

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2007 MTWCC 2

WCC No. 2006-1562

RICHARD D. HINMAN

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

Appealed to Supreme Court January 16, 2007

Affirmed 10/30/07

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Petitioner petitioned the Court for workers' compensation benefits because of chemical exposures occurring during his employment with Specialized Automotive.

Held: Petitioner is not entitled to any workers' compensation benefits. Petitioner has not met his burden of proving his chronic obstructive pulmonary disease was caused by the chemical exposures occurring during his employment with Specialized Automotive.

¶ 1 The trial in this matter was held on August 9, 2006, in Helena, Montana. Petitioner Richard D. Hinman was present and represented himself. Respondent Montana State Fund was represented by Kevin Braun.

¶ 2 Exhibits: Exhibits 1, 2, 5, and 8 (after hearsay objections were withdrawn), and 9 through 13 were admitted without objection. Exhibit 3 was withdrawn. Exhibits 4 and 15 were admitted over objections with the caveat that the emphasized portions of the exhibits which were unable to be redacted would be disregarded by the Court. Exhibit 6 was admitted over Petitioner's objection. Exhibit 14 was admitted for demonstrative purposes only. Exhibit 16 was denied admission. Exhibits 7, 17, and 18 were excluded.

¶ 3 Witnesses and Depositions: The depositions of Petitioner and Gilbert F. Schwarze were taken and submitted to the Court. Petitioner and Misty Coates were sworn and

testified at trial. Mr. Schwarze was sworn, but he was prohibited from testifying because the Court determined, after Respondent and the Court voir dired Mr. Schwarze, that he was not qualified to render an expert opinion in the present matter.

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

¶ 4a Whether the proximate cause of Petitioner's chronic obstructive pulmonary disease (COPD) is chemical exposures occurring at Specialized Automotive.¹

FINDINGS OF FACT

¶ 5 The Court finds Petitioner's testimony to be credible.

¶ 6 The Court finds Gilbert F. Schwarze unqualified to render an expert opinion in the matter at hand. Mr. Schwarze received his Bachelor's Degree in Science in 1957 and has no advanced degrees. He is not professionally licensed and has no medical background. Mr. Schwarze has been retired since 1990. He did not perform any tests on the paint used by Specialized Automotive, nor did he perform any diagnostic tests on Petitioner.²

¶ 7 Petitioner worked for Specialized Automotive from May 2003 through August 2003.³ Petitioner worked as an auto mechanic, body repairer, welder, and painter.⁴

¶ 8 Specialized Automotive was insured by Respondent at the time of Petitioner's employment.⁵

¶ 9 Petitioner filed a First Report with Respondent on August 22, 2005.⁶

¶ 10 Petitioner was diagnosed with COPD on January 28, 2005, by Rebecca Canner, M.D.⁷

¹ Pretrial Order at 2.

² Trial Test.

³ Pretrial Order at 2.

⁴ Petitioner's Dep. 7:20- 9:6; Trial Test.

⁵ Pretrial Order at 2.

⁶ Ex. 1 at 2.

⁷ Ex. 4 at 9.

¶ 11 Petitioner has smoked approximately two packs of cigarettes a day for approximately 20 years.⁸

¶ 12 On February 17, 2005, Erich Pessl, M.D., reported: “History of toxic exposure, with concern of liver and kidney involvement. Blood testing today is reassuring and I would not recommend further testing.”⁹

¶ 13 On February 18, 2005, Dr. Canner stated in her notes, “Exposure to toxic and potentially carcinogenic chemicals. Due to the patient’s repeated concern about this, I think that it would be helpful for him to have a CT scan with contrast, in order to rule out any abnormal growths. We will get this ordered for him.”¹⁰

¶ 14 On March 11, 2005, Mark Schulein, M.D., met with Petitioner. Petitioner asked Dr. Schulein to order several tests based on his exposure to paint chemicals. In the assessment portion of Dr. Schulein’s progress notes it states only “Exposure”.¹¹ Dr. Schulein does not give a medical opinion regarding causation of Petitioner’s COPD.

¶ 15 Although the Court does not doubt Petitioner’s sincerity in his belief that his COPD is caused by his employment at Specialized Automotive, none of the doctors with whom he has treated have offered an opinion regarding the causation of Petitioner’s COPD. Rather, the doctors have merely noted a history of exposure to toxic chemicals as was reported to them by Petitioner.

¶ 16 On November 11, 2005, John Schumpert, M.D., performed an IME on Petitioner. After reviewing the medical records provided by Respondent, taking a history from Petitioner, and performing a physical examination, Dr. Schumpert concluded:

The patient appears to suffer from non-occupational chronic bacterial bronchitis. The patient’s prognosis is guarded as he continues to smoke tobacco, which is in my opinion the proximate cause of the current condition.¹²

⁸ Petitioner’s Dep. 13:15-24; Trial Test.

⁹ Ex. 4 at 11.

¹⁰ Ex. 4 at 12.

¹¹ Ex. 4 at 13.

¹² Ex. 6 at 13.

¶ 17 In his November 11, 2005, report, Dr. Schumpert further concluded:

I suspect the smoking history is the proximate cause of patient's current condition. The high-resolution CT scan failed to reveal objective evidence of any other causes of his current pulmonary complaints. All of the other medical laboratory and pulmonary physiology testing revealed evidence of chronic obstructive pulmonary disease which is smoking related.¹³

¶ 18 Regarding the objective medical findings supporting his diagnosis and conclusion, Dr. Schumpert reported:

The patient has a history of elevated white blood cell counts and elevated neutrophil populations on complete blood count testing dating back to 2001. . . . He has shown no evidence of liver or renal function abnormalities, which would be consistent with a chronic solvent intoxication. He also had no evidence of central nervous system depression or excitation symptoms, which are hallmarks of acute solvent intoxication.¹⁴

¶ 19 Regarding whether medical information supports the diagnosis of toxic exposure, Dr. Schumpert concluded:

There is currently no objective medical data supporting the diagnosis of a toxic exposure. The patient's medical laboratory test results do not indicate any toxic exposure. In fact, the medical laboratory test results indicate a smoldering chronic bacterial infection of the lungs. The patient's recent high-definition CT scan of the chest revealed no evidence of interstitial lung disease or bronchiolitis, which would be expected following an acute or subchronic inhalation exposure of significance. The pulmonary function test results show no evidence of reactive airways disease, which is what one would expect if the patient had been exposed to and reacted to a pulmonary sensitizing agent such as an isocyanate.¹⁵

¹³ Ex. 6 at 22.

¹⁴ Ex. 6 at 13.

¹⁵ *Id.*

CONCLUSIONS OF LAW

¶ 20 This case is governed by the 2003 version of the Montana Workers' Compensation Act since that was the law in effect on Petitioner's last day of work.¹⁶

¶ 21 Petitioner bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.¹⁷

¶ 22 The element of causation is essential to benefit entitlement. Petitioner has to prove a causal connection by a preponderance of the evidence to confer benefit entitlement.¹⁸

¶ 23 Section 39-72-408, MCA, of the Occupational Disease Act reads as follows:

39-72-408. Proximate causation – determination by treating physician. (1) Occupational diseases are considered to arise out of the employment if:

(a) there is a direct causal connection between the conditions under which the work is performed and the occupational disease;

(b) the disease can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment;

(c) the disease can be fairly traced to the employment as the proximate cause;

(d) the disease comes from a hazard to which workers would not have been equally exposed outside of the employment.

(2) If the treating physician makes a positive determination pursuant to the factors provided in subsection (1), the treating physician shall also determine by percentage the amount of the occupational disease that was attributable to work rather than to activities or other conditions unrelated to the employment.

¶ 24 Pursuant to this statute, a positive determination of causation is established by medical opinion. As noted above at ¶ 15, none of the doctors with whom Petitioner has treated have made any such positive determination regarding causation. The only medical opinion regarding the proximate cause of Petitioner's COPD is Dr. Schumpert's opinion that

¹⁶ *Grenz v. Fire and Casualty of Connecticut*, 278 Mont. 268, 271, 924 P.2d 264, 266 (1996).

¹⁷ *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).

¹⁸ *Strom v. MMIA*, 2005 MTWCC 42, ¶25.

Petitioner's COPD is caused by his long history of smoking, not by Petitioner's exposure to chemicals during his employment at Specialized Automotive.

¶ 25 Petitioner has not met his burden of proving that his employment at Specialized Automotive is the proximate cause of his COPD within the meaning of § 39-72-408, MCA. Therefore, the Court concludes that Petitioner is not entitled to benefits.

JUDGMENT

¶ 26 Petitioner's request that this Court find the proximate cause of his chronic obstructive pulmonary disease was caused by chemical exposure which occurred at Specialized Automotive is **DENIED** and Judgment is entered in favor of Respondent.

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

¶ 28 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 5TH day of January, 2007.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Richard D. Hinman
Kevin Braun
Submitted: August 9, 2006