

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2009 MTWCC 20

WCC No. 2004-1092

RAYMOND JOHNSON

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Petitioner Raymond Johnson petitioned the Court for occupational disease benefits arising out of and in the course of his employment with Stimson Lumber Company. Johnson has lived in Libby, Montana, since 1963. He worked at the lumber mill in Libby from 1963 to 2001. Stimson purchased the mill in 1993 and was the owner on Johnson's last day of work. The mill contained asbestos in several areas including the top and floor of the big dryer and the pipe wrap surrounding steam pipes. In 2001, Johnson was diagnosed with asbestosis.

Held: Johnson suffers from an occupational disease as a result of his employment with Stimson Lumber Company. Johnson was exposed to copious amounts of asbestos during his employment at the mill from multiple sources – including his employment from 1993 through 2001, while the mill was owned by Stimson. The negative pressure environment created in the plywood plant further exacerbated Johnson's asbestos exposure. Both of Johnson's treating physicians diagnosed him with asbestosis. Johnson's exposure to asbestos during the eight years he worked for Stimson was sufficient to cause his asbestos-related diseases. Johnson's exposure to asbestos during the years he was employed by Stimson constituted his last injurious exposure to the hazard of his disease.

Topics:

Asbestosis: Causation: Impact of Non-Work Related Incident. Where Petitioner's non-work-related exposure to asbestos was essentially limited to being a Libby resident, and Petitioner was exposed to copious amounts of

asbestos during his employment at the lumbermill in Libby – including the eight years that Stimson owned the mill – the Court found that his work-related exposure to asbestos exceeded his non-work-related exposure and therefore Petitioner’s condition was an occupational disease arising out of his employment under § 39-72-408, MCA.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-72-408. Where Petitioner’s non-work-related exposure to asbestos was essentially limited to being a Libby resident, and Petitioner was exposed to copious amounts of asbestos during his employment at the lumbermill in Libby – including the eight years that Stimson owned the mill – the Court found that his work-related exposure to asbestos exceeded his non-work-related exposure and therefore Petitioner’s condition was an occupational disease arising out of his employment under § 39-72-408, MCA.

Physicians: Treating Physician: Weight of Opinions. Where Petitioner’s treating physician has a superior background, more experience working with the particular type of asbestos exposure at issue, and more experience treating these exposed patients, the Court finds his opinion more persuasive than a physician who has not actively treated patients for at least ten years and does not have the same experience working with the particular type of asbestos at issue.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-72-408. Where the Court found that Petitioner’s employment exposure to asbestos clearly exceeded his non-employment exposure, and the Court found the treating physician’s opinion that Petitioner’s exposure to asbestos during his years at Stimson was sufficient to cause his asbestos-related disease, the Court concluded that Petitioner suffers from an occupational disease as a result of his employment under the proximate causation test as set forth in *Kratovil* and pursuant to § 39-72-408, MCA.

Occupational Disease: Causation. Where the Court found that Petitioner’s employment exposure to asbestos clearly exceeded his non-employment exposure, and the Court found the treating physician’s opinion that Petitioner’s exposure to asbestos during his years at Stimson was sufficient to cause his asbestos-related disease, the Court concluded that Petitioner suffers from an occupational disease as a result of his employment under the proximate causation test as set forth in *Kratovil* and pursuant to § 39-72-408, MCA.

Occupational Disease: Proximate Cause. Where the Court found that Petitioner's employment exposure to asbestos clearly exceeded his non-employment exposure, and the Court found the treating physician's opinion that Petitioner's exposure to asbestos during his years at Stimson was sufficient to cause his asbestos-related disease, the Court concluded that Petitioner suffers from an occupational disease as a result of his employment under the proximate causation test as set forth in *Kratovil* and pursuant to § 39-72-408, MCA.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-72-303. Where Stimson owned the mill on Petitioner's last day of work and the evidence overwhelmingly demonstrates that Petitioner was exposed to asbestos from multiple sources during his eight-year employment with Stimson, and Petitioner's treating physician testified that a person's lungs are immediately injured by the inhalation of asbestos fibers and that additional exposure is damaging to the lungs and worsens the disease, the Court concludes that Petitioner's exposure to asbestos at Stimson constitutes his last injurious exposure to the hazard of the disease.

Occupational Disease: Last Injurious Exposure. Where Stimson owned the mill on Petitioner's last day of work and the evidence overwhelmingly demonstrates that Petitioner was exposed to asbestos from multiple sources during his eight-year employment with Stimson, and Petitioner's treating physician testified that a person's lungs are immediately injured by the inhalation of asbestos fibers and that additional exposure is damaging to the lungs and worsens the disease, the Court concludes that Petitioner's exposure to asbestos at Stimson constitutes his last injurious exposure to the hazard of the disease.

¶ 1 The trial in this matter was held on September 15, 2008, in Libby, Montana; September 16 and 17, 2008, in Kalispell, Montana; and September 22, 23, October 15, 31, and December 1, 2008, in Helena, Montana. Petitioner Raymond Johnson (Johnson) was present and represented by Jon L. Heberling and Laurie Wallace. Respondent Liberty Northwest Insurance Corporation (Liberty) was represented by Larry W. Jones.

¶ 2 Exhibits: Exhibits 1-9, 11-32, 36, 40, 46-48, 105, 108, 142-44, and 146 were omitted by agreement of counsel. Exhibits 10, 33-35, 37-39, 41-45, 50, 56, 79-104, 106, 107, 109-131, 133, 134, 138, 139, 141, and 147-152 were admitted without objection. Exhibits 49, 51-55, 57-78, 135-137, 140, and 145 were admitted over relevancy objections. Johnson withdrew Proposed Exhibit 132, the deposition of James E. Davidson.

¶ 3 Witnesses and Depositions: The depositions of Johnson (x2), Alan C. Whitehouse, M.D. (x2), Leo Ward, Calvin L. Powell, Ernest Anderson, Donald Shea, Robert Stickney, Glen Doubek, Vern Riley, Quentin Young, Charlotte Schauss, Billie Moeller, Pete Nelson, Bruce Foss, Timothy F. Obermiller, M.D. (x2), Brad Black, M.D., Jan Sanderson, Barbara Dumont, Terry Spear, Ph.D., George “Jerry” McCaslin, and Dorsett D. Smith, M.D., were taken and submitted to the Court. Johnson, Donald Shea, Robert Stickney, Ernie Anderson, Alan C. Whitehouse, M.D., Terry Spear, Ph.D., Jerry McCaslin, Gail Stockman, M.D., Stephen Becker, M.D., Timothy F. Obermiller, M.D., and Dorsett D. Smith, M.D., were sworn and testified at trial.

¶ 4 Issues Presented: The Court restates the following contested issues from the Pretrial Order:¹

¶ 4a Whether Johnson is suffering from an occupational disease arising out of and in the course of his employment with Stimson Lumber Company.

¶ 4b Whether Johnson is entitled to permanent total disability benefits, including an impairment rating, and reasonable medical expenses related to the treatment of the alleged occupational disease.

¶ 4c Whether Johnson is entitled to an increase in award for alleged unreasonable delay or refusal to pay proper workers’ compensation benefits pursuant to § 39-71-2907, MCA.

¶ 4d Whether Johnson is entitled to costs and attorneys’ fees pursuant to §§ 39-71-611 and/or -612, MCA.

¶ 5 On September 15, 2008, Johnson withdrew his claims for a penalty and attorneys’ fees.²

FINDINGS OF FACT

¶ 6 Johnson was employed at the lumber mill in Libby, Montana, between 1963 and August 31, 2001. The mill was owned and operated by multiple companies during

¹Pretrial Order at 4.

² Minute Book Hearing No. 3981.

Johnson's employment. Stimson Lumber Company (Stimson) purchased the mill in November 1993 and owned the mill on August 31, 2001.³

¶ 7 Johnson was referred to pulmonologist Timothy F. Obermiller, M.D., by his family physician. Dr. Obermiller diagnosed Johnson with asbestos-related pleural disease and possible early asbestosis on March 19, 2001.⁴ On June 11, 2001, Alan C. Whitehouse, M.D., a pulmonologist at The Center for Asbestos Related Diseases (CARD), diagnosed Johnson with asbestosis and an obstructive defect due to asbestos disease.⁵

¶ 8 On or about December 13, 2001, Johnson filed a claim for compensation alleging that he suffered asbestos-related lung disease arising out of his employment at Stimson.⁶

¶ 9 Stimson was enrolled under Compensation Plan 2 of the Workers' Compensation Act and is insured by Liberty.⁷ Johnson's workers' compensation claim was denied on July 5, 2002.⁸

¶ 10 Johnson testified at trial and I find his testimony to be credible.

¶ 11 Johnson was born on December 2, 1941. He moved to Libby, Montana, in 1963.⁹

¶ 12 Johnson testified at trial regarding his known contact with asbestos outside of his employment at the mill. Johnson has resided in six different homes in Libby. Two of these homes contained asbestos insulation in the attic. Johnson testified that he did not enter the attic of either residence, nor did he have contact with the residential asbestos for purposes such as remodeling or construction work.¹⁰

³ Trial Test.

⁴ Ex. 122 at 2.

⁵ Ex. 116 at 15.

⁶ Pretrial Order at 2, Uncontested Fact No. 3.

⁷ Pretrial Order at 2, Uncontested Fact No. 1.

⁸ Pretrial Order at 2, Uncontested Fact No. 3.

⁹ Trial Test.

¹⁰ *Id.*

¶ 13 Johnson has never been employed by W.R. Grace at the W.R. Grace mine in Libby. Nor has Johnson ever worked for W.R. Grace as a contractor or subcontractor, or had household contact with a family member who worked for W.R. Grace.¹¹

¶ 14 The W.R. Grace vermiculite mine was located up Rainy Creek Road outside Libby. Johnson testified that he did not participate in any logging activities in the Rainy Creek area, and only went up Rainy Creek Road approximately two times for recreational and hunting purposes.¹²

¶ 15 The baseball fields adjacent to the vermiculite popping plant in Libby contained asbestos. Johnson's sons played baseball at these fields. Due to his work schedule at the mill, however, Johnson only attended a few games.¹³

¶ 16 Johnson testified that he ventured to a vermiculite storage facility on one occasion to obtain vermiculite for gardening purposes. He obtained an amount equal to approximately twelve shovels of material.¹⁴

¶ 17 Johnson was continuously employed at the Libby mill between 1963 and August 31, 2001. During this period, he performed the following job duties:

1963 - 1966	dryer puller/off-bearer
1966 - 1982	dryer grader
1982 - 1988	dryer tender
1988 - 1993	dryer stacker
1993 - 1996	dryer tender
1996 - 2000	dryer stacker
2000 - 2001	roundtable off-bearer ¹⁵

¶ 18 The mill had two dryers that were used to dry veneer. The dryers were known around the mill as the "big dryer" and the "little dryer."¹⁶ The big dryer and little dryer sat approximately 30 feet apart inside the plywood plant of the mill. When in service, the

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

dryers were operational 24 hours a day, 7 days a week.¹⁷ The dryers were approximately 50 feet in length and dried veneer that was used to form plywood.¹⁸

¶ 19 During his employment at Stimson, Johnson worked approximately 6461 hours as a dryer tender and 6695 hours as a dryer stacker.¹⁹ The dryer tender was responsible for the general day-to-day operation of the dryers.²⁰ The dryer stacker was responsible for operating the grading controls and overseeing the stacker bins.²¹

¶ 20 In approximately 1983, Zonolite, a commercial insulator containing vermiculite, was mixed with dry cement and placed on top of the big dryer.²² Initially, the Zonolite/cement mixture was spread in a dry-powder form on top of the dryer.²³

¶ 21 Robert Stickney (Stickney), a former mill worker, testified at trial. I find Stickney to be a credible witness. Stickney worked for the mill and replaced the dry insulation on top of the big dryer sometime between 1984 and 1987. He testified that a mixture of one bag of Zonolite to one bag of cement was poured on top of the big dryer as replacement insulation. Stickney testified that the amount of Zonolite used in the process was approximately a semi-trailer load.²⁴

¶ 22 Donald Shea (Shea) testified at trial and I find him to be a credible witness. Shea testified that he and another mill employee loaded sacks of Zonolite onto a flatbed trailer. Shea recalled replacing Zonolite on top of the big dryer after much of the material had blown off.²⁵

¹⁷ Ex. 134 Map; Trial Test.

¹⁸ Johnson's Dep., 08/30/04 (Johnson Dep. I) 44:22-25.

¹⁹ Johnson Dep. I 33:4-12.

²⁰ Johnson Dep. I 46:23 - 47:1.

²¹ Johnson Dep. I 48:14-25.

²² Johnson Dep. I 63:10 - 64:3, 64:12 - 65:1; Trial Test.

²³ Trial Test.

²⁴ *Id.*

²⁵ *Id.*

¶ 23 In approximately 1994, some mill employees added water to the Zonolite/cement mixture to create a hardened cap on top of the big dryer.²⁶ This was apparently done to cut down on the amount of material being blown off the top of the big dryer. However, because the dryer generated extreme amounts of heat and operated at approximately 382 degrees Fahrenheit,²⁷ the cement cap on top of the dryer broke up over time.²⁸

¶ 24 Fans and air hoses located throughout the mill circulated air and stirred up dust and other materials from the top of the big dryer.²⁹

¶ 25 Johnson worked in and around the dryers and climbed on top of the big dryer on several occasions, often after the dryer had caught fire. He testified that he was up on top of the big dryer 3 to 8 times per week. He stayed on top of the dryer anywhere from 5 to 30 minutes each time. Johnson described the area on top of the big dryer as “dusty” due to the cracks in the cap and the general deterioration of the dryer insulation.³⁰

¶ 26 The floor of the big dryer also contained asbestos material. Johnson cleaned up around the dryers from 1983 through 1999.³¹ The intense heat inside the big dryer caused the floor materials to deteriorate. Repairs were made to the cement floor with a one-to-one Zonolite/refractory mix.³² The repairs were often inadequate because the mixture never properly cured and the flooring material remained in poor condition.³³

¶ 27 Steam pipes were located inside the mill. Some of the steam pipes were wrapped in asbestos-containing material during the time Johnson worked at the mill. The condition of the pipe insulation varied from good to very poor.³⁴

²⁶ Johnson Dep I 65:11 - 66:2.; Trial Test.

²⁷ Johnson Dep. I 71:15-18.

²⁸ Trial Test.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² Stickney Dep. 12:8 - 13:1; Trial Test.

³³ Trial Test.

³⁴ *Id.*

¶ 28 Glen Doubek (Doubek) testified by deposition. Doubek assisted with the abatement of some of the asbestos insulation on the pipes over the years.³⁵ According to Doubek, the asbestos pipe insulation he removed was usually friable.^{36, 37}

¶ 29 Robert Stickney worked at the mill as a millwright. Stickney replaced and repaired pipe insulation around the mill. By the time Stickney quit working at the mill in 1993, he estimated that 50% of the asbestos insulation remained on the pipes in the mill.³⁸

¶ 30 Pipe insulation became damaged as a result of being impacted by workers and mill machinery. The insulation also deteriorated as a result of exposure to steam and moisture and from vibration from the steam pipes themselves. The damaged insulation would sometimes go unrepaired for months or years.³⁹ Doubek testified in his deposition that asbestos-containing pipe insulation remained in the plywood plant on the day it closed.⁴⁰

Industrial Hygiene

¶ 31 Terry Spear, Ph.D. (Spear), testified at trial as an expert industrial hygienist for Johnson. Spear has a Ph.D. in industrial hygiene and is a professor at Montana Tech, University of Montana, in Butte.⁴¹ I find Spear to be a credible witness.

¶ 32 Spear testified that the purpose of industrial hygiene is the anticipation, recognition, evaluation, and control of factors in the workplace that cause disease or lead to disease.⁴²

¶ 33 Asbestos fibers in the air are known to travel long distances from their source or point of origin.⁴³ The shape and small size of asbestos fibers cause the fibers to remain

³⁵ *Id.*

³⁶ Doubek Dep. 37:6-11.

³⁷ Friable asbestos is a term used to describe any asbestos-containing material that can be easily crumbled or pulverized to powder by hand.

³⁸ Trial Test.

³⁹ *Id.*

⁴⁰ Doubek Dep. 17:17-24.

⁴¹ Ex. 107 at 1.

⁴² Trial Test.

⁴³ Ex. 107 at 4, ¶ 13.

airborne for hours once introduced into the air.⁴⁴ In Spear's report prepared for this case, he stated:

Movement and air turbulence causes fibers that have settled out of the air to be reintroduced (re-entrained) into the air and to drift long distances from their source. . . . Because of the microscopic size of asbestos fibers, and their aerodynamic properties, typical housekeeping activities such as sweeping tend not to remove that asbestos from the plant. Rather, such activities have the effect of stirring up and re-entraining the asbestos that is in the location, ensuring that it is available for inhalation by workers in the vicinity.⁴⁵

¶ 34 Spear became involved with the Libby asbestos situation in 1996. He has reviewed boxes of documents relating to the industrial hygiene issues at the Libby mill. He has also reviewed photos, maps, and depositions, and conducted mill employee interviews. Spear personally visited the mill in 2004 after the mill's equipment had been removed.⁴⁶

¶ 35 An analysis in 2003 showed that the particular type of asbestos found in Libby (Libby asbestos) is composed of 84% winchite, 11% richterite, and 6% tremolite.⁴⁷

¶ 36 Based upon his review of documents and materials related to the mill, Spear concluded that asbestos-containing materials were present throughout the mill.⁴⁸ Asbestos was present in building materials such as cement board, pipe insulation and fitting insulation, mastic, roofing materials, putty, plaster, floor tile and floor tile mastic, gasketing material, and electrical wire insulation.⁴⁹

¶ 37 Stimson commissioned an asbestos survey in 1994 that was performed by Pacific Rim Environmental, Inc. (PRE). The PRE survey stated:

Pipe insulation in numerous locations tested positive for asbestos within the survey area. All areas except the Shipping Building have some quantity of

⁴⁴ *Id.* at 5, ¶ 14.

⁴⁵ *Id.*

⁴⁶ Trial Test.

⁴⁷ Ex. 107 at 3, ¶ 7 (The Court notes the percentages total 101%).

⁴⁸ *Id.* at 1, ¶ 4.

⁴⁹ *Id.* at 1-2, ¶ 4.

pipe insulation. All pipe insulation in the survey area was in poor to extremely poor condition. The majority of this pipe insulation is in poor condition and PRE recommends that this material be removed as soon as possible due to its high friability and poor condition. Debris in four locations in the survey was discovered to contain asbestos. This debris is generally extremely friable and PRE recommends it be cleaned up as soon as possible. This material will need to be cleaned up prior to any activity in these areas that could potentially disturb the debris.⁵⁰

¶ 38 Pipe wrap around the steam pipes tested positive for asbestos and was removed from the mill in March, April, and May 1996.⁵¹

¶ 39 Ventilation and air quality was poor near the dryers.⁵² Three sets of large fans sat on top of the dryers. There was constant air movement near the dryers, likely keeping the asbestos fibers suspended in the breathing zone of the workers.⁵³

¶ 40 Spear testified that the plywood plant experienced negative pressure, particularly during the winter months. The effect of the negative pressure inside of the plant did not allow for proper removal of hazardous material from the air. Once asbestos fibers got into the air inside the plant, those fibers would travel throughout the plant.⁵⁴

¶ 41 In 2001, the Environmental Protection Agency (EPA) began investigating the presence of asbestos at the mill.⁵⁵ Spear reviewed the documents generated by the EPA's investigation.⁵⁶

⁵⁰ *Id.* at 2, ¶ 4.

⁵¹ Ex. 82 at 1; Ex. 84 at 1.

⁵² Trial Test.

⁵³ Ex. 107 at 15, ¶ 40.

⁵⁴ Trial Test.

⁵⁵ Ex. 100.

⁵⁶ Trial Test.

¶ 42 The EPA's investigation report stated, "Vermiculite insulation is believed to be associated with the big dryer No. 1" ⁵⁷ In June 2003, vermiculite material was found sandwiched between the top of the dryer and a layer of concrete. ⁵⁸

¶ 43 A photo taken by Ernest Anderson in 2002 shows a granulated, loose material located on top of the big dryer. ⁵⁹ Spear opined that this loose material would liberate the Libby amphibole. ⁶⁰

¶ 44 George "Jerry" McCaslin (McCaslin) testified as an industrial hygiene expert for Liberty. I find McCaslin to be a credible witness.

¶ 45 McCaslin is the regional manager for RGA Environmental, Inc. (formerly Prezant Associates, Inc.) in Seattle, Washington. ⁶¹ He has a Bachelors of Science degree in Analytical Chemistry from the University of Washington. ⁶² McCaslin is a member of the American Industrial Hygiene Association, board member of PNS American Industrial Hygiene Association, and has training certificates for Advanced Gas Chromatography and Mass Spectrometry. ⁶³

¶ 46 McCaslin prepared a report for Liberty for the present case. McCaslin's investigation into the mill began in the summer of 2003 and concluded in 2004. McCaslin's final report considered Johnson's potential exposure to asbestos during the period of November 5, 1993, through September 3, 2001. ⁶⁴

¶ 47 Elaine Hagedorn, Field Industrial Hygienist for Prezant and coworker of McCaslin, spent approximately two months in Montana collecting data, taking samples, and interviewing individuals about the job descriptions that Stimson had in place during its mill

⁵⁷ Ex. 100 at 10; Ex. 131.

⁵⁸ Ex. 131; Trial Test.

⁵⁹ Ex. 109-1; Trial Test.

⁶⁰ Trial Test.

⁶¹ Ex. 152-O at 1.

⁶² *Id.*

⁶³ *Id.* at 2.

⁶⁴ Ex. 152-P at 1.

operation years.⁶⁵ She also reviewed documents from Stimson's Missoula headquarters that were not present at the mill site because of confidentiality issues.⁶⁶

¶ 48 McCaslin's final report includes a "best case scenario" and "worst case scenario" for Johnson's asbestos exposure between 1993 and 2001.⁶⁷ McCaslin developed the formulas for the two different scenarios using EPA air samples collected for a September 2002 study of the mill.⁶⁸

¶ 49 As noted above, a 2003 analysis reflected that the particular type of asbestos found in Libby is composed of 84% winchite, 11% richterite, and 6% tremolite.⁶⁹ McCaslin testified that although winchite and richterite are asbestoforms, he did not consider them to be "asbestos" because they are not regulated by the EPA.⁷⁰ McCaslin acknowledged that there may or may not be a health concern with asbestoform fibers, but he made no judgment in that regard because that is not his area of expertise.⁷¹

¶ 50 McCaslin concluded that neither the best case nor worst case scenarios he developed would realistically support an exposure to Johnson "that would result in the development of or worsening of mesothelioma or asbestosis."⁷²

¶ 51 Although McCaslin concluded that Johnson's asbestos exposure would not have resulted in the development or worsening of asbestos-related disease, he acknowledged that he reached this conclusion based on the EPA's data which was collected in 2002. McCaslin further acknowledged that this data was reflective only of the time period in which it was taken. Since Johnson ceased his employment at the mill in August of 2001, I find McCaslin's "best and worst case" conclusions to be of limited value.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ McCaslin Dep. Ex. 1 at 4; Ex. 152-P at 4.

⁶⁸ Trial Test.

⁶⁹ Ex. 107 at 3. (The Court notes the percentages total 101%).

⁷⁰ Trial Test.

⁷¹ *Id.*

⁷² McCaslin Dep. Ex. 1 at 4.

¶ 52 After comparing their respective experience and education and having had the opportunity to assess their testimony at trial, I find Spear's conclusions regarding Johnson's exposure to asbestos at the mill to be more persuasive than McCaslin's.

¶ 53 Multiple sources of asbestos-containing and asbestos-contaminated materials existed in and around the plywood plant during Johnson's entire 38 years of employment at the Libby mill. He worked directly with Libby vermiculite, contaminated with asbestos, where his work activities disturbed an asbestos-containing material and created the transport mechanisms to release fibers into his breathing zone. He also worked in close proximity to areas where asbestos-containing materials were present, were being installed, and were being removed with limited containment, causing the release of asbestos fibers into the workroom air. He worked in a facility with very poor air quality and in an atmosphere laden with dust and smoke. The plywood plant was under negative pressure which trapped the dust and smoke in the building. Mr. Johnson and other workers employed the use of compressed air to clean the stacker machine which would disturb and re-suspend the asbestos fibers within the plywood plant. Mr. Johnson worked his entire career in proximity to asbestos-containing building materials and where friable asbestos was present throughout the plant, causing asbestos fibers to be released during work activities.⁷³

¶ 54 Based on the evidence presented, I find that Johnson was exposed to asbestos fibers from multiple sources during his career at the mill, including while employed by Stimson from 1993 through 2001. The sources of exposure included the top of the big dryer, the floor of the big dryer, and from the deteriorating insulation around the steam pipes.

Medical Evidence

¶ 55 Johnson was examined by Timothy F. Obermiller, M.D., on March 19, 2001. After reviewing Johnson's chest x-ray, taking his history, and performing a physical examination, Dr. Obermiller diagnosed Johnson with asbestos-related pleural disease, possible early asbestosis, and chronic obstructive pulmonary disease (COPD).⁷⁴ Based on these findings Dr. Obermiller ordered a chest CT scan to assess for possible interstitial disease.⁷⁵ On

⁷³ Ex. 107 at 18-19.

⁷⁴ Ex. 122 at 2.

⁷⁵ *Id.* at 3.

April 16, 2001, Dr. Obermiller reviewed a chest CT scan and assessed Johnson with COPD, and mild asbestos-related pleural disease.⁷⁶

¶ 56 Johnson was again examined by Dr. Obermiller on July 20, 2001. At that time, Dr. Obermiller assessed Johnson with COPD and mild “asbestos-related pleural disease/asbestosis”⁷⁷

¶ 57 In an August 1, 2001, letter supporting Johnson’s application for Social Security Disability, Dr. Obermiller opined that Johnson had evidence of COPD and a respiratory impairment related to his asbestos-related pleural disease and asbestosis.⁷⁸

¶ 58 Dr. Obermiller testified at trial by Vision Net videoconferencing and I find his testimony to be credible.⁷⁹ In his trial testimony, Dr. Obermiller clarified that he did not diagnosis Johnson with “asbestosis” in the “correct sense,” but rather was using the term as Dr. Whitehouse uses it to describe Johnson’s “pleural disease.”⁸⁰

¶ 59 Brad Black, M.D., is a physician at the CARD clinic. Dr. Black examined Johnson on June 6, 2001. Dr. Black’s impression was that Johnson had “significant asbestos related disease with a very ominous appearing diffuse pleural change that is virtually circumferential. With a lower normal residual volume and a notably abnormal diffusion capacity, this is consistent with the asbestos related disease we have been observing [in Libby patients].”⁸¹

¶ 60 Johnson was referred by Dr. Black to Dr. Whitehouse for a second opinion regarding his lung disease.⁸² Dr. Whitehouse is licensed to practice medicine in Washington and

⁷⁶ *Id.* at 5.

⁷⁷ *Id.* at 10.

⁷⁸ *Id.* at 11.

⁷⁹ The parties agreed to Dr. Obermiller’s testimony being taken via videoconferencing. In *Bonamarte v. Bonamarte*, 263 Mont. 170, 177, 866 P.2d 1132, 1136 (1994), the Montana Supreme Court stated that within the parameters established in our procedural rules and applicable statutes, the court and counsel are free to agree upon and to utilize different methods of presenting the testimony of and cross-examining a party or witness unable to appear personally at trial to testify. Regarding the taking of video testimony, the Supreme Court noted that this method provides the court with a visual record of the witness’ testimony and allows the fact finder the opportunity to draw conclusions about demeanor and credibility.

⁸⁰ Trial Test.

⁸¹ Ex. 116 at 13-14.

⁸² Ex. 118 at 4.

Montana.⁸³ He is board-certified in internal medicine and pulmonary disease. He also practices chest medicine at the CARD clinic in Libby, Montana.⁸⁴ Since 1980, Dr. Whitehouse has evaluated or treated over 700 patients for asbestos disease related to Libby asbestos.⁸⁵ He has published a peer-reviewed paper on asbestos disease in Libby, titled “Asbestos-Related Pleural Disease Due to Tremolite Associated with Progressive Loss of Lung Function: Serial Observations in 123 Miners, Family Members, and Residents of Libby, Montana.”⁸⁶

¶ 61 Regarding Libby asbestos fibers, Dr. Whitehouse has stated the following:

In relative terms of their length to width (aspect ratio), Libby asbestos fibers are long and sharp, like needles. The fibers breathed in are microscopic, as are the alveoli (tiny air sacs) in the lungs. When breathed in, the fibers lodge in the structure around the alveoli, and are too small to be expelled. Asbestos fibers irritate and inflame the lung tissue structure around the air sacs (the interstitia). Scarring in the interstitia is interstitial disease. When the interstitia are significantly scarred, they can no longer expand or contract fully, and breathing is restricted.

. . . The amphibole fibers also migrate to the outside portion of the lung, where they scar and inflame the pleura (the lung lining) and cause pleural disease. . . . Pleural disease seems particularly pronounced with Libby asbestos fibers.⁸⁷

¶ 62 The latency period for asbestos disease is the period between exposure to asbestos and the time asbestos disease appears on a chest x-ray or CT scan.⁸⁸ “During the latency period, microscopic asbestos fibers are working at a microscopic level, until they become detectable on chest x-ray or CT.”⁸⁹ Dr. Whitehouse has opined, “Data on Libby asbestos disease indicates that changes of asbestos disease can occur in as little as 3-5 years

⁸³ Ex. 129 at 1.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Am J Ind Med 46:219-225 (2004) (see Ex. 129 at 44).

⁸⁷ Ex. 129 at 3-4, ¶¶ 11-12.

⁸⁸ *Id.* at 29, ¶ 55.

⁸⁹ *Id.*

(clearly defined plaques), whereas chrysotile latency periods are generally over 10 years.”⁹⁰ Dr. Whitehouse opined that the average latency for asbestos disease is 15 to 30 years, with a range of 5 to 40 years.⁹¹

¶ 63 Dr. Whitehouse estimates that he has seen 200 to 300 patients who were employed at the Libby mill. In 2006, Dr. Whitehouse made the clinical observation that mill workers appeared over-represented in the patient population.⁹²

¶ 64 Dr. Whitehouse first examined Johnson on June 11, 2001. Dr. Whitehouse took a history from Johnson and ascertained that he had worked for Stimson and the mill’s predecessors. Dr. Whitehouse performed a physical examination of Johnson and reviewed pulmonary function studies that were done on April 16, 2001, in Kalispell.⁹³ At that time, Dr. Whitehouse opined, “Mr. Johnson clearly has asbestosis. This type of airflow obstruction is consistent with asbestosis and has been described by Kay Kilborn⁹⁴ and has been seen multiple times in my own practice.”⁹⁵

¶ 65 Dr. Whitehouse explained that “asbestosis” is often used as an umbrella term to include both asbestos pleural disease and asbestos interstitial disease.⁹⁶

¶ 66 Regarding an April 16, 2001, CT scan taken of Johnson’s lungs, Dr. Whitehouse stated:

This shows extensive pleural thickening throughout the entire chest with areas of calcification. Of particular note is that there is subpleural interstitial disease present above the diaphragm in particular. There is rounded atelectasis involving the left diaphragm with obscuring of the left diaphragm and considerabl[e] interstitial disease is present. There is no bullous disease

⁹⁰ *Id.*

⁹¹ *Id.*; Trial Test.

⁹² Trial Test.

⁹³ Ex. 118 at 4.

⁹⁴ At trial, Dr. Whitehouse identified Dr. Kilborn as an individual who mentored him at Duke University.

⁹⁵ Ex. 118 at 4.

⁹⁶ Trial Test.

present anywhere in the chest x-ray. The x-ray is essentially diagnostic of asbestosis with both interstitial and pleural disease.⁹⁷

¶ 67 In his affidavit, Dr. Whitehouse noted that “smoking disease” is a type of obstructive disease.⁹⁸ “With emphysema, the lung tissue acts like an overexpanded balloon. It does not constrict back to its natural form. Hence exhalation is obstructed.”⁹⁹ Dr. Whitehouse opined that Johnson does not have emphysema.¹⁰⁰

¶ 68 Regarding obstructive disease versus restrictive disease, Dr. Whitehouse has explained:

Asbestos disease is generally a restrictive disease. It restricts what is breathed in. The scarring in the lung lining and the lung air sacs and structure restricts the lungs’ ability to expand on inhalation.

. . . Generally the differences between obstructive disease due to smoking and restrictive disease due to asbestos can be sorted out on pulmonary function tests. This is somewhat complicated by the fact that asbestos disease often causes airway obstruction, or obstructive disease. . . . A significant obstructive component is often found in the Libby cohort.¹⁰¹

¶ 69 In his examination of July 22, 2008, Dr. Whitehouse noted that he heard a very loud rub in Johnson’s left posterior chest.¹⁰² Dr. Whitehouse testified that the rub was so loud that he asked Johnson whether he could hear it when he was sleeping. Dr. Whitehouse testified that the rub is related to pleural disease.¹⁰³

⁹⁷ Ex. 118 at 3.

⁹⁸ Ex. 129 at 30, ¶ 59.

⁹⁹ *Id.*

¹⁰⁰ Trial Test.

¹⁰¹ Ex. 129 at 30-31, ¶ 60-61.

¹⁰² Ex. 116 at 212.

¹⁰³ Trial Test.

¶ 70 Dr. Whitehouse read the April 16, 2001, pulmonary function tests done in Kalispell as Johnson having a restrictive and obstructive defect, with the restrictive disease due to asbestos and the obstructive defect due to asbestos disease as well.¹⁰⁴

¶ 71 On March 19, 2002, Dr. Black assessed Johnson as permanently and totally disabled due to asbestosis and dyspnea beginning August 31, 2001.¹⁰⁵ Dr. Whitehouse agreed with Dr. Black's permanent total disability assessment.¹⁰⁶ On December 15, 2003, Dr. Whitehouse assessed Johnson with a 25% whole person impairment rating.¹⁰⁷

¶ 72 Based on the history provided by Johnson and other Stimson employees interviewed, and based on his review of Spear's report, Dr. Whitehouse opined that Johnson had sufficient exposure to asbestos during the Stimson years to cause asbestos-related disease.¹⁰⁸ Regarding whether Johnson's exposure to asbestos during the Stimson years was "injurious," Dr. Whitehouse testified as follows:

No question that he inhaled a great number of asbestos fibers during that period of time on the driers where he was working. And it's all additive, so that whatever exposure that he got is going to add to all the exposures he may have had previously. So ultimately down the line that's going to give him more disease. And, in fact, his pulmonary function is deteriorating more rapidly than it had been previously.¹⁰⁹

¶ 73 Dr. Whitehouse testified that a person's lungs are immediately injured by the inhalation of asbestos fibers.¹¹⁰ He also testified that additional asbestos exposure is damaging to the lungs "[b]ecause the more you get, the more fiber load you have, and the worse the disease"¹¹¹

¹⁰⁴ Ex. 116 at 15-16.

¹⁰⁵ *Id.* at 34.

¹⁰⁶ Trial Test.

¹⁰⁷ Ex. 118 at 24.

¹⁰⁸ Trial Test.

¹⁰⁹ Trial Trans. (09/15-17/08) 276:16-23.

¹¹⁰ Trial Test.

¹¹¹ Trial Trans. (09/15-17/08) 278:12-13.

¶ 74 Gordon Teel, M.D., is a pulmonary radiologist in Spokane, Washington. Dr. Teel read Johnson's October 21, 2004, CT scan and concluded, "Most Likely Diagnosis: Moderately severe asbestos-related pleural disease and mild asbestos-related lung fibrosis."¹¹² Dr. Teel also noted that Johnson had "no emphysema."¹¹³

¶ 75 Stephen Becker, M.D., read Johnson's May 31, 2006, CT scan and concluded, "There are pleural based changes consistent with changes from previous asbestos exposure and I suspect there is some early interstitial fibrosis."¹¹⁴ Dr. Black also reviewed the 2006 CT scan and assessed, "Asbestosis - continued progression of his disease radiographically and symptomatically."¹¹⁵

¶ 76 Walter R. Fairfax, M.D., of the Billings Clinic, performed an evaluation of Johnson on August 29, 2002. Dr. Fairfax concluded that Johnson has significant lung disease manifested in pleural thickening and interstitial disease consistent with exposure to asbestos and consistent with asbestosis.¹¹⁶

¶ 77 Richard L. Sellman, M.D., performed an independent medical examination (IME) of Johnson on November 25, 2003.¹¹⁷ Dr. Sellman reviewed multiple x-rays and the April 16, 2001, CT scan. Based on his review of Johnson's medical file and tests, Dr. Sellman opined that Johnson has asbestosis, including interstitial lung disease and asbestos-related pleural disease.¹¹⁸

¶ 78 Dorsett D. Smith, M.D., testified for Liberty at trial. Dr. Smith is licensed to practice medicine in Arizona and Washington.¹¹⁹ He is board-certified by the American Board of Internal Medicine and has a subspecialty certification in pulmonary disease.¹²⁰ Dr. Smith

¹¹² Ex. 118 at 25.

¹¹³ *Id.*

¹¹⁴ Ex. 116 at 170 (emphasis removed).

¹¹⁵ *Id.* at 176.

¹¹⁶ Ex. 120 at 2.

¹¹⁷ Ex. 119.

¹¹⁸ *Id.* at 2.

¹¹⁹ Ex. 152-D at 3.

¹²⁰ *Id.*

has published peer-reviewed articles in the area of asbestos-related diseases.¹²¹ Since 1980, Dr. Smith has been certified as a “B” reader by the National Institute of Occupational Safety and Health.¹²²

¶ 79 Dr. Smith has not treated patients since at least 1999. He has, however, performed a number of IMEs. Dr. Smith has testified in numerous asbestos litigation claims on behalf of several defendants including W.R. Grace, Johns-Manville, Owens Corning, Pittsburgh Corning, and the Wellington Group. Dr. Smith has not testified on behalf of a plaintiff in an asbestos-related lawsuit since at least 1980.¹²³

¶ 80 Liberty retained Dr. Smith to perform a records review that included Johnson’s medical records, witness depositions, expert disclosures, and schematic diagrams of the mill.¹²⁴

¶ 81 Based on his review of the records provided to him, Dr. Smith concluded that Johnson suffers from COPD and emphysema due to cigarette smoking, asthmatic bronchitis aggravated by cigarette smoking, pleural plaques with pleural calcification without any functional impairment, exogenous obesity, sub-pleural fat, very minor variable parenchymal scarring, gastroesophageal reflux disease (GERD), hiatal hernia, mild bronchiectasis, hypertension, BPH, hypothyroidism, sleep apnea, and coronary artery calcifications.¹²⁵ Dr. Smith concluded that Johnson “does have evidence of asbestos-related pleural disease, which is going to be most likely related to his prior exposure to commercial amosite containing insulation that was present in the mill when he began employment in 1963 and prior to the purchase by . . . Stimson Lumber.”¹²⁶

¶ 82 Dr. Smith reviewed Johnson’s July 22, 2008, chest x-ray and concluded that Johnson has mild bilateral pleural thickening or plaques, bilateral diaphragmatic calcification, increased bronchial markings, no evidence of asbestosis or diffuse interstitial fibrosis, and plate-like atelectasis over the left diaphragm.¹²⁷

¹²¹ Ex. 152-G at 10; Trial Test.

¹²² Ex. 152-D at 3.

¹²³ Trial Test.

¹²⁴ Ex. 152-L at 1-2; Ex. 152-J at 2.

¹²⁵ Ex. 152-J at 3

¹²⁶ *Id.* at 8-9.

¹²⁷ Ex. 152-J (9/5/08 Rebuttal Report).

¶ 83 Dr. Smith testified at trial that he believes Johnson has asbestos-related pleural plaques and diffuse pleural disease, but does not have asbestosis. Dr. Smith opined that Johnson's asbestos-related pleural disease is related to his asbestos exposure while working at the mill from the 1960s through 1992.¹²⁸

DISPOSITIVE FINDINGS

¶ 84 Having considered the totality of the evidence presented and having made the findings of fact set forth above, I make the following dispositive findings of fact.

¶ 85 Johnson was exposed to copious amounts of asbestos during his employment at the mill from multiple sources – including his employment from 1993 through 2001, while the mill was owned by Stimson. Although Johnson no doubt was exposed to some level of asbestos outside of his employment during the same time, I find it was not equal to the exposure that he experienced in his employment at the mill. Johnson worked at the mill from 1963 to 2001. He often worked in an enclosed area in close proximity to friable asbestos. The negative pressure environment further exacerbated Johnson's asbestos exposure. Conversely, Johnson's exposure outside of his employment was essentially limited to being a resident of Libby. Although Johnson may have been exposed to asbestos outside his employment, the evidence presented leads me to find that his employment exposure to asbestos clearly exceeded his non-employment exposure.

¶ 86 In the present case, both of Johnson's treating physicians, Drs. Black and Whitehouse, have diagnosed Johnson with asbestosis. Drs. Sellman and Fairfax concur with the diagnosis of asbestosis. Dr. Teel concluded that Johnson most likely suffers from asbestos-related pleural disease and mild asbestos-related lung fibrosis. I am persuaded by Dr. Whitehouse's opinion because of his role as Johnson's treating physician, his superior background and experience working with the particular Libby asbestos exposure at issue in this case, and his extensive practice in the area of treating asbestos disease patients. Dr. Smith has not actively treated patients since at least 1999, nor does he have the same experience or expertise in treating and diagnosing Libby asbestos disease patients as Dr. Whitehouse. Therefore, I find that Johnson is suffering from asbestos-related diseases, as diagnosed by his treating physicians.

¶ 87 Dr. Whitehouse opined that Johnson's exposure to asbestos during the Stimson years was both injurious and sufficient to cause his asbestos-related diseases.¹²⁹ I find Dr. Whitehouse's testimony as the treating physician persuasive on this point. I therefore

¹²⁸ Trial Test.

¹²⁹ *Id.*

find that Johnson's asbestos exposure while employed by Stimson was injurious and sufficient to cause his asbestos-related diseases.

CONCLUSIONS OF LAW

¶ 88 To the extent that any of the following conclusions of law may constitute findings of fact, they are incorporated in the findings of fact set forth above.

¶ 89 Johnson's last day of work for Stimson was August 31, 2001. Therefore, the 2001 law applies to his claim.¹³⁰

¶ 90 Johnson bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.¹³¹

¶ 91 "'Occupational disease' means 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."¹³²

¶ 92 Section 39-72-408, MCA, the proximate causation statute, provides:

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.

¶ 93 In *Kratovil v. Liberty Northwest Ins. Corp.*,¹³³ the Montana Supreme Court addressed the correct application of § 39-72-408, MCA, and held that "the correct standard for determining proximate causation for compensability of an ODA claim [is] whether [the]

¹³⁰ *Grenz v. Fire & Cas. of Conn.*, 278 Mont. 268, 271, 924 P.2d 264, 266 (1996).

¹³¹ *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).

¹³² § 39-72-102(10), MCA.

¹³³ *Kratovil v. Liberty Northwest Ins. Corp.*, 2008 MT 443, 347 Mont. 521, 200 P.3d 71.

claimant's employment significantly aggravated or contributed to the occupational disease¹³⁴ Liberty argues that in addition to proving the proximate causation standard as set forth in *Kratovil*, Johnson must specifically address § 39-72-408(4), MCA – i.e., that the disease comes from a hazard to which the worker would not have been equally exposed outside of the employment. As I found above at ¶ 85, Johnson's employment exposure to asbestos clearly exceeded his non-employment exposure. I further found persuasive Dr. Whitehouse's opinion that Johnson's exposure to asbestos during the Stimson years was sufficient to cause his asbestos-related disease. Based on the exposure evidence presented, along with Dr. Whitehouse's opinion that Johnson's employment exposure is the cause of his occupational disease, I conclude that Johnson suffers from an occupational disease as a result of his employment under the proximate causation test as set forth in *Kratovil* and pursuant to § 39-72-408, MCA.

Last Injurious Exposure

¶ 94 Having concluded that Johnson suffers from an occupational disease as a result of his employment, I must next determine which of Johnson's employers may be liable for his occupational disease. In that regard, § 39-72-303(1), MCA, provides:

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.

¶ 95 Larson's Workers' Compensation Law cites to the case of *Osteen v. A.C. & S., Inc.*¹³⁵ to explain the rationale for the last injurious exposure rule. In *Osteen*, the Nebraska Supreme Court adopted the last injurious exposure rule, rather than apportioning liability between insurers.¹³⁶ Though the last insurer at risk argued that the rule was unfair, the Nebraska Supreme Court stated: "[E]ven though liability imposed under this rule can have a harsh result [in a particular case], there will be a spreading of the risk when the total picture of asbestos litigation is considered on a nationwide basis."¹³⁷

¶ 96 The Montana Supreme Court and this Court have previously discussed the last injurious exposure rule in different contexts. Specifically, the Montana Supreme Court has discussed two distinct scenarios in which the last injurious exposure rule has been

¹³⁴ *Id.*, ¶ 21.

¹³⁵ *Osteen*, 209 Neb. 282, 307 N.W.2d 514 (1981).

¹³⁶ 9 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law, §153.02[5] at 153-11 (2006).

¹³⁷ Larson's, quoting *Osteen*, 307 N.W.2d at 520.

applied.¹³⁸ The first scenario involves “allegations of aggravations suffered on account of second, subsequent occupational diseases or aggravations arising after an earlier injury or a previously diagnosed occupational disease.”¹³⁹ The second scenario involves a single disease diagnosed subsequent to the claimant’s retirement.¹⁴⁰ Although, for reasons discussed below, I conclude this case falls within the second scenario, I believe both scenarios warrant discussion.

First Scenario: Allegations of aggravations suffered on account of second, subsequent occupational diseases or aggravations arising after an earlier injury or a previously diagnosed occupational disease.

¶ 97 In cases falling under the first scenario, the Montana Supreme Court has at times held that the injurious exposure must have “materially or substantially contributed” to the symptoms of a condition in order to invoke the last injurious exposure rule.¹⁴¹ Most recently, however, the Supreme Court held that the aggravation must be “significant” before it will be considered the last injurious exposure.¹⁴² Notwithstanding the various terminology employed, the terms “material,” “substantial,” and “significant” have not been defined in the practical sense – i.e., what degree of injurious exposure is necessary to be considered “material,” “substantial,” or “significant.” In attempting to give those terms some practical application, some direction can be derived from the most recent Montana Supreme Court decision regarding the degree of exposure necessary to constitute the “last injurious exposure.”

¶ 98 In *Lanes v. Montana State Fund*,¹⁴³ the insurer (State Fund) invoked the last injurious exposure rule in arguing that the claimant’s (Lanes’) subsequent employer should be liable for his occupational disease. Lanes argued that the last injurious exposure rule did not apply because any aggravation suffered in his subsequent employment as a minister was only temporary.¹⁴⁴ This Court held that Lanes’ employment as a minister was not his last injurious exposure because, “It would seem axiomatic that in order for an

¹³⁸ *Lanes v. Montana State Fund*, 2008 MT 306, ¶ 37, 346 Mont. 10, 192 P.3d 1145 (quoting *Fleming v. Int’l Paper Co.*, 2005 MTWCC 34, ¶ 47).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Caekaert v. State Comp. Mut. Ins. Fund*, 268 Mont. 105, 112, 885 P.2d 495, 499 (1994).

¹⁴² *Lanes*, 2008 MT 306, ¶ 38.

¹⁴³ *Lanes*, 2007 MTWCC 39.

¹⁴⁴ *Lanes*, 2007 MTWCC 39, ¶ 26.

aggravation or contribution to rise to the level of ‘significant,’ it must be more than merely temporary or transient.”¹⁴⁵ Because Lanes’ treating physician opined that any aggravation suffered from his duties as a minister was only temporary, this Court concluded that Lanes was last injuriously exposed to the hazard of the occupational disease he developed while working for his previous employer.¹⁴⁶ The Montana Supreme Court affirmed this Court’s decision, and held:

Because the evidence did not establish that the minister duties “significantly aggravated” Lanes’ pre-existing condition, the WCC did not err in concluding that this temporary aggravation did not constitute the last injurious exposure under § 39-72-303(1), MCA.¹⁴⁷

¶ 99 The reasonable conclusion from the Montana Supreme Court’s holding in *Lanes* is that, irrespective of whether the Court uses the terms “material,” “substantial,” or “significant” to describe the degree of exposure necessary to invoke the last injurious exposure rule, the practical application of those terms is that the aggravation or contribution resulting from the exposure must be permanent to some degree. Even if this case were to fall under the first scenario, it is clear from the evidence presented that Johnson’s asbestos exposure during his eight-year employment with Stimson resulted in a permanent aggravation or contribution to his asbestos-related disease. As discussed at length below, however, I conclude that Johnson’s claim falls under the second scenario.

Second Scenario: A single disease diagnosed subsequent to the claimant’s retirement.

¶ 100 This Court has previously noted that no Montana case addresses the degree of exposure necessary to constitute a “last injurious exposure” when the exposure occurs over a long period of time and results in a single disease.¹⁴⁸ However, in *Fleming v. International Paper Co.*,¹⁴⁹ this Court discussed the various potential applications of the last injurious exposure rule in a case strikingly similar to the present case. *Fleming* involved an asbestos exposure claim brought by a coworker (Fleming) of Johnson’s who had been employed at

¹⁴⁵ *Lanes*, 2007 MTWCC 39, ¶ 37.

¹⁴⁶ *Lanes*, 2007 MTWCC 39, ¶ 40.

¹⁴⁷ *Lanes*, 2008 MT 306, ¶ 38.

¹⁴⁸ *Johnson v. Int’l Paper Co.*, 2005 MTWCC 39, ¶ 3, n.2.

¹⁴⁹ *Fleming*, 2005 MTWCC 34.

the same mill from 1960 through 1998.¹⁵⁰ As was the case with Johnson, the mill changed owners during Fleming's employment but was owned by Stimson on Fleming's last day of work. Although Fleming retired prior to his occupational disease diagnosis whereas Johnson was diagnosed prior to his last day of employment, both Johnson and Fleming had been working for Stimson for several years prior to their respective diagnoses. After being diagnosed with asbestos-related disease in the spring of 2001, Johnson continued to work for Stimson for a few months before ceasing his employment on August 31, 2001. Therefore, I do not find the date of diagnosis relative to the date of retirement to be a pertinent distinction in this case. Because of the striking similarities between *Fleming* and the present case, I conclude that this case falls within the second scenario.

¶ 101 In discussing the last injurious exposure rule in *Fleming*, this Court noted that the rule at issue was not the same last injurious exposure rule as was applied in cases that fell under the first scenario.¹⁵¹ Indeed, in its discussion regarding the two distinct scenarios, the Montana Supreme Court in *Lanes* specifically referenced this Court's analysis from *Fleming* and acknowledged that the last injurious exposure rule in *Fleming* differed from the rule applied to cases which fell within the first scenario.¹⁵² In *Fleming*, this Court began its discussion of the last injurious exposure rule by noting:

Larson's treatise on workers' compensation law reports that the last injurious exposure rule has particular application to diseases arising from the inhalation of fumes and chemicals, *including asbestosis* [Larson] notes that the rule is "particularly useful for allocating liability in occupational disease cases, which often involve a number of insurers," and cites asbestosis cases as an example. . . . The rule imposes liability for cumulative exposures solely on the insurer at risk during the claimant's last injurious exposure to the fumes, chemicals, or substances giving rise to the disease.¹⁵³

¶ 102 Regarding the **degree** of injurious exposure required to hold an employer liable, this Court went on to quote the following from Larson's:

¹⁵⁰ *Fleming*, ¶ 1.

¹⁵¹ *Fleming*, ¶ 47.

¹⁵² *Lanes*, 2008 MT 306, ¶ 37.

¹⁵³ *Fleming*, ¶ 48.

[7] Degree of Injurious Exposure Required

[a] Determining How Much Exposure is “Injurious”

It goes without saying that, before the last-injurious-exposure rule can be applied, there must have been *some* exposure of a kind contributing to the condition. So, if a silicosis claimant had been transferred to outside work or to work in a place where dust conditions were not harmful, the carrier on the risk during the later period will not be held liable. However, once the requirement of some contributing exposure has been met the question remains: Was this enough of an exposure to be deemed “injurious”?

Traditionally, courts applying the last injurious exposure rule have not gone on past the original finding of some exposure to weigh the relative amount or duration of exposure under various carriers and employers. As long as there was some exposure of a kind that could have caused the disease, the last insurer at risk is liable for all disability from that disease. Thus, insurers or employers who have been at risk for relatively brief periods have nevertheless been charged with full liability for a condition that could only have developed over a number of years. In one instance, the carrier had the misfortune to assume coverage at midnight during the last 11:00 P.M. to 7:00 A.M. shift worked by an employee who subsequently filed a claim for disability caused by anthracosilicosis. The insurer was held liable for the entire amount of the claimant’s benefits despite its only being on the risk for seven hours.

In contrast to this traditional rule, however, are decisions such as that in *Busse v. Quality Insulation*, in which the Minnesota Supreme Court took notice of medical testimony to the effect that there is a “lag time” of five to ten years between exposure to asbestos and the development of asbestosis. The court accepted this testimony in support of a conclusion that the claimant’s exposure under the last insurer, who had been at risk for only two months, was not a “substantial contributing cause” of death. Other courts have also held that in order to impose liability on the insurer who was last at risk, the exposure during its period of risk must have been of such length or degree that it could have *actually* caused the disease.

9 Authur Larson & Lex K. Larson, Larson’s Workers’ Compensation Law, § 153.02[7][a] at 153-19-20 (2004) (footnotes omitted). Under the traditional

rule discussed in Larson's, it is likely that Liberty is the insurer at risk for the claimant's asbestosis-related lung disease.¹⁵⁴

¶ 103 I find this Court's discussion of the "last injurious exposure" rule in *Fleming* to be on point with the present case and use that discussion as the foundation for my analysis in this case.

¶ 104 In the present case, the evidence overwhelmingly demonstrates that Johnson was exposed to asbestos from multiple sources during his eight-year employment with Stimson. The evidence demonstrates that pipe insulation in numerous locations tested positive for asbestos and that this insulation was friable. The survey done by PRE at the request of Stimson showed the presence of asbestos in 1994. Asbestos was removed between March and May, 1996. Several employees testified to the presence of vermiculite on top of the big dryer and on the floor of the dryer during the Stimson years of ownership.

¶ 105 Dr. Whitehouse testified that a person's lungs are immediately injured by the inhalation of asbestos fibers. He also testified that additional asbestos exposure is damaging to the lungs "[b]ecause the more you get, the more fiber load you have, and the worse the disease"¹⁵⁵ Larson's describes the traditional "last injurious exposure" rule as requiring a showing of **some** type of exposure sufficient to cause the disease. Under this rule, Johnson's exposure to asbestos fibers during his work years at Stimson were injurious to his lungs and of sufficient exposure to cause the disease. Even under the rule described by Larson's and illustrated in the *Busse*¹⁵⁶ case, Liberty would be liable under the facts of the present case. Johnson's exposure to asbestos fibers took place over a period of approximately eight years, as compared to the claimant in *Busse* whose exposure was only two months.

¶ 106 I conclude that Johnson's exposure to asbestos for the eight years that he was employed by Stimson constitutes his last injurious exposure to the hazard of the disease. As Stimson's insurer, therefore, Liberty is liable for Johnson's occupational disease.

Permanent Total Disability Benefits and Impairment Rating

¶ 107 Based on the opinions of Drs. Black and Whitehouse, as set forth above, I conclude that Johnson is permanently totally disabled as a result of his occupational disease and, accordingly, entitled to permanent total disability benefits.

¹⁵⁴ *Fleming*, ¶ 51.

¹⁵⁵ Trial Trans. (09/15-17/08) 278:12-13.

¹⁵⁶ *Busse v. Quality Insulation Co.*, 322 N.W.2d 206 (Minn. 1982).

¶ 108 Based on Dr. Whitehouse's opinion, as set forth above, I conclude that Johnson is entitled to a 25% impairment rating.

Costs

¶ 109 As the prevailing party, Johnson is entitled to his costs.¹⁵⁷

JUDGMENT

¶ 110 Johnson suffers from an occupational disease arising out of and in the course of his employment with Stimson.

¶ 111 Johnson is entitled to permanent total disability benefits, including a 25% impairment rating, and reasonable medical expenses related to the treatment of his occupational disease.

¶ 112 Johnson is entitled to his costs.

¶ 113 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 1st day of July, 2009.

(SEAL)

/s/ JAMES JEREMIAH SHEA

JUDGE

c: Jon L. Heberling
Laurie Wallace
Larry W. Jones
Submitted: February 2, 2009

¹⁵⁷ *Marcott v. Louisiana Pac. Corp.*, 1994 MTWCC 109 (aff'd after remand at 1996 MTWCC 33).