

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2016 MTWCC 1

WCC No. 2014-3486

LINDA WARBURTON

Petitioner

vs.

LIBERTY NORTHWEST INS CORP.

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Summary: Petitioner tripped and fell during her work shift at a department store. She sought medical treatment approximately 1½ months later and subsequently claimed that she suffered an injury in the industrial accident. Respondent denied the claim, arguing that Petitioner's medical problems predated the industrial accident.

Held: This Court did not find Petitioner credible and concluded that she did not suffer an injury as a result of her industrial accident.

Topics:

Injury and Accident: Accident. Where Petitioner tripped over a clothing rack at work and fell backwards, landing on the floor, she suffered an accident within the meaning of § 39-71-119(2), MCA.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-119. Although the Court held that Petitioner suffered an accident within the meaning of § 39-71-119(2), MCA, the Court concluded that she had not proven that the accident caused an injury. Although the medical evidence indicated that Petitioner has problems with her head, neck, and shoulders, the medical opinions which connected these problems to her industrial accident were based on inaccurate and incomplete medical histories Petitioner provided her doctors and she therefore failed to satisfy her burden of proving causation.

Injury and Accident: Unexpected Strain or Injury. Although the Court held that Petitioner suffered an accident within the meaning of § 39-71-119(2), MCA, the Court concluded that she had not proven that the accident caused an injury. Although the medical evidence indicated that Petitioner has problems with her head, neck, and shoulders, the medical opinions which connected these problems to her industrial accident were based on inaccurate and incomplete medical histories Petitioner provided her doctors and she therefore failed to satisfy her burden of proving causation.

Injury and Accident: Causation. Although Petitioner tripped over a clothing rack at work and fell backwards, landing on the floor, and the medical evidence indicated that Petitioner has problems with her head, neck, and shoulders, the medical opinions which connected these problems to her industrial accident were based on inaccurate and incomplete medical histories Petitioner provided her doctors and she therefore failed to satisfy her burden of proving causation.

Proof: Burden of Proof: Causation. Although Petitioner tripped over a clothing rack at work and fell backwards, landing on the floor, and the medical evidence indicated that Petitioner has problems with her head, neck, and shoulders, the medical opinions which connected these problems to her industrial accident were based on inaccurate and incomplete medical histories Petitioner provided her doctors and she therefore failed to satisfy her burden of proving causation.

Causation: Injury. Although Petitioner tripped over a clothing rack at work and fell backwards, landing on the floor, and the medical evidence indicated that Petitioner has problems with her head, neck, and shoulders, the medical opinions which connected these problems to her industrial accident were based on inaccurate and incomplete medical histories Petitioner provided her doctors and she therefore failed to satisfy her burden of proving that her industrial accident caused her injury.

¶ 1 The trial in this matter began on May 8, 2015, in the Civic Center Commission Chambers in Great Falls. It continued on May 20, 2015, at the Workers' Compensation Court. On June 2, 2015, the parties offered closing arguments telephonically.

¶ 2 Petitioner Linda Warburton appeared and was represented by Thomas J. Murphy. Kelly M. Wills represented Respondent Liberty Northwest Ins. Corp. (Liberty).

¶ 3 Exhibits: This Court admitted Exhibits 1 through 4, 6, 10, 14 through 19, 31 through 34, and 36 without objection. This Court admitted Exhibit 5 after Liberty laid a foundation for it. This Court admitted Exhibits 7, 8, 11 through 13, and 20 through 24 over Warburton's objections. This Court admitted Exhibits 9 and 25 through 29 after Warburton withdrew her objections. This Court did not admit Exhibit 30 since Liberty did not offer it. This Court sustained Liberty's objection to Exhibit 35 and excluded it.

¶ 4 Witnesses and Depositions: This Court admitted the depositions of Warburton and Patrick Armstrong, PA-C, into evidence. On May 8, 2015, Warburton, Hugo Gibson, DC, John Warburton, Andrea Bilger, Yvonne "Cami" Hillis, Gary Peterson, and Ashley Jo Martin were sworn and testified. On May 20, 2015, Lois Pomeroy and John C. Schumpert, MD, MPH, FACOEM, were sworn and testified.

¶ 5 Issues Presented: The Final Pretrial Order¹ sets forth the following issues:

Issue One: Whether Warburton has satisfied her burden of proving she sustained an industrial injury;

Issue Two: Whether Warburton has satisfied her burden of proving an entitlement to temporary total disability benefits and for what period;

Issue Three: Whether Warburton is entitled to any medical benefits for her alleged November 22, 2013, industrial injury; and

Issue Four: Whether Warburton is entitled to costs, attorney fees, and a penalty.

Since this Court has ruled against Warburton on Issue One, it does not reach the remaining issues. Furthermore, this Court need not rule upon Respondent's Motion to Dismiss Claim for Attorney's Fees and Penalty and Supporting Brief² since this Court's ruling on Issue One makes Liberty's motion moot.

FINDINGS OF FACT³

¶ 6 Warburton testified at trial. This Court did not find her to be a credible witness.

¶ 7 Warburton has had two previous workers' compensation claims. In 1991, she filed a claim with Montana State Fund after she reported a work-related injury to her back and

¹ Final Pretrial Order at 2, Docket Item No. 37.

² Docket Item No. 15.

³ All findings herein are taken from trial testimony except where otherwise noted.

neck.⁴ Warburton complained of low- and mid-back pain, neck and shoulder pain, and headaches.⁵ Over the next several years, Warburton complained of, and sought treatment for, back, neck, and right-arm pain, numbness and tingling in her right arm and leg, and headaches.⁶ Warburton reported frequent, if not constant, headaches, and she was diagnosed with chronic migraine headaches with a myofascial component.⁷ During this time, she explained that she had headaches that would last for two or three days and it felt like her head was in a vise.⁸ In a November 6, 2000, letter, a doctor described her condition as causing “headaches that are incapacitating.”⁹ Warburton settled a dispute over her indemnity benefits in 1995,¹⁰ and settled a dispute over her medical benefits in 2001.¹¹

¶ 8 In 2006, Warburton filed a workers’ compensation claim in Louisiana for two work-related falls. At trial, Warburton testified that she did not recall if she suffered from severe headaches following these falls. However, on cross-examination, she admitted that she had reported “extreme” headaches in the litigation resulting from this claim. Warburton settled this claim in November 2009.¹²

¶ 9 On November 12, 2012, Warburton began working as a clerk and a store ambassador at the Herberger’s department store in Havre.¹³ She was a “short-hour” employee, meaning she could not work more than 1,000 hours per year. Although Warburton was a good employee, she missed several days of work because of migraine headaches,¹⁴ which, she told her employer, were “very bad.”

¶ 10 In the spring of 2013, Warburton and her husband had a judgment for over \$47,000 entered against them in a civil case which arose out of a business dispute.¹⁵ In November

⁴ Warburton Dep. 41:2-16; Ex. 12 at 1.

⁵ Ex. 27 at 2.

⁶ Ex. 27 at 4-8.

⁷ Ex. 27 at 4.

⁸ Ex. 10 at 6.

⁹ Ex. 27 at 8.

¹⁰ Ex. 11.

¹¹ Ex. 12.

¹² Ex. 13.

¹³ Ex. 5 at 4.

¹⁴ See Ex. 5 at 4.

¹⁵ Ex. 24 at 1.

2013, the Warburtons' judgment creditor served a Writ of Execution upon Herberger's in an attempt to garnish Warburton's wages.¹⁶

¶ 11 On November 22, 2013, Warburton and two co-workers, Ashley Jo Martin and Chelsea Dinsmore, were removing merchandise from a stock room when Warburton caught her foot on a rolling cart and fell backward. According to Warburton, she hit a wall and the floor, striking her head, right shoulder, and right side. Warburton testified that she struck her head so forcefully that the barrette she was wearing left a permanent indentation in her head. She also testified, "And I fell hard enough that I knocked my shoes off my feet, because I remember putting them back on."¹⁷ Warburton testified that she injured her head "where the barrette was," her neck, right shoulder, low back, and right hip.¹⁸ Warburton testified that her co-workers offered to help her up. Warburton stood up and finished her shift, getting off work around 4:00 p.m.

¶ 12 Martin and Dinsmore witnessed Warburton's fall.¹⁹ Martin testified at trial. This Court found her to be a credible witness. Martin saw Warburton start to fall out of the corner of her eye and then turned and saw Warburton fall. Martin recalled that Warburton landed "on her rear." Martin testified that Warburton landed several feet away from the wall and when asked if Warburton hit her head against the wall, Martin stated, "Not that I can recall." Martin testified that Warburton did not hit the electrical box on the wall because "it was too far away." Martin did not hear Warburton hit the wall, and testified that the wall is hollow and would make "quite a bit of a noise if you were to hit it."

¶ 13 After Warburton fell, Martin asked Warburton if she was all right and offered to help her up.²⁰ Warburton indicated that she was unhurt, and she stood up and laughed about the fall. Martin did not observe Warburton acting in a way that would suggest she was injured. Thus, Martin did not call a manager.

¶ 14 Warburton reported the fall to Andrea Bilger, a supervisor, that same day.²¹ Warburton stated:

I believe I told her I had fell and that I was embarrassed, because I am older than a lot of them that work at Herberger's, so it made me feel real

¹⁶ Ex. 24 at 2-4.

¹⁷ Warburton Dep. 56:8-10.

¹⁸ Warburton Dep. 57:19-23.

¹⁹ See Exs. 8 & 9, respectively.

²⁰ Ex. 8.

²¹ Warburton Dep. 20:8-11, 20:17-21.

embarrassed about falling, and basically that I thought I would get better in the next few days.²²

¶ 15 Warburton further stated, “I believe I told her where I had hurt myself, but I’m not sure.”²³ Warburton testified that she felt the beginning of a headache, and she had some pain in her hip, leg, and arm. Warburton did not seek medical treatment and explained she had already scheduled a doctor’s appointment for January 9, 2014, for an unrelated medical condition, so she decided to wait until then in order to save money.

¶ 16 Lois Pomeroy, Herberger’s Human Resources Development Counselor, asked the staff to show up for all their shifts through the Christmas season and Warburton did so. According to Warburton, it became harder for her to perform her job duties and she asked supervisors, including Bilger and Yvonne Camille “Cami” Hillis, if she could lay down on a couch in an employee lounge during her work shifts because of headaches.²⁴

¶ 17 Bilger testified at trial. This Court found her to be a credible witness. Bilger was the manager on duty on November 22, 2013. Bilger agreed that Warburton reported that she tripped and fell and sat down hard on the floor. Bilger recalled that Warburton laughed and stated that she did not hurt anything other than her pride. Warburton did not say that she hit her head or struck a wall with her body, nor that she felt dazed or dizzy. Although Herberger’s policy generally required completing an accident report, it was a judgment call whether to do so for any particular incident and Bilger felt it was unnecessary in this case since Warburton said she was uninjured and that Bilger did not need to fill out an accident report. Bilger worked with Warburton throughout the holiday shopping season, and Warburton did not report that she hurt herself in that fall, nor did she ask Bilger if she could lie down because of a headache. This Court finds Bilger’s testimony that Warburton reported that she was uninjured more credible than Warburton’s testimony that she told Bilger she had injured herself in the fall. This Court does not believe that, had Warburton reported an injury, Bilger would have violated company policy and failed to complete an accident report.

¶ 18 Hillis testified at trial. This Court found her to be a credible witness. Hillis has worked at Herberger’s for the past three years and has been the Human Resources Manager since November 2, 2014. Hillis frequently worked with Warburton. Despite Warburton’s claim that she was having difficulty working throughout the holiday shopping season due to the injuries she allegedly suffered in the fall, Hillis testified that Warburton never said anything about an injury. Moreover, when Hillis asked Warburton about

²² Warburton Dep. 20:24 – 21:3.

²³ Warburton Dep. 21:5-6.

²⁴ Warburton Dep. 65:11 – 66:9.

whether Warburton wanted more hours, Warburton said something to the effect that it was not in her best interest to do so because of her wage garnishment.

¶ 19 On January 9, 2014, Joseph Z. Nemes, MD, saw Warburton.²⁵ Warburton reported that in October or November 2013, she slipped and fell, hitting her right side.²⁶ She reported pain in her right neck, shoulder, and elbow.²⁷ Dr. Nemes noted that Warburton had tingling and numbness on her right side and occasional headaches.²⁸

¶ 20 Warburton testified that when she saw Dr. Nemes, she was suffering from “terrible” headaches which were severe enough to cause vomiting. Warburton further testified that Dr. Nemes took her off work, and she gave the off-work slip to a supervisor a day or two later.

¶ 21 Warburton never returned to work after her appointment with Dr. Nemes. Warburton called in sick on January 10, 12, 13, 14, and 16, 2014, indicating that she had the flu.²⁹

¶ 22 On January 21, 2014, Lois Cooper, PA-C, saw Warburton at Sweet Medical Center in Chinook for headache and neck pain.³⁰ Warburton testified that her headaches had worsened and they got progressively worse whenever she was standing up. Warburton testified that it felt like her head was in a vise that tightened throughout the day. Cooper took Warburton off work for one week.³¹ The work release form had a handwritten notation stating: “Remain off work for 1 week if not improved Return to clinic for f/u.”³²

¶ 23 Warburton gave Pomeroy the off-work slip from Cooper within a day or two of the appointment.

¶ 24 Pomeroy also testified at trial. This Court found her to be a credible witness. Pomeroy was the human resources manager at Herberger’s when Warburton worked there and until October 31, 2014, when Pomeroy retired. Pomeroy received the off-work slip from Cooper; however, Pomeroy interpreted the handwritten abbreviation “f/u” to mean “flu.” At the time, Pomeroy was unaware that Warburton claimed she could not

²⁵ Ex. 16 at 1.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ Ex. 5 at 3.

³⁰ Ex. 16 at 1.

³¹ Ex. 16 at 4.

³² Ex. 16 at 4.

work because of injuries allegedly sustained in the November 22, 2013, fall. Although Warburton argued that Pomeroy's failure to submit this release to Liberty is evidence that Herberger's was attempting to thwart her claim, this Court finds Pomeroy's interpretation of the note understandable given the circumstances.

¶ 25 On January 28, 2014, Warburton called Herberger's and informed Pomeroy that she intended to get an MRI due to a work-related injury. This was how Pomeroy first learned that Warburton was claiming she was injured as a result of the November 22, 2013, fall. Pomeroy advised Warburton that she should not assume that Herberger's workers' compensation insurance would pay for the MRI unless Warburton had an accepted claim. Warburton then asked to file a claim.

¶ 26 On January 29, 2014, Pomeroy prepared a First Report of Injury or Illness (FROI) in which she noted that on November 22, 2013, Warburton "was removing items [from] the holding rack in the back[] stock room, backed up and ran her heel into a rolling rack."³³ Pomeroy stated that the part of body affected was "unknown – insufficient info."³⁴ After she prepared the FROI, she attempted to contact Warburton by telephone on several occasions and left voice mail messages asking Warburton if she planned to return to work. However, Warburton never returned her calls.

¶ 27 If a worker suffers an industrial accident, Herberger's policy is to obtain statements from anyone who witnessed the accident. Thus, Pomeroy asked Martin and Dinsmore for statements. She asked them to write down "what, where, when, why, and how" independently of each other.

¶ 28 Martin prepared a written witness statement about Warburton's fall at Pomeroy's request. Martin wrote:

Linda [Warburton], Chelsea [Dinsmore], and myself were putting a hold away for a customer in the hard home back room. There was an empty Z-bar in the vicinity of the hold area. Linda put something [on] one of the shelves. She took a step back and tripped. The Z-bar moved with her as she fell on her posterior. I offered her a hand as she giggled when I helped her up. We asked her if she was okay; she insisted she was fine as she dusted herself off.³⁵

¶ 29 On February 3, 2014, Dinsmore wrote her witness statement:

³³ Ex. 1.

³⁴ *Id.*

³⁵ Ex. 8 at 1.

Linda [Warburton], Jo [Martin], and I were putting holds in the backroom when Linda stepped back into a Z-bar and fell backwards. I set the things I was carrying aside to see if she was okay. We asked if she was okay and after sitting up she thought she was okay and we all went back to putting holds away.³⁶

¶ 30 Warburton also wrote a statement at Pomeroy's request. Warburton wrote that she stepped backward and caught her heel in a rolling rack "& it moved & down I went[.] I hit my head against the wall & part of the right side of my body[.] . . . I hit the floor. . . . [Martin and Dinsmore] helped me up & we went back to work."³⁷

¶ 31 This Court finds Martin credible and does not find Warburton's description of her fall to be credible. This Court does not believe that Warburton hit her head when she fell or that her fall was as severe as she claims. If Warburton had hit her head so hard that her barrette left a permanent indentation and fallen so hard that her shoes were knocked off, this Court does not believe that she would have simply got up, laughed, and dusted herself off. There is no reason to doubt Martin's testimony, and this Court does not think Martin and Dinsmore would have independently described a minor trip and fall if Warburton had had as dramatic a fall as she claims. Warburton's counsel contends that Martin's testimony that she did not recall Warburton hitting the wall means that Martin does not remember whether Warburton hit her head, but this Court understood Martin's testimony to be that she did not recall that the fall occurred in the way Warburton contends that it occurred. Martin unambiguously testified that she saw Warburton fall and that Warburton did not hit her head.

¶ 32 On February 12, 2014, Amy C. Fredrickson, Claims Specialist II for Liberty, took Warburton's recorded statement.³⁸ Warburton made several misrepresentations during this statement. Fredrickson asked Warburton if she had any history of headaches and Warburton responded, "No, not that I remember."³⁹ Warburton then denied that she had ever sought treatment for headaches in the past.⁴⁰ Warburton also denied any history of medical treatment for migraine headaches and denied that she ever called off work prior to her industrial accident due to a migraine headache.⁴¹ In response to Fredrickson's question if she had ever had a previous workers' compensation claim, Warburton

³⁶ Ex. 9.

³⁷ Ex. 6.

³⁸ Ex. 14.

³⁹ Ex. 14 at 10.

⁴⁰ Ex. 14 at 9.

⁴¹ Ex. 14 at 13.

responded that she had had a claim approximately 30 years earlier and denied having any others since then.⁴²

¶ 33 This Court finds that the only rational explanation for Warburton's failure to disclose her prior history of headaches and her 2006 workers' compensation claim in answer to specific questions from the claims examiner is that she attempted to conceal this information from Liberty. This Court does not believe that Warburton "forgot" about the years of incapacitating headaches she suffered after her 1991 and 2006 claims — headaches so severe that at the time, she maintained they impeded her ability to return to work. Warburton's testimony cannot be attributed to mere forgetfulness, but rather points to a lack of candor which is another reason this Court does not believe her testimony regarding her industrial accident.

¶ 34 On February 12, 2014, Liberty denied Warburton's claim.⁴³

¶ 35 On April 2, 2014, Dr. Nemes took Warburton off work for one week.⁴⁴ Warburton testified that she gave the off-work slip to Pomeroy within a few days of her appointment. Warburton further testified that she gave Herberger's every off-work slip she received shortly after she received it.

¶ 36 However, Pomeroy testified that Warburton did not provide this off-work slip to Herberger's. Pomeroy testified that if someone brought an off-work slip to the store, a manager would have accepted it and placed it in Pomeroy's mailbox, but Pomeroy never received this or any subsequent off-work slips for Warburton.

¶ 37 On April 2, 2014, Warburton underwent an x-ray of her cervical spine.⁴⁵ Steven E. Liston, MD, FACR, found severe degenerative disk disease at C3-4.⁴⁶

¶ 38 On April 10, 2014, Dr. Nemes issued a work release stating that Warburton could return to work on April 17, 2014.⁴⁷ Warburton testified that after Dr. Nemes released her to return to work, she gave the note to Pomeroy, but Pomeroy never offered her the

⁴² Ex. 14 at 10.

⁴³ Ex. 2.

⁴⁴ Ex. 16 at 8.

⁴⁵ Ex. 16 at 9.

⁴⁶ *Id.*

⁴⁷ Ex. 16 at 10.

opportunity to return to work.⁴⁸ Warburton testified, “I guess I assumed that she would put me on the schedule, and she never did.”⁴⁹

¶ 39 After April 17, 2014, Pomeroy never spoke with Warburton about returning to work because she never received any work releases. Pomeroy was certain that none of Warburton’s off-work slips except Cooper’s were submitted to Herberger’s during Pomeroy’s tenure. Pomeroy testified that Herberger’s typically schedules an employee for shifts after it receives a note releasing the worker to return to work. Pomeroy agreed that Warburton was a good employee and she had no reason to keep Warburton off the schedule if she was released to return to work.

¶ 40 On April 21, 2014, Patrick T. Armstrong, PA-C, saw Warburton at the Liberty Medical Center in Chester.⁵⁰ Armstrong had previously treated Warburton for other medical conditions, most recently on November 2, 2011.⁵¹ Warburton reported that she fell backwards at work and hit her neck and head in November 2013.⁵² Warburton complained that she continued to have headaches which lasted half a day and were 8 out of 10 on the pain scale.⁵³ Warburton reported that she had not improved since she fell.⁵⁴ Armstrong released Warburton to work with some restrictions.⁵⁵

¶ 41 Warburton testified that she also gave Armstrong’s April 21, 2014, return-to-work slip to Pomeroy, but Pomeroy did not offer her a modified position and did not put her on the work schedule. Pomeroy testified that Warburton did not submit the return-to-work slip. Pomeroy also testified that Warburton could have performed her job duties while staying within these restrictions.

¶ 42 This Court finds that Warburton did not submit her work releases to Herberger’s, and rejects her allegation that Herberger’s or Liberty destroyed them.⁵⁶ Warburton’s lack of communication with her employer, including her failure to return phone calls, further

⁴⁸ Warburton Dep. 52:15-25.

⁴⁹ Warburton Dep. 53:13-15.

⁵⁰ Ex. 18 at 1-2.

⁵¹ Ex. 25 at 11-13.

⁵² Ex. 18 at 1.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Ex. 18 at 3.

⁵⁶ While this Court did not reach the issue of whether Warburton is entitled to temporary total disability benefits and the factual questions surrounding Warburton’s work releases and her employer’s ability to accommodate her restrictions goes largely to this issue, these questions of fact also reflect on Warburton’s credibility. Therefore, this Court has made findings concerning whether Warburton provided her work releases to her employer and whether her employer could have accommodated her work restrictions.

indicates that Warburton deliberately avoided Herberger's attempts to offer her a modified job position. Once Warburton ceased reporting to work, there is no credible evidence that she ever intended to return to work at Herberger's.

¶ 43 On May 23, 2014, Hugo M. Gibson, DC, saw Warburton for a new patient examination.⁵⁷ Her chief complaints consisted of pain and weakness in her low back, neck, right hip, knee, and foot, and in both shoulders.⁵⁸ Warburton also complained of severe headaches.⁵⁹

¶ 44 Dr. Gibson's medical history notes show that Warburton greatly exaggerated what happened when she fell, even when compared to Warburton's testimony and to what she told the claims examiner in her recorded statements. In a letter Dr. Gibson wrote to Warburton's counsel, he stated that Warburton reported that she suffered lacerations on her head and right shoulder in her fall and that she immediately developed pain in her head and neck.⁶⁰ Warburton also "recalled that she felt dazed, dizzy, and weak" after the fall and that she did not know if she had lost consciousness.⁶¹ Dr. Gibson understood from Warburton that she went to the Sweet Medical Center a few days after her fall with pain in her head, neck, low back, and right shoulder.⁶² Dr. Gibson also noted that Warburton reported that she had no history of the same or similar complaints.⁶³

¶ 45 On May 28, 2014, Warburton underwent a radiographic study of her cervical spine.⁶⁴ Dr. Gibson testified that in comparing a 2008 x-ray report with the 2014 films, he concluded that something new had happened to Warburton between 2008 and 2014. Dr. Gibson testified that in particular, the new x-rays revealed a kyphotic curve which is typically seen with the mechanism of injury Warburton described. Dr. Gibson also made a new finding of a step defect at C3.

¶ 46 Dr. Gibson testified that based upon his x-ray, his physical exam, his understanding on how Warburton fell, and the symptoms she reported to him, it was his opinion that Warburton suffered a whiplash injury in the fall. Dr. Gibson found the x-ray findings consistent with the symptoms a person could experience from a fall like

⁵⁷ Ex. 19 at 1-2.

⁵⁸ Ex. 19 at 1.

⁵⁹ *Id.*

⁶⁰ Ex. 19 at 11.

⁶¹ *Id.*

⁶² *Id.*

⁶³ Ex. 19 at 12.

⁶⁴ Ex. 19 at 3.

Warburton described and he believes Warburton's industrial accident caused her current condition.

¶ 47 While this Court does not doubt the sincerity of Dr. Gibson's opinion, this Court finds that Warburton misled Dr. Gibson about the severity of her fall and also misrepresented her medical history. At trial, Warburton confirmed that she suffered no lacerations or bleeding as a result of her industrial accident. Warburton testified that Dr. Gibson's notes are mistaken in that regard, and he also incorrectly noted that she sought medical treatment a few days after the industrial accident when she did not seek treatment for several weeks. There is no evidence supporting the statement that Warburton felt "dazed, dizzy, and weak" immediately after the fall or any credible evidence supporting the statement that she immediately felt pain in her head and neck. Warburton further testified that she has not had an x-ray taken of her head, as reported by Dr. Gibson. This Court has previously been unpersuaded by a physician's opinion concerning causation which was based on an inaccurate history provided by a claimant.⁶⁵ Since Dr. Gibson reached his opinion concerning causation in part on Warburton's description of her industrial accident and on her report that she had not previously had similar symptoms, this Court assigns no weight to the conclusions he reached.

¶ 48 On July 3, 2014, Pomeroy wrote to Warburton and stated that the company's policy was to terminate "short-hour associates" who had not worked in a 60-day period, and that Warburton had not worked since February 2014.⁶⁶ Pomeroy stated, "I have made attempts to contact you concerning your employment" after Liberty denied Warburton's claim.⁶⁷ She further stated that if Warburton did not contact Pomeroy by July 7, 2014, Pomeroy would process Warburton's "separation paperwork" effective July 8, 2014.⁶⁸

¶ 49 Pomeroy wrote the July 3, 2014, letter at the direction of Herberger's corporate human resources manager. Pomeroy sent the letter via certified mail, and it was returned to the store. Pomeroy attempted to contact Warburton via telephone after she sent the letter, but she never reached Warburton.

¶ 50 Pomeroy never processed Warburton's separation paperwork on the advice of Herberger's corporate office. As of Pomeroy's retirement on October 31, 2014, Herberger's still considered Warburton an "active employee."

⁶⁵ *Christensen v. Rosauer's Supermarkets, Inc.*, 2003 MTWCC 62, ¶ 26.

⁶⁶ Ex. 5 at 8.

⁶⁷ *Id.*

⁶⁸ *Id.*

¶ 51 In December 2014, Hillis received a report which indicated that Warburton had not worked any shifts in the last 30 days. Hillis did not know about Warburton's industrial accident until she inquired about the report. Pomeroy informed her that Warburton was off work because of a potential workers' compensation issue. Typically, if Hillis received a report that an employee had not worked any shifts in 30 days, she would contact the employee to determine if they could work. However, she was told she could not contact Warburton because the matter was "[in] mediation."

¶ 52 On March 6, 2015, John C. Schumpert, MD, MPH, FACOEM, issued an independent medical evaluation (IME) report concerning Warburton's condition.⁶⁹ As part of the IME, Dr. Schumpert interviewed Warburton, conducted a physical examination, and reviewed medical records dating back to January 11, 1991.⁷⁰ Dr. Schumpert assessed Warburton with a history of several conditions, including migraine headaches, muscle tension headaches, chronic myofascial pain in the cervical, thoracic, and lumbar regions, right ulnar neuropathy in the elbow, C3-4 disk degeneration, and left shoulder acromioclavicular joint degeneration.⁷¹ Dr. Schumpert opined that Warburton had a well-documented history of right-sided pain complaints similar to her present complaints.⁷² He found that none of the conditions were claim-related.⁷³ Dr. Schumpert stated that without a cervical MRI, he could not determine whether the radiographic finding of a disk space collapse was a natural progression of Warburton's pre-existing condition, a significant aggravation of a pre-existing condition, or a new injury.⁷⁴

¶ 53 On April 8, 2015, Courtney Maas, Risk Claims Manager for The Bon-Ton Stores, Inc., wrote to Warburton and stated that the company had recently received Armstrong's April 21, 2014, Medical Status Form which provided Warburton with certain work restrictions.⁷⁵ Maas stated that the company could offer Warburton a position as a sales associate, beginning immediately, which fit within those restrictions.⁷⁶ Maas also stated, "Further, had you provided us a copy of the Medical Status Form, we could have brought you back to work as of 4/21/2014 and continued to provide you work consistent with the restrictions and your typical schedule."⁷⁷ Maas asked Warburton to call another company

⁶⁹ Ex. 27.

⁷⁰ Ex. 27 at 1.

⁷¹ Ex. 27 at 17-18.

⁷² Ex. 27 at 20-21.

⁷³ Ex. 27 at 17-18.

⁷⁴ Ex. 27 at 22.

⁷⁵ Ex. 29. Shortly before writing this letter, Maas contacted Hillis and confirmed that Herberger's would have a position available for Warburton and could accommodate a light-duty work restriction.

⁷⁶ Ex. 29.

⁷⁷ *Id.*

representative to discuss the job offer and to be placed on the work schedule.⁷⁸ She further stated, “If we do not hear from you by April 22, 2015, we will assume you are not interested in the position and that you have voluntarily resigned.”⁷⁹

¶ 54 Hillis testified that Warburton never contacted Herberger’s about returning to work after Maas wrote the letter.

¶ 55 After receiving Maas’ letter, Warburton made an appointment to see Armstrong.

¶ 56 On April 14, 2015, Warburton underwent a cervical MRI.⁸⁰ The radiologist found a reversal of cervical lordosis centered at C3-4.⁸¹ Additional findings included disk space height loss at C3-4 and a minimal disk bulge at C4-5.⁸²

¶ 57 On April 16, 2015, Armstrong took Warburton off work.⁸³ Armstrong testified that he noted changes in Warburton’s condition which caused him to take her off work.⁸⁴ In particular, Armstrong reviewed the results of Warburton’s MRI and found severe spinal stenosis at C3-4.⁸⁵ In his medical report, Armstrong noted that Warburton had been suffering a worsening headache for the past week.⁸⁶ He stated that her symptoms were constant and included blurred vision, dizziness, fever, nausea, phonophobia, photophobia, neck stiffness, and vomiting.⁸⁷ He categorized the problem as “severe.”⁸⁸

¶ 58 On April 20, 2015, Dr. Schumpert created an addendum to his IME report to incorporate Warburton’s cervical MRI results into his conclusions.⁸⁹ Dr. Schumpert opined that the MRI revealed new findings which were likely a combination of aging and the natural progression of Warburton’s pre-existing condition, and unrelated to the November 22, 2013, industrial accident.⁹⁰ Dr. Schumpert opined that Warburton did not

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Ex. 28 at 6-7.

⁸¹ Ex. 28 at 6.

⁸² *Id.*

⁸³ Ex. 31 at 1.

⁸⁴ Armstrong Dep. 26:24 – 29:1.

⁸⁵ Armstrong Dep. 27:6-13.

⁸⁶ Ex. 31 at 2.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Ex. 28.

⁹⁰ Ex. 28 at 3.

suffer either a permanent aggravation of a pre-existing condition or a new injury on November 22, 2013.⁹¹

¶ 59 At trial, Dr. Schumpert testified that he did not see a change in the type or severity of Warburton's symptoms since 1991. Dr. Schumpert did not attribute any changes in Warburton's objective medical findings to an aggravation or acute injury.

¶ 60 Armstrong testified that he believes Warburton's November 22, 2013, industrial accident caused the problems she complained of at her April 21, 2014, medical appointment.⁹² He based this opinion on his belief that she was honest with him about her complaints, and because on examination, she reported neck pain during palpation and crepitation on neck extension.⁹³ He added that Warburton had vertebral point tenderness at C4, C5, C6, and C7, which had not been present previously.⁹⁴

¶ 61 This Court, however, finds insufficient foundation to give Armstrong's opinion any weight. While Armstrong was familiar with Warburton's medical history, he based his opinion, in part, on Warburton's statement that she fell and hit her neck and head against the wall.⁹⁵ As with Dr. Gibson, this Court does not doubt the sincerity of Armstrong's opinion, but assigns no weight to it because the history provided to him was false.⁹⁶

¶ 62 Warburton testified that she remains off work under Armstrong's advisement. At trial, Warburton testified that she continues to suffer from several problems as a result of the industrial accident. She indicated that she could not stand for more than an hour before having to sit or lie down due to low-back and neck pain. She further testified that she has an almost constant headache which makes it uncomfortable to sit for any length of time. Warburton has not applied to work anywhere since leaving Herberger's.⁹⁷

⁹¹ Ex. 28 at 4.

⁹² Armstrong Dep. 22:2-5, 22:16-20, 23:24-25.

⁹³ Armstrong Dep. 24:1-8.

⁹⁴ Armstrong Dep. 24:8-12.

⁹⁵ Armstrong Dep. 21:16-19.

⁹⁶ See *Christensen*, ¶ 26.

⁹⁷ Warburton Dep. 55:19-21.

CONCLUSIONS OF LAW

¶ 63 This case is governed by the 2013 version of the Workers' Compensation Act since that was the law in effect at the time of Warburton's industrial accident.⁹⁸

¶ 64 An injured worker bears the burden of proving by a preponderance of the evidence that she is entitled to the benefits she seeks.⁹⁹

Issue One: Whether Warburton has satisfied her burden of proving she sustained an industrial injury.

¶ 65 Although the parties agreed in the Final Pretrial Order that an issue exists as to whether Warburton has proven she sustained an industrial injury,¹⁰⁰ at trial Warburton's counsel asserted that Liberty agrees that Warburton sustained an industrial injury on November 22, 2013.¹⁰¹ This Court found nothing in the record to support this assertion. In fact, it appears that while the parties agree that Warburton suffered an industrial accident on November 22, 2013, the question of whether she sustained an injury as a result of that accident is the determinative issue in this case.

¶ 66 Section 39-71-119, MCA, states in pertinent part:

(1) "Injury" or "injured" means:

(a) internal or external physical harm to the body that is established by objective medical findings;

...

(2) An injury is caused by an accident. An accident is:

(a) an unexpected traumatic incident or unusual strain;

(b) identifiable by time and place of occurrence;

(c) identifiable by member or part of the body affected; and

(d) caused by a specific event on a single day or during a single work shift.

¶ 67 Warburton suffered an occurrence which satisfies the definition of "accident" found in § 39-71-119(2), MCA. On November 22, 2013, she fell backwards while within the course and scope of her employment. Warburton and the witnesses agree that she

⁹⁸ *Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶ 32, 365 Mont. 405, 282 P.3d 687(citation omitted); § 1-2-201, MCA.

⁹⁹ *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).

¹⁰⁰ See Final Pretrial Order at 2.

¹⁰¹ Warburton's Opening Statement.

landed on the floor. While Warburton maintains that she struck her head and other parts of her body against the wall or another hard object in the course of the fall, Martin, who witnessed the accident, testified at trial that Warburton landed sitting down several feet away from the wall and that she did not strike anything on the way down.

¶ 68 The medical evidence in this case demonstrates that Warburton has problems with her head, neck, and shoulders. However, Warburton has not established a causal connection between these problems and her November 22, 2013, industrial accident. “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.”¹⁰² Warburton has a long history of similar complaints and this Court did not find her description of the fall credible. Although Warburton offers the opinions of Armstrong and Dr. Gibson, this Court gave neither any weight in light of the inaccurate medical histories and understanding of the industrial accident upon which they were based. Thus, Warburton has failed to satisfy her burden of proving that she suffered an injury.¹⁰³

JUDGMENT

¶ 69 Petitioner has not satisfied her burden of proving that she sustained an industrial injury.

¶ 70 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 7th day of January, 2016.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: Thomas J. Murphy
Kelly M. Wills

Submitted: June 2, 2015

¹⁰² *Grenz v. Fire & Cas. of Conn.*, 250 Mont. 373, 380, 820 P.2d 742, 746 (1991) (citation omitted).

¹⁰³ See *Ford*, ¶ 49 (holding that claimants are required to establish injury and causation by medical evidence).