrist pain on October 27, 2011.¹⁸ Dr. Thorderson diagnosed Vonfeldt with bilateral carpal tunnel syndrome and ordered an electromyography (EMG).¹⁹ Dr. Thorderson placed Vonfeldt on work restrictions of no lifting, pushing, or pulling of more than 5 pounds.²⁰ Since she could not work in the bakery with these restrictions, Costco temporarily assigned her to the job of checking membership cards and receipts at the front door.

¹¹ Ex. A.

¹² Ex. DD25-1.

¹³ Ex. DD25-2.

¹⁴ *Id.*

¹⁵ Ex. B.

¹⁶ *Id.*

¹⁷ Pretrial Order at 2; *see also* Ex. K.

¹⁸ Ex. DD26-1 to 5.

¹⁹ Ex. DD26-1, 3.

²⁰ Ex. DD26-5.

¶ 18 Vonfeldt returned to Dr. Thorderson's office on December 1, 2011.²¹ The EMG test was essentially normal.²² Dr. Thorderson noted Vonfeldt's continuing complaints of pain in her hands, wrists, elbows, and shoulders, and referred her for physical therapy.²³ Dr. Thorderson also changed his diagnosis from carpal tunnel syndrome to bilateral tenosynovitis of Vonfeldt's wrists and forearms.²⁴

¶ 19 On January 27, 2012, Vonfeldt saw Greg Vanichkachorn, MD, for an impairment rating evaluation for her bilateral tenosynovitis.²⁵ Dr. Vanichkachorn assigned a 2% whole person impairment rating.²⁶

¶ 20 Dr. Thorderson saw Vonfeldt again on March 15, 2012, and found her to be at maximum medical improvement (MMI).²⁷ He agreed with the physical therapist who performed a functional capacity evaluation (FCE) on Vonfeldt on March 8, 2012, and assigned her permanent work restrictions in the light- to medium-duty range.²⁸ The only diagnosis referenced in the FCE was bilateral tenosynovitis.²⁹

¶ 21 Although Dr. Thorderson's office note of March 15, 2012, stated that "[s]he is released from my routine care,"³⁰ Vonfeldt returned to Dr. Thorderson on April 12, 2012, for follow up of her left-shoulder pain.³¹ An x-ray of the left shoulder showed mild acromioclavicular joint arthrosis.³² Dr. Thorderson diagnosed "left rotator cuff tendinitis and weakness" and recommended a rotator cuff strengthening program, with no change in work restrictions.³³

¶ 22 Although Vonfeldt had been complaining of neck and shoulder pain as well as wrist pain, she learned that Dr. Thorderson was a hand specialist and he would only treat her wrists. Because Dr. Thorderson would not treat her neck or shoulder, Vonfeldt asked the

²¹ Ex. DD26-6.

²² Ex. DD26-6; Ex. DD27-2.

²³ Ex. DD26-6.

²⁴ *Id.*

²⁵ Ex. DD-28.

²⁶ Ex. DD28-7.

²⁷ Ex. DD26-10 to 12.

²⁸ Ex. DD26-11 to 12; Ex. DD-29.

²⁹ Ex. DD29-1.

³⁰ Ex. DD26-11.

³¹ Ex. DD26-14 to 16.

³² Ex. DD26-16.

³³ Ex. DD26-14.

claims examiner assigned to her case if she could see another physician. The claims examiner informed Vonfeldt that liability had not been accepted for her neck and shoulder and refused to pay for any treatment with anyone other than Dr. Thorderson for her wrists.

¶ 23 On April 4, 2012, Vonfeldt's attorney wrote to the claims examiner, requesting that the insurer accept liability for Vonfeldt's "upper extremity, shoulder and back conditions (overuse syndrome)."³⁴ The claims examiner wrote back on April 5, 2012, explaining that Vonfeldt's claim was currently accepted for "bilateral upper extremities [sic] conditions – which is what she has been treating for. Prior to accepting anything further under her claim I think additional clarification will be necessary."³⁵ The claims examiner's letter goes on to state that Vonfeldt had been found to be at MMI with a 2% impairment rating with work restrictions, and that a meeting was being scheduled between her and Costco to try to find a position compatible with her restrictions.³⁶ Apparently because Vonfeldt did not agree that she was at MMI, the claims examiner set another appointment for Vonfeldt to be seen by Dr. Thorderson on April 12, 2012.³⁷

¶ 24 After meeting with Costco staff in April 2012 to explore other positions that might be compatible with her restrictions, Costco offered Vonfeldt the front-door attendant position (classified as a PT Member Service Assistant) on a permanent basis.³⁸ She has held that position ever since. Vonfeldt's job duties include checking membership cards, handing out brochures, and checking receipts against items in customers' carts. Vonfeldt estimated that she encounters approximately 200 people an hour working at the front door when Costco is busy, and stands in one place for most of her workday. Although she no longer gets the sharp pains from heavy lifting, she still experiences tingling in her fingers, and her neck and shoulders ache and burn. When Vonfeldt started working the front door, her work schedule was six-hour days, two days on then one day off, followed by two days on and two days off. That schedule, she explained, gave her body time to recuperate. However, at the time of trial, her work schedule is five days on, followed by two days off, and her body does not get time to recuperate before she has to be back at work.

¶ 25 On April 20, 2012, Vonfeldt's attorney asked the claims examiner for permission for Vonfeldt to be seen by Dr. Jahnke.³⁹ Vonfeldt had previously treated with Dr. Jahnke

³⁴ Ex. J-2.

³⁵ Ex. K.

³⁶ *Id.*

³⁷ *Id.*

³⁸ Ex. I.

³⁹ Ex. J-3.

in 2006 for low-back pain related to her 2001 motor vehicle accident and 2005 fall.⁴⁰ Dr. Jahnke is board-certified in physical medicine and rehabilitation, and in pain medicine, concentrating his practice in the field of musculoskeletal, spine, and sports medicine.⁴¹

¶ 26 Costco did not agree to pay for Dr. Jahnke's treatment. Thus, Vonfeldt saw him on her own on June 27, 2012.⁴² (Vonfeldt turned Dr. Jahnke's medical bills in to her health insurer for payment, which initially denied the bills as work-related. Eventually, the health insurer relented, although Vonfeldt believes there are still some bills from Dr. Jahnke's office that have not been paid.) Vonfeldt reported that her neck felt "compressed and tight," and that she had tingling and burning in her hands, popping in her left shoulder, and tender elbows.⁴³ Dr. Jahnke noted that she had worked at Costco for many years and did "a fair amount of heavy lifting from 50 to 100 pounds working in the bakery."⁴⁴ Dr. Jahnke ordered a cervical MRI to rule out a disk herniation but stated, "She may have just myofascial pain symptomatology between her neck and bra area. This may be more of an overuse injury."⁴⁵

¶ 27 On Vonfeldt's follow-up visit on July 3, 2012, Dr. Jahnke informed her that the MRI showed degenerative disk disease at C4-C6 with mild retrolisthesis at C4-C5 and disk osteophytes causing neuroforaminal narrowing.⁴⁶ Dr. Jahnke made the primary diagnosis of cervical radiculitis.⁴⁷ He also diagnosed numbness, carpal tunnel syndrome, shoulder joint pain, spasms of her paraspinal muscles, and low-back syndrome.⁴⁸ Vonfeldt returned to Dr. Jahnke on July 13, 2012.⁴⁹ Dr. Jahnke's assessment at that time was that Vonfeldt had cervical radiculitis, numbness/dysesthesias, carpal tunnel syndrome, shoulder joint pain, spasms of her paraspinal muscles, low-back syndrome, disorders of sacrum, and enthesopathy of hip.⁵⁰ Dr. Jahnke restricted Vonfeldt to working 6 hours per day with a 24-hour workweek.⁵¹

⁴⁰ Ex. DD17-1 to 10.

⁴¹ Jahnke Dep. 7:16 – 8:6; Jahnke Dep. Ex. 1 at 1.

⁴² Ex. DD17-11 to 13.

⁴³ Ex. DD17-11.

⁴⁴ *Id.*

⁴⁵ Ex. DD17-13.

⁴⁶ Ex. DD17-15.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Ex. DD17-16 to 18.

⁵⁰ Ex. DD17-17.

⁵¹ Ex. DD17-18.

¶ 28 On July 10, 2012, Vonfeldt attended an independent medical examination (IME) at WellCare in Missoula performed by three physicians: Catherine C. Capps, MD, orthopedic surgeon; Dr. Wilson, neurologist; and Dr. Vincent, occupational medicine specialist.⁵² Dr. Capps performed the majority of the orthopedic examination, and Dr. Wilson did the neurological portion.⁵³ Dr. Vincent dictated the IME report.⁵⁴

¶ 29 The panel reviewed dozens of Vonfeldt's medical records dating back to 1997.⁵⁵ On physical examination, the IME panel noted, *inter alia*, that Vonfeldt had trigger points in her left rhomboid, which produced symptoms in her left thumb, and in her upper extremities including the extensor wad and pronator muscles, which also referred to her thumb.⁵⁶ The IME panel diagnosed Vonfeldt with myofascial pain syndrome and concluded that it was temporarily aggravated by her work in the Costco bakery.⁵⁷ The panel summarized its opinions as follows:

This is an unfortunate 45-year-old female who presents with recurrent neck, thoracic and upper extremity pain. Symptoms are similar to symptoms she had suffered in a motor vehicle accident in 1998. She suffered symptoms from that MVA through 2006 per her medical records. We believe that she has chronic myofascial pain syndrome aggravated by her work activities as a baker at Costco. She has no evidence on examination of myelopathy or radiculopathy. She does have multilevel degenerative disc disease in the cervical spine likely on an age related degenerative basis. We found no evidence of clinical findings suggesting her cervical spine is the source of her upper back and shoulder pain. She has clinical mild carpal tunnel syndrome on the right with normal nerve conduction studies. In general, we would recommend this woman limit her physical and work activities to the sedentary to light range. We don't recommend her returning to the bakery as this involves heavy lifting and this would likely aggravate her myofascial condition. We think the work injury 08/26/2011 was likely a temporary aggravation of her underlying chronic myofascial pain. We found no objective evidence of new injury. Her symptoms are improving with work modification though not completely resolved.⁵⁸

⁵² Ex. DD31.

⁵³ Vincent Dep. 11:12-14.

⁵⁴ Vincent Dep. 9:11-12.

⁵⁵ Ex. DD31-1 to 15.

⁵⁶ Ex. DD31-17.

⁵⁷ Ex. DD31-19.

⁵⁸ Ex. DD31-18.

¶ 30 In answering the question as to whether Vonfeldt's complaints were "consistent with the current objective findings and mechanism of injury," the panel stated: "We found tenderness with trigger points in the shoulders and arms. This is consistent with chronic myofascial pain syndrome. There is no mechanism of injury per se other than overuse. This is certainly consistent with an aggravation due to overuse in someone previously sensitized to such pain."⁵⁹ When asked if her preexisting injury contributed to her condition, the panel answered:

She has a prior history of myofascial pain that began after a motor vehicle accident by her history dating back to 1998. She was being treated for chronic pain for a period of time, possibly as long as to 2006. She seemed to be lost to follow up but did present in 2009 with recurrent symptoms. We believe this is an underlying chronic condition and that her work in the bakery at Costco likely contributed to worsening of this condition. These types of pain conditions, however, have waxing and waning type natural history and so we cannot say with any certainty that the Costco work activities were a major contributing cause of her recurrent symptoms. She also has multilevel degenerative disc disease in the cervical spine. We believe, at this point in time, this is asymptomatic. We do not believe that her lumbar spine condition has been significantly affected by her work. She has findings on examination of clinic though not electrodiagnostically supported mild carpal tunnel syndrome on the right. We cannot conclude that work has been a major contributing cause of that finding.⁶⁰

The panel recommended that Vonfeldt not return to work as a baker and that she limit her work activities to the sedentary- to light-duty range.⁶¹ They found her to be at MMI with no ratable impairment, other than the one assigned by Dr. Vanichkachorn for her tenosynovitis.⁶²

¶ 31 At his deposition, Dr. Wilson testified that it was his understanding that Vonfeldt had a long-standing history of myofascial pain dating back at least 15 years.⁶³ He explained that Vonfeldt's complaints were of pain in the shoulders, back, and neck areas and in her hands and forearms.⁶⁴ Dr. Wilson testified that his understanding of Vonfeldt's

⁵⁹ Ex. DD31-19.

⁶⁰ Ex. DD31-19 to 20.

⁶¹ Ex. DD31-21.

⁶² Ex. DD31-20.

⁶³ Wilson Dep. 13:21 – 14:1.

⁶⁴ Wilson Dep. 14:5-9; Wilson Dep. 17:8-15.

injury was that there was no discrete injury but that she was doing very heavy work as a baker and her pain grew progressively worse over time.⁶⁵

¶ 32 Dr. Wilson explained that the panel found trigger points in Vonfeldt's neck but no muscle spasms, which he described as a clinical finding, not an objective finding.⁶⁶ Dr. Wilson testified that the correlation between examiners and their findings of muscle spasms was "very equivocal," meaning some people might find a muscle spasm while others do not.⁶⁷ Dr. Wilson opined that Vonfeldt's complaints of pain are real and that based on his review of Vonfeldt's chart, she did not inappropriately seek pain medication.⁶⁸ Dr. Wilson indicated that Vonfeldt's anxiety and depression may be contributing to her pain.⁶⁹ Dr. Wilson also testified that he found nothing in Vonfeldt's chart to indicate that she had either been unreliable or dishonest in reporting her symptoms to her treating physician and examiners.⁷⁰ Dr. Wilson testified that because Vonfeldt's pain did not significantly decrease after she stopped working in the Costco bakery, it was an indication that her condition fit the category of chronic pain.⁷¹

¶ 33 Dr. Vincent testified at his deposition that he felt that Vonfeldt had a "long history of chronic neck pain, upper back pain, intermittently lower back pain, [and] upper extremity pain."⁷² Dr. Vincent testified that Vonfeldt was originally diagnosed with overuse syndrome, a condition that eventually evolved into a pain syndrome.⁷³ Dr. Vincent did not believe that Vonfeldt was exaggerating her symptoms and believed she "truly has pain."⁷⁴ Dr. Vincent testified that the panel made no finding that Vonfeldt was malingering, nor did he make a diagnosis of a somatoform disorder.⁷⁵

¶ 34 When asked about the physical examination, Dr. Vincent testified, "Dr. Capps, who is particularly astute at this, identified a number of trigger points in her upper extremities and in her – top of her shoulders that actually produced referred symptoms all the [way]

⁶⁵ Wilson Dep. 12:11-18.

⁶⁶ Wilson Dep. 23:25 – 24:6.

⁶⁷ Wilson Dep. 24:12-22.

⁶⁸ Wilson Dep. 69:1-15.

⁶⁹ Wilson Dep. 15:22 – 16:18.

⁷⁰ Wilson Dep. 70:12-23; Wilson Dep. 75:17-20.

⁷¹ Wilson Dep. 77:17 – 78:11.

⁷² Vincent Dep. 23:1-3.

⁷³ Vincent Dep. 29:14-24.

⁷⁴ Vincent Dep. 86:13 – 87:17.

⁷⁵ Vincent Dep. 63:8-15.

down to her thumb.”⁷⁶ However, Dr. Vincent stated that he did not believe that muscle spasms, or trigger points, constituted an objective finding because it is “not very objectively verifiable.”⁷⁷

¶ 35 Dr. Vincent opined that there was nothing in Vonfeldt’s medical records that would indicate that her job caused a permanent aggravation of her preexisting myofascial pain syndrome.⁷⁸ When asked about the term “temporarily aggravated” used in the panel’s report, Dr. Vincent testified that it was a “poor choice” of words, since he understood that the legal definition of “aggravation” means a “change in some pathology” and Vonfeldt “really didn’t have any. She just really had an exacerbation of symptoms related to her work, so that’s probably what it should have said.”⁷⁹ Dr. Vincent testified the panel believed that once Vonfeldt was taken out of the bakery and was no longer doing heavy lifting, her symptoms would get better and that was why the panel “anticipated [the aggravation] would be temporary” and “seemed like it would resolve.”⁸⁰

¶ 36 Dr. Vincent testified that at the time the panel examined Vonfeldt she had reached MMI for the condition in her upper extremities, although she was still complaining of pain primarily in the upper extremities, and also pain in the neck and shoulders.⁸¹ Dr. Vincent testified that the reason the panel believed Vonfeldt had been at MMI when they saw her was because they believed her condition had returned to the baseline of her preexisting pain syndrome.⁸²

¶ 37 For someone with chronic myofascial pain, Dr. Vincent explained, heavy lifting is not recommended because it could aggravate symptoms.⁸³ Because Vonfeldt told the panel that her job as a baker entailed heavy labor, Dr. Vincent and the other panel physicians thought it advisable that she seek other work.⁸⁴ Dr. Vincent knew that Vonfeldt had gone back to work at Costco as a front-door greeter, a position he was familiar with as he shopped at Costco.⁸⁵ He termed the position a “very easy job” not incompatible

⁷⁶ Vincent Dep. 21:22 – 22:1.

⁷⁷ Vincent Dep. 67:15 – 68:2.

⁷⁸ Vincent Dep. 38:17-21.

⁷⁹ Vincent Dep. 23:25 – 24:8.

⁸⁰ Vincent Dep. 30:7-20.

⁸¹ Vincent Dep. 23:7-20.

⁸² Vincent Dep. 75:18 – 76:11.

⁸³ Vincent Dep. 24:20 – 25:5.

⁸⁴ Vincent Dep. 25:14-17.

⁸⁵ Vincent Dep. 31:1-11.

with Vonfeldt's pain syndrome.⁸⁶ Although the panel doctors did not believe there was a need for treatment, Dr. Vincent explained that they all agreed Vonfeldt might benefit from treatment for her chronic pain that might make her more tolerant of work.⁸⁷

¶ 38 At some point after the IME, Costco accepted liability for Vonfeldt's neck and upper-back condition as a temporary aggravation to a preexisting condition.⁸⁸

¶ 39 On August 13, 2012, the claims examiner sent Vonfeldt a copy of the IME Report.⁸⁹ The claims examiner wrote, "The IME indicated that you suffered a temporary aggravation of your underlying preexisting myofascial pain condition and that you have returned to your baseline condition from that temporary aggravation."⁹⁰ The claims examiner also gave Vonfeldt the 14-day notice that her temporary partial disability benefits would end.⁹¹

¶ 40 Also on August 13, 2012, the claims examiner wrote to Dr. Thorderson, enclosing a copy of the IME performed by WellCare.⁹² The claims examiner inquired whether Dr. Thorderson agreed with the report "in every particular."⁹³ The claims examiner asked Dr. Thorderson to either sign his name to the statement, "I concur with the report of the physician(s)," or if he did not agree with it, to "please provide a report addressing the specific items with which you disagree."⁹⁴ Dr. Thorderson signed and dated his signature on August 20, 2012.⁹⁵

¶ 41 In July 2013, Vonfeldt and Costco settled their disputes over her bilateral tenosynovitis, leaving open medical benefits and the dispute "regarding the compensability of Claimant's neck and shoulder complaints, including the conditions diagnosed as multilevel degenerative disc disease in the cervical spine."⁹⁶

¶ 42 On December 15, 2013, Dr. Jahnke sent a letter to Vonfeldt's attorney in which he opined, "on a more probable than not basis, I do feel that Ms. Vonfeldt's work activities at

⁸⁶ Vincent Dep. 31:4-19.

⁸⁷ Vincent Dep. 25:18 – 26:5.

⁸⁸ See, e.g., Ex. D-1 ("The claims administrator accepted this claim for diffuse tenosynovitis of the upper extremities bilaterally and for temporary aggravation of preexisting myofascial pain syndrome . . .").

⁸⁹ Ex. C.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Ex. DD26-17.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Ex. D-1; Ex. E-1.

Costco were the direct cause of her neck, shoulder, and upper arm symptomatology” and that “the tenosynovitis and the myofascial pain syndrome are more likely than not related to her overall workers’ compensation issues.”⁹⁷ Dr. Jahnke also stated that Vonfeldt should have a limited work schedule and that “she should avoid repetitive actions and be able to change up what she does frequently throughout the day.”⁹⁸ He stated that she was not at MMI.⁹⁹

¶ 43 Vonfeldt continues to treat with Dr. Jahnke.¹⁰⁰ His treatment includes medications, trigger point injections, and manipulation of her shoulder, scapular, and neck areas.¹⁰¹ Vonfeldt testified that the medication Dr. Jahnke prescribes allows her to remain working, and that without Dr. Jahnke’s treatment and her medication she would have to quit her job.

¶ 44 Dr. Jahnke’s records reflect that Vonfeldt’s condition improves when she is off work for a while,¹⁰² and her work continues to aggravate her myofascial pain syndrome.¹⁰³ In his record dated December 31, 2014, Dr. Jahnke stated:

We talked about the possibility of taking her off work. I think that, at some point, she needs to be retrained into doing the type of job that is sedentary to light duty. I would not be able to tell that without doing an FCE on her, but I am anticipating it would be sedentary to light duty, something that she can do primarily sitting, get up and walk around when she needs to, but not have to do a lot of lifting, perhaps more of a secretarial type or sales type job where she spends some time on the phone and at a desk. I think that would be her best bet in terms of long term employment because she does need to continue to work. She is only 48 years old.¹⁰⁴

In his record dated January 28, 2015, Dr. Jahnke stated:

I told her the myofascial issues are definitely related as an overuse chronic myositis/tendinopathy. The other thing, in terms of her neck issues, I think her continued repetitive reaching that she does both lifting trays and passing

⁹⁷ Ex. DD17-36 to 37.

⁹⁸ Ex. DD17-37.

⁹⁹ *Id.*

¹⁰⁰ Ex. DD17-38 to 78.

¹⁰¹ See, e.g., Ex. DD17-42 to 43, 66.

¹⁰² See, e.g., Ex. DD17-73.

¹⁰³ See, e.g., Ex. DD17-73 to 74.

¹⁰⁴ Ex. DD 17-74.

out flyers have aggravated her neck. I do feel that her activities at Costco have contributed to the accelerated degenerative process in her neck; however, it is really impossible to say if it meets the 51/49% criteria. I would say that it is a minimally significant contributor in the 40-60% range.¹⁰⁵

¶ 45 At his deposition, Dr. Jahnke opined that Vonfeldt's symptoms fell into the category of an overuse injury.¹⁰⁶ Dr. Jahnke testified that on a more likely than not basis Vonfeldt's work as a baker — particularly the heavy overhead lifting of metal trays into the tray racks — was the leading cause of the degenerative changes in Vonfeldt's neck.¹⁰⁷ When asked whether or not Vonfeldt's avocational activities like kayaking, golfing, and hiking contributed to her neck condition, Dr. Jahnke testified that those activities, on a recreational and occasional basis, would likely not have been major contributing causes of the arthritic changes in Vonfeldt's neck.¹⁰⁸ Dr. Jahnke opined that Vonfeldt's work in the bakery caused her myofascial pain syndrome, and it has never had a chance to get better because she has never been off of work for an extended period of time.¹⁰⁹ And he further suggested that Vonfeldt's current activity of handing out brochures and checking baskets and membership cards was continuing to aggravate her neck and shoulders, causing her pain.¹¹⁰ Dr. Jahnke responded to the question of whether Vonfeldt's injury was simply a temporary aggravation of a preexisting condition by explaining that, if you ran a marathon, you would not think of running another one soon afterwards because the body needs time to recover.¹¹¹ If you did run a marathon every day, the muscle injuries "don't have a chance to heal and then it becomes an ongoing issue."¹¹²

¶ 46 Dr. Jahnke's office note of June 27, 2012, revealed multiple trigger points in her neck.¹¹³ Dr. Jahnke testified that a trigger point is a "band of isolated muscle spasm."¹¹⁴ He stated that if a physician does not have the training to palpate a trigger point, he will

¹⁰⁵ Ex. DD17-76.

¹⁰⁶ Jahnke Dep. 22:3 – 23:1.

¹⁰⁷ Jahnke Dep. 25:15 – 29:13.

¹⁰⁸ Jahnke Dep. 29:14 – 31:24.

¹⁰⁹ Jahnke Dep. 39:8-12.

¹¹⁰ Jahnke Dep. 39:12-22.

¹¹¹ Jahnke Dep. 23:2-19.

¹¹² Jahnke Dep. 23:14-19.

¹¹³ Ex. DD17-12.

¹¹⁴ Jahnke Dep. 16:4-6.

not find it.¹¹⁵ He also testified that the fact that a trigger point does not show up on an x-ray or an EMG does not mean that it is not there.¹¹⁶

¶ 47 Dr. Jahnke testified that Vonfeldt does have continued numbness and tingling, chronic neck and shoulder pain, myofascial pain syndrome, muscle spasms in her neck, and is developing more serious cervical conditions with regard to the disk osteophyte complex that may require surgery in the future.¹¹⁷ Dr. Jahnke explained that Vonfeldt's symptoms have changed only slightly since she was moved out of the bakery.¹¹⁸ During one of Vonfeldt's last visits with Dr. Jahnke, she had just come off of a vacation and she was feeling better, which suggested to the doctor that her continued performance of repetitive activity at work was irritating and flaring up her myofascial pain.¹¹⁹

¶ 48 This Court has weighed the evidence and finds Dr. Jahnke's opinion that Vonfeldt's work was the major contributing cause of her myofascial pain syndrome more persuasive than the IME panel's opinion that Vonfeldt's work in the bakery was just a temporary aggravation of a preexisting condition. This Court makes this finding for three reasons.

¶ 49 First, as the treating physician, Dr. Jahnke's opinion is generally entitled to greater weight.¹²⁰ Dr. Jahnke has seen Vonfeldt since 2006,¹²¹ and he treats patients with pain conditions, having completed a musculoskeletal spine and pain fellowship at Emory University in Atlanta and being board-certified in pain medicine.¹²² Costco has not shown that the IME panel has any greater expertise than Dr. Jahnke or that it had any greater knowledge of Vonfeldt's medical history.

¶ 50 Second, Dr. Jahnke's opinion is supported by the other evidence in this case while the IME panel's opinion is not. Although the IME panel thought that Vonfeldt's work in the bakery only temporarily aggravated her myofascial pain syndrome and anticipated that she would return to baseline, the evidence shows that Vonfeldt's neck pain from her 2001 motor vehicle accident had subsided before she began working in the bakery in 2004. Her medical records from 2005 and 2006 do not reflect that she had any mid-back, upper-back, or neck pain. Thus, the IME panel's conclusion that Vonfeldt would return to

¹¹⁵ Jahnke Dep. 13:13-17.

¹¹⁶ Jahnke Dep. 13:18 – 14:4.

¹¹⁷ Jahnke Dep. 34:10-20.

¹¹⁸ Jahnke Dep. 17:24 – 18:2.

¹¹⁹ Jahnke Dep. 35:17-25.

¹²⁰ *EBI/Orion Grp. v. Blythe*, 1998 MT 90, ¶ 12, 288 Mont. 356, 957 P.2d 1134 (“[A]s a general rule, the opinion of a treating physician is accorded greater weight than the opinions of other expert witnesses.”).

¹²¹ See, e.g., Ex. DD17-1.

¹²² Jahnke Dep. 8:1-3; Jahnke Dep. Ex. 1 at 1.

baseline, and Costco's conclusion that she had returned to baseline, is not supported by the evidence, as Vonfeldt's baseline was that she had no pain in her upper back and neck. Moreover, the evidence shows that Vonfeldt continued to have myofascial pain at the time of trial, more than four years after she began experiencing pain. While the IME panel anticipated that Vonfeldt's pain would resolve, it has not and, at this point, it cannot be considered "temporary."

¶ 51 Third, Dr. Jahnke's opinion that Vonfeldt's work in the bakery was the major contributing cause of Vonfeldt's myofascial pain syndrome is essentially uncontroverted. The IME panel opined that Vonfeldt's work in the bakery aggravated her preexisting myofascial pain syndrome and the only other potential causes of Vonfeldt's myofascial pain syndrome that the panel identified were her preexisting condition and her anxiety and depression. The panel was not asked to compare the causes of her myofascial pain syndrome and give an opinion as to which was the leading cause. The IME panel's belief that Vonfeldt's symptoms would subside if she no longer did heavy lifting is an indication that they thought the heavy lifting significantly contributed to her myofascial pain syndrome.

CONCLUSIONS OF LAW

¶ 52 This case is governed by the 2011 version of the Montana Workers' Compensation Act (WCA) since Vonfeldt's right to compensation accrued at the time she filed her claim.¹²³

¶ 53 Vonfeldt bears the burden of proving by a preponderance of the evidence that she is entitled to the benefits she seeks.¹²⁴

Issue One: Whether the Petitioner is entitled to acceptance of liability for her myofascial pain syndrome in her upper back, shoulders, neck, and arms as an occupational disease.

¶ 54 Section 39-71-116(23)(a), MCA, defines "occupational disease" as "harm, damage, or death arising out of or contracted in the course and scope of employment caused by events occurring on more than a single day or work shift." For an occupational

¹²³ See *Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶ 32, 365 Mont. 405, 282 P.3d 687(citing *Fleming v. Int'l Paper Co.*, 2008 MT 327, ¶ 26, 346 Mont. 141, 194 P.3d 77); *Bouldin v. Liberty Northwest Ins. Corp.*, 1997 MTWCC 8; § 1-2-201, MCA.

¹²⁴ *Ricks v. Teslow Consol.*, 162 Mont. 469, 483-84, 512 P.2d 1304, 1312-13 (1973) (citations omitted); *Dumont v. Wickens Bros. Constr. Co.*, 183 Mont. 190, 201, 598 P.2d 1099, 1105-06 (1979) (citations omitted).

disease to be compensable under the WCA, § 39-71-407(12), MCA, requires a claimant to prove that the occupational disease:

- (a) is established by objective medical findings; and
- (b) arises out of or is contracted in the course and scope of employment.

An occupational disease is considered to arise out of or be contracted in the course and scope of employment if the events occurring on more than a single day or work shift are the major contributing cause of the occupational disease in relation to other factors contributing to the occupational disease.

¶ 55 Section 39-71-116(22), MCA, defines “objective medical findings” as “medical evidence, including range of motion, atrophy, muscle strength, muscle spasm, or other diagnostic evidence, substantiated by clinical findings.”

¶ 56 Section 39-71-407(16), MCA defines “major contributing cause” as “a cause that is the leading cause contributing to the result when compared to all other contributing causes.”

¶ 57 The Montana Supreme Court addressed the issue of whether an aggravation of a preexisting condition can be an occupational disease in *Montana State Fund v. Grande*.¹²⁵ In *Grande*, the claimant alleged that his work as a truck driver aggravated his preexisting rheumatoid arthritis and osteoarthritis. In rejecting State Fund’s argument that an aggravation of a preexisting condition cannot be an occupational disease under the post-2005 WCA, the Court explained as follows:

As the WCC pointed out, although the word “aggravation” does not appear in the statutory definition of “occupational disease,” the statutory requirement that the work-related aspect of an occupational disease be the “major contributing cause” would be meaningless if, as MSF argues, permanent aggravations of underlying conditions can no longer be considered occupational diseases even if work-related factors are the major contributing cause of the condition. It is unlikely that the only contributing factor to an occupational disease will be the employee's job duties, and that is precisely why § 39-71-407, MCA, provides that for an occupational disease to be compensable under the WCA, only “the leading cause contributing to the result” must be related to the employment. Moreover, § 39-71-407(13), MCA, requires that the “leading cause” must be compared to “all other contributing causes,” and a preexisting condition certainly falls within the ambit of “all other contributing causes.”

¹²⁵ 2012 MT 67, 364 Mont. 333, 274 P.3d 728.

MSF argues that in order for Grande's work to be the leading cause of his condition, the occupational factors must weigh heavier than any of the other individual contributors to an occupational disease. The WCC pointed out that just as a horse can "lead" a race by a nose, a "leading cause" under the statute is that cause which ranks first among all causes "contributing to the result"—i.e., the condition for which benefits are sought regardless of the respective percentages of multiple contributing causes.¹²⁶

¶ 58 Thus, the Montana Supreme Court affirmed this Court's decision that, although the cause of osteoarthritis and rheumatoid arthritis are unknown and were preexisting, the claimant had a compensable occupational disease. The court explained:

Dr. Van Belois opined that it was more probable than not that Grande's job duties, when compared to all other contributing causes, were the leading cause of the worsening or accelerating of his osteoarthritis because Grande spent most of his time doing his work-related activities repetitively. Dr. Van Belois testified that activities of daily living can aggravate arthritic conditions, but to a lesser degree because individuals can moderate how much time they spend doing those activities in a way that they cannot in a work environment which requires repetitive movement.¹²⁷

¶ 59 Likewise, the preponderance of the evidence in this case leads to the conclusion that Vonfeldt's myofascial pain syndrome is a compensable occupational disease because her work in the bakery was the leading cause of the onset of her myofascial pain syndrome in 2010. Dr. Jahnke and the IME panel agree that Vonfeldt has myofascial pain syndrome and that her work in the bakery aggravated it. Although the IME panel opined that Vonfeldt's work only temporarily aggravated her myofascial pain syndrome, Vonfeldt was still suffering from its effects at the time of trial, which was more than four years after she first started experiencing pain.

¶ 60 Dr. Jahnke opined that Vonfeldt's work at Costco was "the direct cause of [her] neck, shoulder, and upper arm symptomatology."¹²⁸ He further opined that Vonfeldt's work in the bakery caused her myofascial pain syndrome and that it has never had a chance to get better because she continues to work. The physicians' diagnosis of myofascial pain syndrome is supported by objective medical findings, as Dr. Jahnke and Dr. Capps identified trigger points, which Dr. Jahnke defined as a "band of isolated muscle

¹²⁶ Grande, ¶¶ 39-40.

¹²⁷ Grande, ¶ 42.

¹²⁸ Jahnke Dep. 40:6-9.

spasm[s],”¹²⁹ and decreased range of motion, both of which are specifically included in the definition of “objective medical findings.”¹³⁰ Vonfeldt has carried her burden of proof, and she is entitled to acceptance of liability for her myofascial pain syndrome as a compensable occupational disease. Having found that Vonfeldt is entitled to acceptance of liability for her myofascial pain syndrome as an occupational disease, this Court concludes Vonfeldt is entitled to benefits under the WCA.

Issue Two: Whether Respondent is required to pay reasonable costs and attorney fees under §§ 39-71-611 and -612, MCA, and a penalty under § 39-71-2907, MCA.

¶ 61 Section 39-71-611(1), MCA, states that an insurer shall pay reasonable costs and attorney fees as established by the workers’ compensation court if:

- (a) the insurer denies liability for a claim for compensation or terminates compensation benefits;
- (b) the claim is later adjudged compensable by the workers’ compensation court; and
- (c) in the case of attorneys fees, the workers’ compensation court determines that the insurer’s actions in denying liability or terminating benefits were unreasonable.

¶ 62 Section 39-71-612, MCA, also requires a finding that the actions of the insurer were unreasonable before attorney fees can be awarded. Section 39-71-2907, MCA, provides that this Court may increase by 20% the full amount of benefits due a claimant when an insurer unreasonably delays or refuses to pay benefits prior or subsequent to an order granting benefits from this Court.

¶ 63 Costco based its denial of Vonfeldt’s neck and shoulder conditions on the grounds that the conditions preexisted her August 26, 2011, claim, and that her heavy work in the Costco bakery only temporarily aggravated her neck and shoulder conditions. Costco based its denial on the IME report of WellCare’s three physicians,¹³¹ and upon their findings that Vonfeldt reached MMI for those conditions by July 10, 2012, with no permanent impairment. Costco then sent the IME Report to Dr. Thorderson, and he concurred.¹³² Although Dr. Jahnke opined that Vonfeldt’s work at Costco contributed to her myofascial pain syndrome, he agreed that there were other causes and indicated that

¹²⁹ Jahnke Dep. 16:4-6.

¹³⁰ § 39-71-116(22), MCA.

¹³¹ Ex. DD31.

¹³² Ex. DD26-17.

it was difficult to determine the percentages of the causes.¹³³ Under these facts, Costco's denial of ongoing liability for Vonfeldt's myofascial pain syndrome was reasonable. Therefore, Vonfeldt is not entitled to her attorney fees or a penalty.

¶ 64 As the prevailing party, Vonfeldt is entitled to her costs.

JUDGMENT

¶ 65 Petitioner is entitled to acceptance of liability for her myofascial pain syndrome in her upper back, shoulders, neck, and arms as an occupational disease.

¶ 66 Petitioner is entitled to the payment of her costs.

¶ 67 Petitioner is not entitled to her attorney fees or to a penalty.

¶ 68 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 this 16th day of November, 2015.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: Michael A. Bliven
Ronald W. Attwood

Submitted: March 6, 2015

¹³³ See Ex. DD17-76.