

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2011 MTWCC 13

WCC No. 2006-1544

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EDNA BANCO

Petitioner

vs.

LIBERTY NORTHWEST INS. CORP.

Respondent/Insurer.

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ORDER AND JUDGMENT ON STIPULATED RECORD  
**APPEALED TO MONTANA SUPREME COURT - 06/20/11**  
**AFFIRMED – 01/10/12**

**Summary:** Petitioner worked part-time as a food server for Respondent's insured and concurrently worked full-time as a cook for an employer insured under the federal workers' compensation system. Petitioner left her employment at Respondent's insured while continuing to work at her other job. Petitioner filed a workers' compensation claim, alleging that she developed an occupational disease in her right shoulder. Respondent denied liability.

**Held:** Under the "last injurious exposure" rule as set forth in *In re Mitchell*, the employer who is liable for an occupational disease is the employer at which the claimant was last exposed to the working conditions of the same type and kind which gave rise to the occupational disease. In this case, Petitioner continued to be exposed to those working conditions at her other employment after she quit her job at Respondent's insured. Therefore, Respondent is not liable for Petitioner's occupational disease.

¶ 1 Petitioner Edna Banco and Respondent Liberty Northwest Ins. Corp. (Liberty) have submitted this case for judgment on a stipulated record.<sup>1</sup> On May 17, 2011, I ruled during a conference call with the parties that, in addition to the exhibits previously submitted by the parties, I would consider Docket Item Nos. 9, 13, 14, 17, 20, 25, 29, 48, 49, 51, 52, 54, 57, and 58 in rendering a decision. Liberty objects to the Court's consideration of Docket Item No. 22, on the ground that it is irrelevant. I noted Liberty's

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<sup>1</sup> Minute Book Hearing No. 4258, Docket Item No. 61.

relevancy objection and stated that I would rule upon the relevancy of Docket Item No. 22 at the time of rendering a decision in this matter, and that if my decision does not rely upon Docket Item No. 22, Liberty may consider its objection sustained.<sup>2</sup>

¶ 2 The issue before the Court is whether Banco contracted an occupational disease from her employment with Liberty's insured.<sup>3</sup>

### FACTS

¶ 3 Until April 29 or 30, 2005, Banco worked both at 4B's Restaurant (4B's), Liberty's insured, and at the Child Development Center on Malmstrom Air Force Base (CDC), which is insured under the federal workers' compensation system.<sup>4</sup> On June 13, 2005, Banco filed a first report of injury, naming 4B's as her employer, in which she contended that she suffered a shoulder injury on June 10, 2005. In the report, Banco noted that she had last worked at 4B's on April 30, 2005, and that she quit her job on that date.<sup>5</sup> Liberty denied Banco's claim against 4B's.<sup>6</sup> Banco continued to work at the CDC after she left 4B's.<sup>7</sup>

¶ 4 On June 20, 2005, Liberty's Field Investigator Jack Randolph interviewed Banco.<sup>8</sup> Banco told Randolph that she worked full-time as a cook at the CDC, and that she had held this position for 28 years. Banco told Randolph that she had worked part-time at 4B's until April 29, 2005, and that she quit 4B's because of her shoulder.<sup>9</sup> Banco explained that she continued to work at CDC after she quit 4B's because she thought it would be easier on her shoulder if she only worked one job.<sup>10</sup>

¶ 5 Banco estimated that at the CDC, she prepared approximately 150 to 170 meals for each of three meals per day. She stated that her job duties included lifting heavy pots and pans, doing dishes, and putting away "freight." She further stated that until

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<sup>2</sup> Minute Book Hearing No. 4276, Docket Item No. 67.

<sup>3</sup> Order Setting Briefing Schedule, Docket Item No. 47.

<sup>4</sup> Banco Dep. 17:4-14; Ex. K1; Ex. K2.

<sup>5</sup> Ex. K2.

<sup>6</sup> Ex. N10.

<sup>7</sup> Schumpert Dep., Ex. B at 5.

<sup>8</sup> Banco Dep., Ex. 1.

<sup>9</sup> Banco Dep., Ex. 1 at 2-3.

<sup>10</sup> Banco Dep., Ex. 1 at 25.

2004, she did all the dishes, and this repetitive task required approximately one and one-half hours of continuous work each day.<sup>11</sup>

¶ 6 On a typical day at the CDC, Banco arrived at 6:30 a.m. and cooked breakfast, helped clean up the dishes, prepared lunch, and helped clean up after lunch. Banco spent four or five hours of her eight-hour shift cooking. Banco stated that flipping eggs, hamburgers, and pancakes hurt her arm, as would stirring large pots. Banco estimated that the pots she used held approximately 20 or 25 pounds of hamburger or chicken.<sup>12</sup> Banco also prepared an afternoon snack and she typically cut up fresh fruit or sliced meat by hand for the snack. Her shift ended at 3:00 p.m. each day.<sup>13</sup>

¶ 7 Banco had concurrently worked at 4B's in the evenings. Banco could not recall when she first began working at 4B's, but estimated that she worked for them for about 14 or 18 years, quit for a year, and then worked there again for 7 or 8 years before quitting on April 29, 2005. Banco typically worked at 4B's from 5:00 p.m. until 8:00 or 9:00 p.m. three nights per week, and on Saturdays and Sundays from 7:00 a.m. until 3:00 p.m. Her job duties included waiting tables, carrying food trays, and carrying bus tubs. She also carried buckets of ice at least twice a day. Banco estimated that she carried 20 to 30 bus tubs each shift. Banco stated that on weekend shifts, she waited on 125 to 150 customers per shift.<sup>14</sup>

¶ 8 Banco stated that her shoulder condition developed over time and no particular incident spurred it. In approximately December 2004, she experienced some minor discomfort in her shoulder. In February 2005, she noticed that her shoulder hurt when she lifted her arm. She then sought medical care.<sup>15</sup>

¶ 9 In March or April of 2005, Banco informed her manager at 4B's that she was having difficulty with her shoulder and that she was attending physical therapy. Her manager arranged Banco's job duties so that she could avoid repetitive lifting. At the time, Banco did not tell her manager that the injury might be work-related because Banco was unsure what caused her shoulder problems. In May 2005, Banco learned from Keith D. Bortnem, D.O., that her condition might be work-related. She informed

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<sup>11</sup> Banco Dep., Ex. 1 at 4-5.

<sup>12</sup> Banco Dep., Ex. 1 at 5-7.

<sup>13</sup> Banco Dep., Ex. 1 at 8-9.

<sup>14</sup> Banco Dep., Ex. 1 at 9-13.

<sup>15</sup> Banco Dep., Ex. 1 at 15-16.

her former manager at 4B's that she intended to file a workers' compensation claim. Her former manager helped her fill out the claim form.<sup>16</sup>

¶ 10 When she gave her statement to Randolph, Banco contended that her job duties at CDC were "definitely" more strenuous than 4B's, and that the CDC job was probably more strenuous on her shoulder, hands, and arms.<sup>17</sup> Banco further stated that the work at the CDC was more constant than her job duties at 4B's, and that she believes her work at the CDC was more detrimental to her shoulder than her 4B's job, although both were physical jobs which required her to use her right arm.<sup>18</sup> During her deposition, Banco reviewed the transcript of her statement and stated that she believes that both jobs required an equal amount of heavy lifting.<sup>19</sup>

¶ 11 Banco filled out a Comprehensive Patient History for Dr. Bortnem on May 23, 2005. She noted that she had suffered shoulder pain for approximately three months, and that she believed "lifting" may have contributed to the problem.<sup>20</sup> Dr. Bortnem opined that Banco suffers from a degenerative tendinosis of her shoulder that is multifactorial in origin.<sup>21</sup> Dr. Bortnem testified that activities which involve repetitive, overhead, and chronic uses of the arms away from the body predispose people to developing this condition.<sup>22</sup>

¶ 12 Dr. Bortnem stated that Banco reported that she was employed as a dishwasher at 4B's, and that she lifted heavy pots, but that she did not indicate any overhead use of her arms.<sup>23</sup> Dr. Bortnem further stated that he had no knowledge of Banco's work at the CDC.<sup>24</sup>

¶ 13 Dr. Bortnem reviewed other medical reports regarding Banco's condition. He could not comment on Dr. Schumpert's conclusions because he had no knowledge of

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<sup>16</sup> Banco Dep., Ex. 1 at 22-24.

<sup>17</sup> Banco Dep., Ex. 1 at 26.

<sup>18</sup> Banco Dep., Ex. 1 at 26-27.

<sup>19</sup> Banco Dep. 11:4-10; 11:21-22.

<sup>20</sup> Bortnem Dep., Ex. 1.

<sup>21</sup> Bortnem Dep. 6:16-22.

<sup>22</sup> Bortnem Dep. 9:3-7.

<sup>23</sup> Bortnem Dep. 9:8-22.

<sup>24</sup> Bortnem Dep. 10:13-17.

Banco's work at the CDC.<sup>25</sup> He disagreed with Aimee V. Hachigian, M.D., who concluded that Banco's shoulder condition could be attributed 50% to each of Banco's two jobs.<sup>26</sup> He explained:

[E]verything about her shoulder that I'm aware of is a degenerative process that has a multifactorial cause. It's not just because you work. It has to do with aging, lifestyle, activities at home, brushing her hair, doing dishes in her home, things she does at work. And I don't feel that all of her shoulder[']s problems were 50 percent due to working as a dishwasher, and 50 percent due to working at a child development center. I think that's unfair. I would say that maybe 50 percent of her problem is work-related, and 50 percent of her problem is from all of the other assorted.<sup>27</sup>

¶ 14 Dr. Bortnem testified that while "some complicated way" might allow apportionment of Banco's shoulder condition between her two employments, he could not do so. He noted that he had not been provided with any job analyses.<sup>28</sup> When provided with a description of Banco's duties at each job, Dr. Bortnem responded that while he believed her job duties contributed to her shoulder condition, he could not "put a number on that." He noted that he has no knowledge as to Banco's non-work activities, and he further opined that the number of hours Banco worked weekly at 4B's was "not very significant."<sup>29</sup>

¶ 15 On October 28, 2005, John C. Schumpert, M.D., M.P.H., conducted an independent medical examination to diagnose Banco's shoulder condition and to determine whether she suffers from an occupational disease. Dr. Schumpert took a history from Banco in which she described her job duties at 4B's and the CDC and her typical work hours. He reviewed and summarized Banco's available medical records and examined Banco's right shoulder. Dr. Schumpert assessed Banco as suffering from, "[r]ight shoulder impingement syndrome, work related." He opined that the impingement was due to her work activities at the CDC. He further opined that Banco's

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<sup>25</sup> Bortnem Dep. 10:13-17.

<sup>26</sup> Bortnem Dep. 10:20-24.

<sup>27</sup> Bortnem Dep. 11:4-15.

<sup>28</sup> Bortnem Dep. 12:2-14.

<sup>29</sup> Bortnem Dep. 14:6-12.

tenure at the CDC was considerably longer than her employment at 4B's, and that the CDC job duties were more demanding on her arms than the 4B's job duties were.<sup>30</sup>

¶ 16 Dr. Schumpert testified that food handlers and food preparation workers who prepare large, repetitive meals are prone to developing tendinitis.<sup>31</sup> Dr. Schumpert explained that he believed Banco's shoulder condition was more related to her work at the CDC than the work she performed at 4B's because of: the duration and nature of each employment; the specific activity of lifting 5-gallon jugs of water which she did as part of her job duties for several months at the CDC; the volume of work she performed at the CDC; the number of hours per week she spent at each employment; and the duration, force, and repetitive nature of her job duties.<sup>32</sup> Dr. Schumpert added that Banco is right-handed, and in his experience, food servers tend to injure their non-dominant arm because of how they typically carry trays of food. Taking all these factors into consideration, he concluded it was more probable than not that Banco's work at the CDC was the employment which contributed more to her shoulder condition.<sup>33</sup>

¶ 17 On July 7, 2006, Aimee V. Hachigian, M.D., P.C., wrote a letter to Anni Druce at the Workers' Compensation Claims Assistance Bureau in the Department of Labor and Industry. Dr. Hachigian stated that she had examined Banco's right shoulder on June 20, 2006, taken a medical and occupational history from Banco, and reviewed additional medical records. Based on Banco's description of her job duties, Dr. Hachigian opined:

[W]hile I do note that Dr. Schumpert opined that it was the lifting of the water bottles [at the CDC] that triggered her right shoulder complaints, I would respectfully submit that her shoulder complaints actually predated [the time in which her CDC job required her to lift water bottles] and that a case that [sic] equally be made for the requirement of repetitive overhead motions required at the 4B's Restaurant. Therefore I would suggest that a 50/50 apportionment be established here between the work required at the 4B's Restaurant and the child development center, as I strongly think that it will be impossible to sort out an absolute contribution between the two jobs.<sup>34</sup>

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<sup>30</sup> Bortnem Dep., Ex. 3 at 4-5.

<sup>31</sup> Schumpert Dep. 9:11 – 10:8.

<sup>32</sup> Schumpert Dep. 29:14 – 31:19.

<sup>33</sup> Schumpert Dep. 32:18 – 33:20.

<sup>34</sup> Bortnem Dep., Ex. 4 at 5.

## ANALYSIS AND DECISION

¶ 18 An employee's last day of work is the point in time from which an occupational disease claim must flow.<sup>35</sup> Banco's last day of work with 4B's was on April 29 or 30, 2005. Therefore the 2003 statutes apply.

¶ 19 An occupational disease is harm, damage, or death arising out of or contracted in the course and scope of employment and caused by events occurring on more than a single day or work shift.<sup>36</sup> Under § 39-72-303(1), MCA, where compensation is payable for an occupational disease, the only employer liable is the employer in whose employment the employee was last injuriously exposed to the hazard of the disease.

¶ 20 In *In re Mitchell*, the Montana Supreme Court considered which legal standard applies in determining liability under the last injurious exposure doctrine when a worker has been exposed to the hazards which led to his or her occupational disease at more than one employment.<sup>37</sup> The court concluded that the "potentially causal" standard is the correct standard to apply under Montana law. The court explained:

Under this approach, the claimant who has sustained an OD and was arguably exposed to the hazard of an OD among two or more employers is not required to prove the degree to which working conditions with each given employer have actually caused the OD in order to attribute initial liability. Instead, the claimant must present objective medical evidence demonstrating that he has an OD and that the working conditions during the employment at which the last injurious exposure was alleged to occur, were the type and kind of conditions which could have caused the OD.<sup>38</sup>

The court concluded:

[F]or purposes of the initial liability determination of an OD where two or more employers are potentially liable, the "last injurious exposure" to the hazard of the OD occurs during the last employment at which the claimant

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<sup>35</sup> *Fleming v. Int'l Paper Co.*, 2008 MT 327, ¶ 27, 346 Mont. 141, 194 P.3d 77.

<sup>36</sup> § 39-72-102(10), MCA.

<sup>37</sup> *Liberty Northwest Ins. Corp. v. Montana State Fund*, 2009 MT 386, 353 Mont. 299, 219 P.3d 1267 (*In re Mitchell*).

<sup>38</sup> *In re Mitchell*, ¶ 24.

was exposed to working conditions of the same type and kind which gave rise to the OD.<sup>39</sup>

¶ 21 The record demonstrates that Banco worked two physically demanding jobs seven days a week, and well in excess of 40 hours per week, for over 25 years. Under *In re Mitchell*, the liable employer is the employer where the claimant was last exposed to working conditions of the same type and kind which gave rise to the occupational disease. Based on the evidence presented, I am persuaded that Banco was exposed to working conditions of the type and kind which would give rise to her shoulder condition both at 4B's and at the CDC. Banco continued to work at the CDC after discontinuing her employment with 4B's. Pursuant to the standard established in *In re Mitchell*, Banco's last injurious exposure occurred during her employment with the CDC.

### JUDGMENT

¶ 22 The last injurious exposure to the hazard of the occupational disease from which Banco currently suffers occurred during her employment with the CDC.

¶ 23 Liberty is not liable for Banco's occupational disease.

¶ 24 Pursuant to ARM 24.5.348(2), this Judgment is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

DATED in Helena, Montana, this 2<sup>nd</sup> day of June, 2011.

(SEAL)

/s/ JAMES JEREMIAH SHEA  
JUDGE

c: John E. Seidlitz, Jr.  
Larry W. Jones  
Submitted: May 17, 2011

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<sup>39</sup> *In re Mitchell*, ¶ 26.