

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2007 MTWCC 15

WCC No. 2005-1499

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ROBERT FAULKNER

Petitioner

vs.

HARTFORD UNDERWRITERS INSURANCE COMPANY

Respondent/Insurer.

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FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

**Summary:** Petitioner petitioned the Court for payment of wages and medical benefits which he argues he is entitled to as a result of an occupational disease suffered while performing his duties as a janitor at National Electronics Warranty.

**Held:** Petitioner suffers from an occupational disease as a result of performing his duties as a janitor and is entitled to wage-loss and medical benefits.

**Topics:**

**Constitutionals, Statutes, Regulations and Rules: Montana Code Annotated: 39-71-407.** Under the 2005 version of the Workers' Compensation Act, the Court does not need to determine whether Petitioner's occupational disease is related to the January 2000 injury or is a new distinct occupational disease unrelated to the 2000 injury. The Court only needs to determine whether the events that occurred during Petitioner's employment at N.E.W. were the "major contributing cause" of his occupational disease in relation to other factors.

**Occupational Disease: Subsequent Disease.** Under the 2005 version of the Workers' Compensation Act, the Court does not need to determine whether Petitioner's occupational disease is related to the January 2000 injury or is a new distinct occupational disease unrelated to the 2000 injury. The Court only needs to determine whether the events that occurred during

Petitioner's employment at N.E.W. were the "major contributing cause" of his occupational disease in relation to other factors.

**Occupational Disease: Causation.** Under the 2005 version of the Workers' Compensation Act, the Court does not need to determine whether Petitioner's occupational disease is related to the January 2000 injury or is a new distinct occupational disease unrelated to the 2000 injury. The Court only needs to determine whether the events that occurred during Petitioner's employment at N.E.W. were the "major contributing cause" of his occupational disease in relation to other factors.

**Occupational Disease: Causation.** Based on the trial testimony of Petitioner's treating physician, the medical evidence, and the evidence regarding Petitioner's work activities, the Court concludes that Petitioner sustained an occupational disease in the course and scope of his employment at N.E.W. Petitioner's employment activities at N.E.W. were the major contributing cause of his occupational disease in relation to other factors.

¶ 1 The trial in this matter was held on March 31, 2006, in Great Falls, Montana. Petitioner Robert Faulkner was present and represented by Richard J. Martin. Respondent Hartford Underwriters Insurance Company was represented by William O. Bronson.

¶ 2 Exhibits: Exhibits 1 through 4, 7 through 9, 11 through 15, 19 through 24, and 26 through 48 were admitted without objection. Exhibits 16 through 18 were withdrawn. Exhibits 5, 6, and 25 were excluded on hearsay and best evidence grounds. Exhibit 10 was excluded on relevance grounds.

¶ 3 Witnesses and Depositions: Petitioner, Dr. Ronald M. Peterson, Liv Hale, and Linda Slavik were sworn and testified. Petitioner's deposition was taken and submitted to the Court.

¶ 4 Issues Presented: The Court restates the contested issues of law from the Pretrial Order as follows:

¶ 4a Whether Petitioner acquired an occupational disease to his upper extremities while performing his duties as a janitor for National Electronics Warranty.

¶ 4b Whether Petitioner is entitled to wage-loss and medical benefits as a result of the occupational disease.<sup>1</sup>

¶ 5 At the conclusion of trial, the Court issued a bench ruling pursuant to ARM 24.5.335. The following findings and conclusions are in accordance with that ruling.

#### FINDINGS OF FACT

¶ 6 Petitioner Robert Faulkner was born on September 1, 1947.<sup>2</sup>

¶ 7 The Court finds the testimony of Petitioner, Dr. Ronald M. Peterson, Liv Hale, and Linda Slavik credible.

¶ 8 Petitioner began working at National Electronics Warranty (N.E.W.) as a maintenance worker on March 4, 2002. He was a full-time employee, working 40 hours per week. On September 12, 2005, his last day of work at N.E.W., Petitioner was earning a wage of \$8.07 per hour.<sup>3</sup>

¶ 9 Petitioner was responsible for the maintenance of two floors of the N.E.W. building in Great Falls, Montana. Specifically, he was responsible for maintaining and cleaning the bathrooms, break rooms, storage areas, conference rooms, and offices. This work included sweeping, mopping (including mopping both unfinished and finished cement floors), and scrubbing. Petitioner also lifted boxes filled with supplies, took out trash, vacuumed, moved furniture, changed light bulbs, and washed windows inside and out using a squeegee, often working with his arms raised above shoulder level.<sup>4</sup>

¶ 10 Petitioner received good job-performance reviews while working for N.E.W.<sup>5</sup>

¶ 11 Petitioner testified that mopping the unfinished cement floor in the basement of N.E.W. caused him pain. Petitioner further testified that mopping an unfinished cement

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<sup>1</sup> Pretrial Order at 2.

<sup>2</sup> Trial Test.; Ex. 1

<sup>3</sup> Ex. 1.

<sup>4</sup> Trial Test.

<sup>5</sup> Trial Test.; Ex. 46 at 51-78.

floor caused significant increased friction between the mop and the floor than would ordinarily be experienced by mopping a sealed cement floor.<sup>6</sup>

¶ 12 Prior to his employment at N.E.W., Petitioner was employed by Big Sky Transfer & Storage, Inc. (Big Sky). During the course of this employment, Petitioner filed a workers' compensation claim on January 11, 2000. The claim was for a lifting injury which involved primarily his neck, but also his shoulder. The claim was accepted by Big Sky's insurer, Montana State Fund (State Fund), and medical benefits were paid. Following this injury, Dr. Ronald M. Peterson declared Petitioner to be at maximum medical improvement (MMI) on August 4, 2000, and assigned Petitioner a 15% impairment rating.<sup>7</sup> Petitioner entered into a settlement with the State Fund with medical benefits left open. The settlement was approved on March 20, 2002.<sup>8</sup>

¶ 13 Dr. Peterson is a licensed Montana physician.<sup>9</sup> He determined that Petitioner qualified for an impairment rating because of "DRE Cervicothoracic Category III: Radiculopathy."<sup>10</sup> On August 4, 2000, Dr. Peterson authorized Petitioner's return to full-time employment with restrictions.<sup>11</sup>

¶ 14 Petitioner continued to treat with Dr. Peterson after achieving MMI.<sup>12</sup> Between August 4, 2000, and October 10, 2005, Petitioner treated with Dr. Peterson or his assistant, Robin Boland, F.N.P.-C., approximately forty times.<sup>13</sup>

¶ 15 On March 15, 2004, Petitioner reported increasing right shoulder and neck pain, decreasing range of motion, daily headaches, and numbness in his hands. On April 22, 2004, Petitioner reported flares of neck pain with increased activities, episodes of achiness in his right shoulder, and difficulty with strength in his right hand grip.<sup>14</sup>

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<sup>6</sup> Trial Test.

<sup>7</sup> Ex. 9 at 109-112.

<sup>8</sup> Trial Test.; Ex. 33 at 1-4.

<sup>9</sup> Ex. 47.

<sup>10</sup> Ex. 9 at 112.

<sup>11</sup> *Id.*

<sup>12</sup> Trial Test.

<sup>13</sup> Ex. 9 at 1-112

<sup>14</sup> Ex. 9 at 46-51.

¶ 16 On September 23, 2004, Petitioner reported a “sharp” increase in pain in his right shoulder over the previous three weeks and “difficulty with any activities [lifting his arms] away from his body or over shoulder height,” such as cleaning mirrors and mopping floors.<sup>15</sup> He also experienced increased left arm symptoms and significantly decreased range of motion in his right shoulder.<sup>16</sup> Dr. Peterson’s office removed Petitioner from work for a short period of time in September 2004 in an effort to relieve the increased symptoms.<sup>17</sup>

¶ 17 On October 14, 2004, Petitioner stated that he “absolutely has to return to work” in order to pay his bills.<sup>18</sup>

¶ 18 On January 3, 2005, Petitioner was examined at Dr. Peterson’s office and reported “right posterior shoulder and acromioclavicular pain” that increased when “mopping the basement cement floor” at N.E.W.<sup>19</sup>

¶ 19 On April 5, 2005, Dr. Peterson’s office put additional limitations on Petitioner that included no work with his arms raised above his head.<sup>20</sup>

¶ 20 On June 28, 2005, Petitioner reported “increasing difficulty with right shoulder pain, especially with repetitive activities such as cleaning windows and mopping.”<sup>21</sup> He was also having increasing difficulties with sleep and maintaining his work schedule.<sup>22</sup>

¶ 21 On September 12, 2005, Dr. Peterson noted that Petitioner’s right shoulder and upper extremity symptoms had worsened and that the symptoms were an aggravation of his previous injury from January 11, 2000, and not a new injury. The dramatic increase in

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<sup>15</sup> Ex. 9 at 41.

<sup>16</sup> *Id.*

<sup>17</sup> Ex. 9 at 40.

<sup>18</sup> Ex. 9 at 32.

<sup>19</sup> Ex. 9 at 22-24.

<sup>20</sup> Ex. 9 at 19-21.

<sup>21</sup> Ex. 9 at 16-18.

<sup>22</sup> *Id.*

his right shoulder pain increased to the point where Petitioner was unable to work. Dr. Peterson took Petitioner off work on September 12, 2005.<sup>23</sup>

¶ 22 An MRI was performed on October 4, 2005, and revealed an abnormal signal, suspicious for calcific bursitis and tendinitis with no evidence of a rotator cuff tear.<sup>24</sup>

¶ 23 In a January 25, 2006, letter to Petitioner's counsel, Dr. Peterson opined that Petitioner's work activity at N.E.W. between the dates of March 4, 2002, and September 26, 2005, "materially and substantially aggravated his pre-existing injury" of January 11, 2000, after Petitioner had reached MMI on August 4, 2000.<sup>25</sup>

¶ 24 In his trial testimony, Dr. Peterson stated that Petitioner's symptoms were consistent with bursitis and tendinitis of the right shoulder as well as adhesive capsulitis. Furthermore, Dr. Peterson stated that as Petitioner began working as a maintenance person at N.E.W. and did more repetitive mopping, sweeping, and lifting tasks involving his right shoulder, his symptoms became less and less myofascial pain in his neck and more consistent in his right shoulder and in tendons of his right shoulder. Based on these facts, Dr. Peterson opined that Petitioner's symptoms were not related to the initial injury of January 2000. Rather, Dr. Peterson opined that Petitioner was suffering from symptoms of a new occupational disease caused by his maintenance work.<sup>26</sup>

¶ 25 On February 28, 2006, Dr. John C. Schumpert performed an Independent Medical Evaluation (IME) of Petitioner. In his IME report, Dr. Schumpert observed that, based on the right shoulder radiographs of January 2000, Petitioner's right-shoulder condition probably pre-dated the January 11, 2000, injury. Dr. Schumpert opined that on a more-likely-than-not basis, the events of 2004 and 2005 likely represented aggravations of a pre-existing condition.<sup>27</sup>

¶ 26 After performing an IME on Petitioner, Dr. Schumpert was asked whether Petitioner's medical condition changed in a substantial and significant way within the last two years. Dr. Schumpert responded that Petitioner's status actually changed over the course of less than one year because when Petitioner was examined by Dr. Tierney in October 2004, Petitioner had a markedly reduced right shoulder range of motion. Following

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<sup>23</sup> Ex. 9 at 10-12.

<sup>24</sup> Ex. 31.

<sup>25</sup> Ex. 4.

<sup>26</sup> Trial Test.

<sup>27</sup> Ex. 45 at 9.

two months of physical therapy, the range of motion was within normal limits. By July 2005, Dr. Peterson documented the shoulder range of motion to be near that observed by Dr. Tierney in October 2004, prior to Petitioner's course of physical therapy.<sup>28</sup>

¶ 27 The Court finds Petitioner's work activities at N.E.W. were strenuous, stressing both his shoulder and neck. Dr. Peterson initially opined in September 2005 that Petitioner's right shoulder symptoms were suffered due to an aggravation of Petitioner's January 11, 2000, work injury.<sup>29</sup> Dr. Schumpert opined that Petitioner's condition was an aggravation of a pre-existing condition.<sup>30</sup> In January 2006, Dr. Peterson opined that Petitioner's condition was a substantial and material aggravation of his January 2000 injury. At trial, Dr. Peterson testified that based on the jobs Petitioner was performing at N.E.W. and his review of Petitioner's medical file, he currently believes Petitioner's condition is a new occupational disease.<sup>31</sup>

#### CONCLUSIONS OF LAW

¶ 28 This case is governed by the 2005 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Petitioner's last day of work.<sup>32</sup>

¶ 29 This Court has jurisdiction of this case pursuant to § 39-71-2905, MCA.

¶ 30 Petitioner bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.<sup>33</sup> Petitioner has met his burden.

¶ 31 Under the 2005 version of the Montana Workers' Compensation Act, an occupational disease is defined 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."<sup>34</sup> An occupational disease is considered to have arisen out of employment if two conditions are met: (1) the occupational disease must be established

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<sup>28</sup> Ex 45 at 9-10.

<sup>29</sup> Ex. 9 at 11.

<sup>30</sup> Ex. 45 at 9.

<sup>31</sup> Trial Test.

<sup>32</sup> *Grenz v. Fire & Cas. of Conn.*, 278 Mont. 268, 271, 924 P.2d 264, 266 (1996).

<sup>33</sup> *Ricks v. Teslow Consol.*, 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wickens Bros. Constr. Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

<sup>34</sup> § 39-71-116(20)(a), MCA.

by objective medical findings; and (2) 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.<sup>35</sup> As used in the statute, a “major contributing cause” means “a cause that is the leading cause contributing to the result when compared to all other contributing causes.”<sup>36</sup>

¶ 32 “When 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.”<sup>37</sup> In the case at hand, N.E.W. was the employer at the time of Petitioner’s last injurious exposure and therefore Respondent, N.E.W.’s insurer, is liable.

¶ 33 Under the 2005 version of the Workers’ Compensation Act, the Court does not need to determine whether Petitioner’s occupational disease is related to the January 2000 injury or is a new distinct occupational disease unrelated to the 2000 injury. The Court only needs to determine whether the events that occurred during Petitioner’s employment at N.E.W. were the “major contributing cause” of his occupational disease in relation to other factors.<sup>38</sup>

¶ 34 Based on the trial testimony of Dr. Peterson, the medical evidence, and the evidence regarding Petitioner’s work activities, the Court concludes that Petitioner sustained an occupational disease in the course and scope of his employment at N.E.W. Petitioner’s employment activities at N.E.W. were the major contributing cause of his occupational disease in relation to other factors.

¶ 35 Petitioner is entitled to medical benefits and temporary total disability benefits until he reaches MMI from his occupational disease.

### JUDGMENT

¶ 36 Petitioner’s petition to receive wage-loss and medical benefits is **GRANTED**.

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

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<sup>35</sup> § 39-71-407(9)(a) and (b), MCA.

<sup>36</sup> § 39-71-407(13), MCA.

<sup>37</sup> § 39-71-407(10), MCA.

<sup>38</sup> § 39-71-407(9), MCA.



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

DATED in Helena, Montana, this 24<sup>th</sup> day of April, 2007.

(SEAL)

/s/ JAMES JEREMIAH SHEA  
JUDGE

c: Richard J. Martin  
William O. Bronson  
Submitted: March 31, 2006.