

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2014 MTWCC 21

WCC No. 2014-3358

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ROGER G. KRAMLICH

Petitioner

vs.

THE MONTANA MUNICIPAL INTERLOCAL AUTHORITY

Respondent/Insurer.

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FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

**Summary:** Petitioner contends that he suffers from an occupational disease caused by exposure to dust, exhaust, and other inhalants in the course and scope of his employment performing street worker duties for the City of Lewistown, and that Respondent unreasonably denied his claim. Respondent contends it reasonably denied the claim because Petitioner's employment was not the major contributing cause of his medical conditions.

**Held:** Petitioner has not met his burden of proving that his employment was the major contributing cause of his alleged occupational diseases. Petitioner's treating physicians and the IME physician appear to agree that Petitioner's sleep apnea was the major contributing cause of his congestive heart failure and sequelae. The IME physician testified that Petitioner's sleep apnea was not work-related. Petitioner has not offered any medical evidence to the contrary. Respondent is therefore not liable for his claim.

**Topics:**

**Causation: Medical Condition.** Although Petitioner argued that his working conditions caused him to develop COPD, the Court concluded that Petitioner had failed to prove that he actually suffered from COPD. The only reference to COPD in a medical record was from an older radiology report, and although Petitioner's treating physician listed COPD as a diagnosis when he filled out an employment form on Petitioner's behalf, none of the medical records introduced from the treating physician contained any reference to COPD.

**Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-407.** Where no medical providers opined that COPD was the major contributing cause of Petitioner's other medical problems, but several opined that obstructive sleep apnea led to Petitioner's condition, the Court concluded that Petitioner had not proven that his employment caused him to develop COPD, which in turn caused his other medical problems.

**Causation: Medical Condition.** Where no medical providers opined that COPD was the major contributing cause of Petitioner's other medical problems, but several opined that obstructive sleep apnea led to Petitioner's condition, the Court concluded that Petitioner had not proven that his employment caused him to develop COPD, which in turn caused his other medical problems.

**Occupational Disease: Causation.** Although some medical providers opined that Petitioner's work conditions exacerbated his symptoms, § 39-71-407(12), MCA (2011), requires not just that employment be a contributing cause of an alleged occupational disease, but that it be the major contributing cause. The Court concluded that Petitioner's reliance upon his medical records without supporting medical testimony was insufficient to fulfill that requirement.

**Unreasonable Conduct by Insurers.** Petitioner's argument that Respondent's failure to accept his claim and pay benefits forced him "to live a life of devastation" does not prove that Respondent acted unreasonably when it denied Petitioner's claim.

¶ 1 The trial in this matter occurred on November 4, 2014, in Great Falls, Montana. Petitioner Roger G. Kramlich attended and was represented by Jack R. Stone. Morgan M. Weber and Oliver H. Goe represented Respondent The Montana Municipal Interlocal Authority (MMIA). Denise L. Jensen, claims examiner for MMIA, also attended.

¶ 2 Exhibits: The Court admitted Exhibits 1 through 10, 16, 18, 20 through 27, and 29 through 43 without objection. The Court admitted Exhibit 44 without objection, except for pages 172 and 173, which appeared to be included inadvertently as they do not relate to Kramlich's case. During its cross-examination of Kramlich, MMIA's counsel determined that the Court's copy of Exhibit 44, page 181, was incomplete and moved to provide a replacement copy of this page post-trial. Kramlich had no objection and the

Court granted the motion. The parties withdrew Exhibits 17 and 45 through 47 prior to trial. The Court sustained MMIA's hearsay objections to Exhibits 11 through 15 and did not admit them into evidence. The Court overruled Kramlich's objection to Exhibit 28 and admitted it. However, the Court noted that Exhibit 28 at page 5 contains inadmissible mediation information and the Court will not consider that portion of the Exhibit. The Court overruled MMIA's relevancy objections to Exhibits 19 and 48 through 50 and admitted them.

¶ 3 During trial, MMIA moved to admit additional pages to Exhibit 23. With no objection from Kramlich, the Court admitted these as pages 9 through 11. During trial, MMIA also moved to exclude from evidence web pages which Kramlich cited to in his Proposed Findings of Fact and Conclusions of Law, but which Kramlich had neither moved to introduce into evidence, nor laid a foundation for their consideration. The Court sustained MMIA's objection and did not admit the cited documents into evidence.

¶ 4 On November 10, 2014, MMIA provided a new copy of page 181 of Exhibit 44. The Court replaced this page in the exhibit binder and deemed the matter submitted for decision.

¶ 5 Witnesses and Depositions: The Court admitted Kramlich's deposition and it can be considered part of the record. Kramlich, John William Wright, Jr., and David J. Hewitt, MD, MPH, DABT, were sworn and testified at trial.

¶ 6 Issues Presented: The Final Pretrial Order<sup>1</sup> sets forth the following issues:

Issue One: Whether Petitioner is suffering from a compensable occupational disease.

Issue Two: Whether Respondent reasonably denied Petitioner's April 17, 2013, claim.

Issue Three: Whether Petitioner is entitled to attorney fees, penalty, and costs.

### FINDINGS OF FACT

¶ 7 Kramlich testified at trial. The Court found him to be a credible witness.

¶ 8 Kramlich resides in Lewistown, Montana, where he has spent the majority of his life.<sup>2</sup> After high school, Kramlich worked for tire businesses for several years. He then

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<sup>1</sup> Final Pretrial Order, Docket Item No. 25.

worked on the bridge crew for Fergus County for 15 years.<sup>3</sup> In 2004, Kramlich began working for the City of Lewistown.<sup>4</sup>

¶ 9 Kramlich's position with the City of Lewistown was called Street Worker 2.<sup>5</sup> Kramlich ran the city's street maintenance equipment.<sup>6</sup> His job duties included operating a road grader, dump trucks, backhoe, snowplow, sander, paint sprayer, and street sweeper.<sup>7</sup> Kramlich testified that his job exposed him to inhalant irritants on a daily basis.<sup>8</sup> He explained that many of his job duties involved running street maintenance equipment under dusty and dirty conditions, and he was often exposed to fumes from exhaust and oil.<sup>9</sup>

¶ 10 Kramlich testified that the City of Lewistown owns two street sweepers. Kramlich always operated the "pelican," which has a beak in front that picks up debris.<sup>10</sup> Kramlich testified that he operated the street sweeper for milling, spring cleanup, and for picking up leaves and sawdust.<sup>11</sup> Kramlich testified that the amount of time he spent operating the street sweeper varied every year. He estimated that he operated the sweeper between six and 15 times per year, but he would usually do so for his entire shift for several days in a row.<sup>12</sup> Kramlich testified that he possibly ran the street sweeper 20 to 30 days per year.<sup>13</sup>

¶ 11 Kramlich testified that running the street sweeper was a particularly dirty job and he experienced shortness of breath from the dusty conditions each time he operated the vehicle.<sup>14</sup> Kramlich testified that his lungs would fill up with dust and for several days afterward, he felt as if he could not breathe.<sup>15</sup> His symptoms would gradually resolve,

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<sup>2</sup> Kramlich Dep. 4:13-23.

<sup>3</sup> Kramlich Dep. 6:2-13.

<sup>4</sup> Trial Test.

<sup>5</sup> Kramlich Dep. 11:12-15.

<sup>6</sup> Trial Test.

<sup>7</sup> Kramlich Dep. 11:16-22.

<sup>8</sup> Kramlich Dep. 19:11 – 20:5.

<sup>9</sup> Trial Test.

<sup>10</sup> Kramlich Dep. 28:6-15.

<sup>11</sup> Kramlich Dep. 29:18 – 30:3.

<sup>12</sup> Kramlich Dep. 26:25 – 27:17.

<sup>13</sup> Kramlich Dep. 83:4-15; Trial Test.

<sup>14</sup> Trial Test.

<sup>15</sup> Kramlich Dep. 43:11-17.

although he occasionally took two days off work after running the sweeper.<sup>16</sup> Kramlich testified that he never sought medical treatment for the condition because it always resolved on its own.<sup>17</sup>

¶ 12 John William Wright, Jr., testified at trial. I found him to be a credible witness. Wright worked for the City of Lewistown prior to when Kramlich worked there. Wright testified that he operated the same street sweeper that Kramlich operated in the course of his employment. He stated that it was a dusty and dirty job. He last operated the street sweeper in approximately 2010. He retired in approximately 2012.<sup>18</sup>

¶ 13 Kramlich testified that from 2005 until April 15, 2013, his hypertension and his weight had both increased, and his ability to engage in physical activity had decreased.<sup>19</sup> On July 12, 2007, Kramlich underwent chest x-rays prior to a right knee arthroscopy, and the radiologist found chronic obstructive pulmonary disease (COPD) but no evidence of acute cardiopulmonary disease.<sup>20</sup> Kramlich testified that he does not recall anyone informing him that he had COPD in 2007.<sup>21</sup> From the medical records in evidence, it appears that Kramlich had been diagnosed with hypertension at least as early as August 31, 2010, when he treated with Kristopher G. Cunningham, MD, for a back injury, and Dr. Cunningham noted hypertension in his assessment of Kramlich's condition.<sup>22</sup> On February 14, 2011, Dr. Cunningham saw Kramlich for fatigue, pleurisy, and occasional dyspnea.<sup>23</sup> On November 18, 2011, Dr. Cunningham noted Kramlich was "here for follow[ ]up on [hypertension]. no palpitations, chest pain, doe, or increased edema. watching salt intake. discussed having normal exercise regimen."<sup>24</sup> At this time, Kramlich was an occasional cigar smoker.<sup>25</sup> In late 2012, he quit smoking.<sup>26</sup>

¶ 14 According the medical records in evidence, Richard Tenney, MD, saw Kramlich for hypertension and other conditions not relevant to the present case on October 10,

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<sup>16</sup> Kramlich Dep. 43:18-21.

<sup>17</sup> Kramlich Dep. 43:25 – 44:7.

<sup>18</sup> Trial Test.

<sup>19</sup> Trial Test.

<sup>20</sup> Ex. 27 at 1.

<sup>21</sup> Kramlich Dep. 74:17-19.

<sup>22</sup> Ex. 34 at 1.

<sup>23</sup> Ex. 34 at 2.

<sup>24</sup> Ex. 22 at 1.

<sup>25</sup> Trial Test.

<sup>26</sup> Ex. 22 at 5.

11, 25, November 10, and December 17, 2012.<sup>27</sup> Kramlich testified that he knew his blood pressure was very high during this time period and that this was a significant problem for him. He agreed that he felt less fatigued and had no chest symptoms when his blood pressure was better controlled.<sup>28</sup> On February 13, 2013, Dr. Tenney completed a Family Medical Leave Act (FMLA) Medical Certification for the City of Lewistown in which he indicated that Kramlich required a reduced work schedule because of a serious health condition. He stated that Kramlich required medical supervision and would need monthly medical appointments, blood pressure medications, and oxygen.<sup>29</sup> He also stated that Kramlich would require permanent modification of his work activities, and that he would have some functional limitations upon his return to work.<sup>30</sup>

¶ 15 Kramlich testified that he had operated the street sweeper for approximately eight days in 2013 prior to April 15, 2013.<sup>31</sup> Kramlich testified that in the week prior to April 15, 2013, he ran the street sweeper and also cleaned some large bolts for the water department.<sup>32</sup> He used a grinder to remove rust from the bolts.<sup>33</sup> He spent four days running the street sweeper and one day grinding the bolts during that workweek.<sup>34</sup>

¶ 16 On April 15, 2013, Kramlich presented to the emergency room at the Central Montana Medical Center (CMMC) in Lewistown, Montana. His chief complaint was an inability to breathe. Joan M. McMahon, MD, saw Kramlich and took a history. Kramlich reported that his boss had ordered him to go to the emergency room.<sup>35</sup>

¶ 17 Kramlich testified that on the morning he went to the emergency room, which was a Monday, he felt exhausted and could barely walk.<sup>36</sup> Kramlich testified that he had operated the street sweeper the previous Friday, and over the weekend, he did nothing because he did not feel well.<sup>37</sup>

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<sup>27</sup> Ex. 22 at 2-6.

<sup>28</sup> Trial Test.

<sup>29</sup> Ex. 22 at 7.

<sup>30</sup> Ex. 22 at 8.

<sup>31</sup> Kramlich Dep. 40:2-5.

<sup>32</sup> Kramlich Dep. 40:15-23.

<sup>33</sup> Kramlich Dep. 41:1-3.

<sup>34</sup> Kramlich Dep. 41:4-10.

<sup>35</sup> Ex. 26 at 1.

<sup>36</sup> Kramlich Dep. 45:4-10.

<sup>37</sup> Kramlich Dep. 45:15-19.

¶ 18 Dr. McMahon noted that Kramlich reported shortness of breath, which had been ongoing for several months but had worsened in the last month, and he had also been coughing up some green purulent sputum. She noted that Kramlich could not lie flat in bed because of pressure and coughing. He reported night sweats and a decrease in exercise tolerance.<sup>38</sup> Upon examination, Dr. McMahon found Kramlich to have labored breathing and that he weighed 350 pounds – 40 pounds more than three months earlier. She found diminished lung sounds and end expiratory wheezes. Dr. McMahon further found edema, pitting, and mild erythema. Kramlich’s breathing and oxygen saturation improved after treatment. Dr. McMahon suggested hospitalization, but Kramlich preferred to be seen as an outpatient, and noted that he had an appointment scheduled with Dr. Tenney in two days. Dr. McMahon scheduled Kramlich for an echocardiogram and recommended a sleep study.<sup>39</sup>

¶ 19 Dr. McMahon’s impression was that Kramlich had underlying morbid obesity, hypertension, and gout, presenting on this day with increasing dyspnea, a 40-pound weight gain, and shortness of breath. Dr. McMahon found Kramlich to be hypoxic with COPD and increased mediastinal lymphadenopathy.<sup>40</sup>

¶ 20 On April 15, 2013, radiologist V. Anne Hingle, MD, took films of Kramlich’s chest and found enlargement of the right hilum, patchy areas of consolidation in the right middle lobe and lingula, and cardiomegaly. She compared Kramlich’s films to a July 12, 2007, study, and found his heart was enlarged, his right hilum appeared more prominent, and she could see calcified plaque within the aortic arch.<sup>41</sup> From a chest angiogram, Dr. Hingle found mediastinal and hilar lymphadenopathy with no evidence of pulmonary embolus or acute pulmonary disease. She recommended a short-term follow-up CT scan.<sup>42</sup>

¶ 21 On April 17, 2013, Dr. Tenney saw Kramlich for “Med check / feet swelling, fatigue.” He noted that Kramlich had improved somewhat since his April 15 emergency room visit. Under the history of present illness, he explained, “This process began with his exposure to street sweepers with development of wheezing, green phlegm and infective symptoms. . . . He is not a known asthmatic but dust does bother him.” Dr. Tenney assessed Kramlich with hypertension and shortness of breath and recommended hospitalization.<sup>43</sup> Regarding Kramlich’s hypertension, he added, “multiple

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<sup>38</sup> Ex. 26 at 1.

<sup>39</sup> Ex. 26 at 2.

<sup>40</sup> Ex. 26 at 3.

<sup>41</sup> Ex. 27 at 2.

<sup>42</sup> Ex. 27 at 3.

<sup>43</sup> Ex. 9 at 1.

problems and etiology of this is not clear when it initially started. Might have been pneumonia o[r] reactive airway disease, but might have been silent MI initially.”<sup>44</sup>

¶ 22 On April 17, 2013, Danny M. Harbour, MD, saw Kramlich at the CMMC emergency room.<sup>45</sup> Kramlich testified that at the time he saw Dr. Harbour, he suffered from extreme shortness of breath, weakness, and fluid retention.<sup>46</sup>

¶ 23 Dr. Harbour noted that Dr. Tenney had referred Kramlich to the emergency room and recommended that he be admitted to the hospital. Kramlich presented with a chief complaint of edema and shortness of breath. Dr. Harbour reported that Kramlich had experienced several months of progressive edema and shortness of breath as well as a 37-pound weight gain.<sup>47</sup> Dr. Harbour noted that Kramlich had no history of asthma or COPD.<sup>48</sup> Dr. Harbour further reported:

His symptoms were exacerbated after working for the city using a street sweeper. . . . When he has used the street sweeper in the past, it has exacerbated his cough and shortness of breath, but it has never been this bad before.<sup>49</sup>

Dr. Harbour assessed Kramlich with hypoxia and edema from right heart failure. He admitted Kramlich under the care of Michael E. Sura, MD.<sup>50</sup>

¶ 24 On April 17, 2013, Dr. Sura assumed Kramlich’s care. In his medical report, Dr. Sura summarized Kramlich’s recent medical care and took a history from Kramlich. He reported:

[Kramlich] reports having had symptoms for the last two months with dyspnea and weight gain. He does work as a street sweeper, and he recalls problems breathing and coughing for two or three days following times when he is sweeping the street. . . . He recently was diagnosed with hypertension . . . . His blood pressure has been well controlled. . . . He has never been evaluated for sleep apnea although he reports snoring, and

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<sup>44</sup> Ex. 9 at 2.

<sup>45</sup> Ex. 5 at 1.

<sup>46</sup> Trial Test.

<sup>47</sup> Ex. 5 at 1.

<sup>48</sup> Ex. 5 at 2.

<sup>49</sup> Ex. 5 at 1.

<sup>50</sup> Ex. 5 at 2.

witnesses have noted apnea events. Prior to this, he denies any history of heart disease, congestive heart failure, or diabetes.<sup>51</sup>

After an examination and review of medical records and imaging, Dr. Sura assessed Kramlich with pulmonary hypertension, cor pulmonale, and anasarca. He noted that the hypertension was of unclear etiology and made no comment as to the cause of the other conditions.<sup>52</sup>

¶ 25 On April 17, 2013, Kramlich submitted a First Report of Injury and Occupational Disease, in which he contended that he suffered from an occupational disease arising out of his employment with the City of Lewistown.<sup>53</sup> Kramlich described his conditions as shortness of breath and hypertension and stated, “got sick after using sweeper & cleaning rusty bolts from lower water station.”<sup>54</sup>

¶ 26 On April 22, 2013, Dr. Sura discharged Kramlich from CMMC. At the time of discharge, Dr. Sura’s diagnoses were: pulmonary artery hypertension; anasarca, improved; hypertension; morbid obesity; obstructive sleep apnea; and mediastinal and hilar lymphadenopathy. Dr. Sura explained, “I feel that sleep apnea is the most likely cause for his pulmonary artery hypertension and thus leading to right heart failure and his edema.”<sup>55</sup>

¶ 27 On April 24, 2013, Dr. Tenney saw Kramlich for a follow-up appointment and found Kramlich improved but still requiring further treatment. He assessed Kramlich with sleep apnea, hypertension, cor pulmonale, and right heart failure due to pulmonary hypertension. He noted, “I suspect that [the] major problem is [sleep] apnea . . . with acute exacerbation and right heart failure . . . .”<sup>56</sup> He took Kramlich off work until further notice.<sup>57</sup>

¶ 28 On April 30, 2013, Roy N. Kohler, MD, saw Kramlich for a polysomnogram on Dr. Sura’s referral. Dr. Kohler assessed Kramlich as having moderate to severe obstructive sleep apnea.<sup>58</sup>

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<sup>51</sup> Ex. 6 at 1.

<sup>52</sup> Ex. 6 at 3.

<sup>53</sup> Final Pretrial Order at 2.

<sup>54</sup> Ex. 10.

<sup>55</sup> Ex. 23 at 9-10.

<sup>56</sup> Ex. 22 at 12.

<sup>57</sup> Ex. 22 at 14.

<sup>58</sup> Ex. 20 at 1.

¶ 29 On June 4, 2013, Dr. Tenney wrote a letter intended to serve as a “disability evaluation” for Kramlich. Dr. Tenney explained, “His medical conditions that are operative in this evaluation are right heart failure, sleep apnea and severe lung disease.” He placed several work restrictions on Kramlich, including a total restriction from exposure to dust, fumes, and gases.<sup>59</sup>

¶ 30 On June 11, 2013, Dr. Tenney completed an Attending Physician’s Statement for the Montana Public Employee Retirement Administration (MPERA). He noted that Kramlich’s chief complaints were shortness of breath and fatigue, and that Kramlich needed continual oxygen and a CPAP at night. Under “Contributing causes of injury if due to employment,” Dr. Tenney wrote, “Dusty environment, inhalants[,] smoke, dust[.]”<sup>60</sup> He diagnosed Kramlich with hypertension (controlled), obstructive sleep apnea, and COPD.<sup>61</sup> He stated that Kramlich could not be exposed to inhalants or dust and opined that Kramlich was unable to perform his job duties. He further noted that he considered Kramlich’s condition to be permanent, noting, “obstructive sleep apnea and hyperten[sion] are not reversible diseases.”<sup>62</sup>

¶ 31 On June 26, 2013, Kramlich wrote to City Manager Kevin Myhre and requested additional leave time, noting that he was in the process of pursuing his workers’ compensation claim.<sup>63</sup>

¶ 32 On July 8, 2013, Myhre denied Kramlich’s request for additional leave without pay. Myhre terminated Kramlich’s employment effective July 9, 2013.<sup>64</sup>

¶ 33 On July 9, 2013, Dr. Tenney saw Kramlich for a follow-up appointment. He noted, “He continues to improve . . . . No chest pain. Had to quit job because of work load and environmental hazards[,] vapors etc[.] I agree with that plan.”<sup>65</sup>

¶ 34 On July 30, 2013, MMIA’s claims examiner Denise L. Jensen wrote to Kramlich and denied liability for his occupational disease claim. She stated that Dr. Kenneth

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<sup>59</sup> Ex. 4.

<sup>60</sup> Ex. 3 at 1.

<sup>61</sup> Ex. 3 at 1. Although Dr. Tenney includes COPD as one of Kramlich’s diagnoses on this form, the Court has not found any reference to COPD in Dr. Tenney’s medical records.

<sup>62</sup> Ex. 3 at 2.

<sup>63</sup> Ex. 44 at 141.

<sup>64</sup> Ex. 44 at 79-80.

<sup>65</sup> Ex. 22 at 27.

Carpenter had reviewed Kramlich's April 15, 2013, emergency room medical record and opined that Kramlich's conditions were not work-related.<sup>66</sup>

¶ 35 On August 7, 2013, Kramlich saw Dr. Kohler for a follow-up appointment. Dr. Kohler noted that Kramlich was using the CPAP and had seen some improvement in his condition. He further stated:

[Kramlich] is fighting with Workman's Comp. Apparently they feel that he is not working on account of sleep apnea. He tells me that he has a sensitivity to dust and fumes. Exposure to these causes him to be short of breath. . . . Typically, there is no wheezing. No chest pain is noticed. He reports some dyspnea with exertion.<sup>67</sup>

Dr. Kohler assessed Kramlich with obstructive sleep apnea and shortness of breath, noting, "He describes problems with breathing related to exposures to dust and fumes. His obstructive sleep apnea appears to be well treated at this point and is not a cause of his alleged disability."<sup>68</sup>

¶ 36 On August 7, 2013, Jacob Forke, MD, wrote a letter in which he stated that he had assumed Kramlich's care. Dr. Forke noted that Kramlich had been admitted to the hospital on April 17, 2013, secondary to increasing shortness of breath, weight gain, and swelling. He noted that Kramlich was found to have severe pulmonary hypertension and diastolic heart dysfunction, and that he was subsequently diagnosed with severe sleep apnea. Dr. Forke stated, "Per the records the physician taking care of him at the time felt that dust, smoke and other inhalants contributed to his hospitalization and continued SOB." He further noted that Kramlich reported shortness of breath when exposed to dust or other irritants.<sup>69</sup> Dr. Forke noted that he had reviewed Dr. Tenney's June 4, 2013, letter, and that he agreed with the limitations Dr. Tenney set for Kramlich.<sup>70</sup>

¶ 37 On October 7, 2013, Jensen wrote to Kramlich's attorney and refused to authorize Kramlich's request for temporary total disability (TTD) benefits. She stated that she had found no information which would lead her to believe that Kramlich's diagnoses of sleep apnea, congestive heart failure, and hypoxia were work-related.

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<sup>66</sup> Ex. 36.

<sup>67</sup> Ex. 1 at 1.

<sup>68</sup> Ex. 1 at 1.

<sup>69</sup> Ex. 2.

<sup>70</sup> Ex. 2.

However, she noted that she intended to obtain an independent medical examination (IME).<sup>71</sup>

¶ 38 On February 7, 2014, David J. Hewitt, MD, MPH, DABT, conducted an IME of Kramlich at MMIA's request.<sup>72</sup> Dr. Hewitt works for Resources for Environmental and Occupational Health, Inc., in Missoula, where he evaluates people with work-related conditions or diseases.<sup>73</sup> Dr. Hewitt has board certifications in occupational medicine, toxicology, general preventive medicine, and public health.<sup>74</sup> He also has a certification as a medical review officer. He is associated with the American College of Occupational and Environmental Medicine as well as the regional chapter for Montana and Colorado.<sup>75</sup>

¶ 39 Dr. Hewitt testified at trial. The Court found him to be a credible witness. During the IME, Dr. Hewitt took Kramlich's history, noting that Kramlich reported decreased respiratory function beginning gradually in 2012, primarily due to dust exposure from the street sweeper. Kramlich reported shortness of breath, wheezing, and difficulty sleeping while lying down.<sup>76</sup> Kramlich reported occasional non-productive cough, dyspnea with exertion, and sensitivity to cold air, dust, and perfumes. He further reported that since weight loss and CPAP treatment, he could sleep lying down, and that he used oxygen at night and periodically during the day.<sup>77</sup> Dr. Hewitt also reviewed medical records from April 15, 2013, through November 15, 2013.<sup>78</sup>

¶ 40 On physical examination, Dr. Hewitt found Kramlich to have a regular heart rate, clear lungs, and no leg edema.<sup>79</sup> In his assessment, he noted: a claim-related history of dust exposure; and non-claim-related conditions of obstructive sleep apnea, pulmonary hypertension, hypoxemia, obesity, hypertension, left ventricular hypertrophy, history of recent congestive heart failure, history of gout, history of right knee arthroscopy, umbilical hernia, and history of right inguinal hernia.<sup>80</sup> Dr. Hewitt did not include COPD among his diagnoses.

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<sup>71</sup> Ex. 37.

<sup>72</sup> Ex. 28.

<sup>73</sup> Trial Test.

<sup>74</sup> Trial Test.

<sup>75</sup> Trial Test.

<sup>76</sup> Ex. 28 at 1.

<sup>77</sup> Ex. 28 at 6.

<sup>78</sup> Ex. 28 at 2-5.

<sup>79</sup> Ex. 28 at 7.

<sup>80</sup> Ex. 28 at 7.

¶ 41 In response to questions posed by MMIA, Dr. Hewitt opined that Kramlich did not need further treatment for his occupational dust exposures. He opined that the major contributing cause of Kramlich's respiratory complaints that culminated in congestive heart failure and peripheral edema was obstructive sleep apnea and hypoxemia. He further opined that Kramlich's obstructive sleep apnea, hypoxemia, and severe pulmonary hypertension were likely "present and untreated for an extended period prior to diagnosis as evidence[d] by the individual's reported history of increasing dyspnea for a year or more prior to his hospital admission."<sup>81</sup> Dr. Hewitt further explained, "although dust exposure may cause temporary aggravation of breathing due to irritant effects at sufficient exposures, and may be more noticeable in an individual with reduced cardiovascular function, it would not result in cardiovascular effects such as left ventricular hypertrophy, pulmonary hypertension, or obstructive sleep apnea."<sup>82</sup> Dr. Hewitt further opined that Kramlich's use of supplemental oxygen would preclude him from returning to his time-of-injury employment and that Kramlich would be restricted to sedentary job duties with limited walking requirements and no significant dust or respiratory irritant exposure.<sup>83</sup>

¶ 42 Dr. Hewitt testified that obstructive sleep apnea, pulmonary hypertension, obesity, left ventricular hypertrophy, and congestive heart failure are all associated with shortness of breath.<sup>84</sup> Dr. Hewitt testified that Kramlich has several different conditions which contribute to his health problems. He noted that Kramlich has a body mass index over 40, which is considered morbid obesity. Dr. Hewitt testified that about 70% of people with that body type have obstructive sleep apnea. Sleep apnea causes hypoxemia and, over time, repeated low oxygen levels cause pulmonary hypertension. In turn, that affects the heart, which enlarges to try to overcome the hypertension. All this leads to increased cardiovascular problems. In Kramlich's case, it led to cor pulmonale and severe edema. Dr. Hewitt testified that sleep apnea ultimately put Kramlich on the course of congestive heart failure. Dr. Hewitt further testified that Kramlich's sleep apnea is not work-related.<sup>85</sup> Dr. Hewitt testified that while he believed Kramlich's on-the-job exposure to dust may have been a slight irritant, he did not think it aggravated Kramlich's underlying conditions.<sup>86</sup>

¶ 43 Dr. Hewitt further opined that some of Kramlich's test results during his April 2013 hospitalization indicated that he was suffering from a chronic disease process. In

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<sup>81</sup> Ex. 28 at 8.

<sup>82</sup> Ex. 28 at 8-9.

<sup>83</sup> Ex. 28 at 9.

<sup>84</sup> Trial Test.

<sup>85</sup> Trial Test.

<sup>86</sup> Trial Test.

particular, Dr. Hewitt noted that testing on April 15, 2013, revealed that Kramlich had an increased red blood cell count of 6.07,<sup>87</sup> which indicated that Kramlich had had hypoxia and hypoxemia for a long enough time to cause his body to increase its production of red blood cells.<sup>88</sup>

¶ 44 Dr. Hewitt testified that Kramlich's use of the street sweeper for 20 to 30 days per year for approximately 10 years is not sufficient exposure to cause COPD. Dr. Hewitt testified that he is aware that Kramlich had other dust exposures including running a milling machine and laying asphalt. However, Dr. Hewitt found Kramlich's use of the street sweeper to be the focus of Kramlich's complaints.<sup>89</sup>

¶ 45 Dr. Hewitt testified that he did not receive any medical records dated prior to April 15, 2013, until after he had examined Kramlich. He then received medical records from approximately 2005 through 2013. He reviewed and summarized those records, and also read the transcript of Kramlich's deposition.<sup>90</sup> Dr. Hewitt noted that in reviewing those records, he discovered that in April 2005, Kramlich weighed 259 pounds, but at the time of his hospital admission in April 2013, he weighed 340, which Dr. Hewitt found to be significant, since increased weight is associated with hypertension and an increased risk of sleep apnea. Dr. Hewitt testified that he found it significant that in December 2005, Kramlich reported experiencing heart burn and coughing while lying in bed, because that is indicative of reflux: a common symptom in people who have obstructive sleep apnea. Dr. Hewitt opined that Kramlich's medical records from 2005 to 2013 indicate that his lungs were generally clear and that it did not fit with a diagnosis of COPD. Dr. Hewitt testified that Kramlich did not require any respiratory medications prior to 2013, as he would have expected with someone with COPD. Dr. Hewitt also noted that a Department of Transportation physical in 2009 stated that Kramlich had no shortness of breath, cough, or wheezing. However, the records indicate that Kramlich has a history of difficulty controlling his blood pressure and it was notably high at times, including an extremely high blood pressure reading in 2012.<sup>91</sup> In October 2012, Kramlich's oxygen saturation was recorded at 89% and Dr. Hewitt suspects Kramlich may have been suffering from obstructive sleep apnea at that time. Dr. Hewitt testified that these earlier medical records did not change his opinions.<sup>92</sup>

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<sup>87</sup> See Ex. 26 at 4.

<sup>88</sup> Trial Test.

<sup>89</sup> Trial Test.

<sup>90</sup> Trial Test.

<sup>91</sup> See Ex. 22 at 2.

<sup>92</sup> Trial Test.

¶ 46 When asked about the cause of Kramlich's heart failure in April 2013, Dr. Hewitt opined that Kramlich's biggest problem is obstructive sleep apnea which resulted in hypoxemia over a number of years and led to cardiovascular changes and then congestive heart failure.<sup>93</sup>

¶ 47 At the time of his deposition, Kramlich testified that he uses an oximeter to monitor his blood oxygen levels five or six times each day, and he uses supplemental oxygen and a CPAP at night.<sup>94</sup> He also takes prescription medication to lower his blood pressure, as well as medications for water retention, gout, and to maintain his potassium levels.<sup>95</sup> At trial, Kramlich testified that he continues to use the CPAP nightly.<sup>96</sup> Kramlich testified that he continues to experience shortness of breath whenever he is exposed to dust, perfume, or inhalants.<sup>97</sup>

### CONCLUSIONS OF LAW

¶ 48 This case is governed by the 2011 version of the Montana Workers' Compensation Act since that was the law in effect on Kramlich's last day of employment and consequently, his alleged last injurious exposure.<sup>98</sup> Kramlich bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.<sup>99</sup> For the reasons set forth below, the Court has concluded that Kramlich has not met his burden.

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<sup>93</sup> Trial Test.

<sup>94</sup> Kramlich Dep. 17:3-25.

<sup>95</sup> Kramlich Dep. 18:1 – 19:6.

<sup>96</sup> Trial Test.

<sup>97</sup> Kramlich Dep. 63:4-11.

<sup>98</sup> *Hardgrove v. Transportation Ins. Co.*, 2004 MT 340, ¶ 2, 324 Mont. 238, 103 P.3d 999 (citing *Grenz v. Fire & Cas.*, 278 Mont. 268, 272, 924 P.2d 264, 267 (1996)); *Nelson v. Cenex, Inc.*, 2008 MT 108, ¶ 33, 342 Mont. 371, 181 P.3d 619.

<sup>99</sup> *Ricks v. Teslow Consol.*, 162 Mont. 469, 483-84, 512 P.2d 1304, 1312-13 (1973); *Dumont v. Wickens Bros. Constr. Co.*, 183 Mont. 190, 201, 598 P.2d 1099, 1105-06 (1979).

**ISSUE ONE: Whether Petitioner is suffering from a compensable occupational disease.**

¶ 49 Kramlich indisputably suffers from several serious medical conditions and the medical records are replete with objective medical findings in support of those diagnoses. Kramlich's medical providers all agree he cannot return to his time-of-injury job because of these conditions. However, the Court must determine whether Kramlich's employment with the City of Lewistown is the major contributing cause of these conditions.<sup>100</sup>

¶ 50 In the Final Pretrial Order, Kramlich contended only that he suffers from a compensable occupational disease, but did not specify the nature of that disease.<sup>101</sup> However, in his proposed conclusions of law submitted to the Court prior to trial, Kramlich argues that, contrary to Dr. Hewitt's opinions, he suffers from COPD and that it is a compensable occupational disease.<sup>102</sup> He further maintains that his COPD caused his pulmonary hypertension, hypoxemia, obesity, hypertension, left ventricular hypertrophy, and congestive heart failure and, therefore, MMIA is liable for these conditions.<sup>103</sup> He further maintains that his obstructive sleep apnea "could be a result of pulmonary hypertension."<sup>104</sup>

¶ 51 Section 39-71-407(12), MCA, states:

An insurer is liable for an occupational disease only if the occupational disease:

- (a) is established by objective medical findings; and
- (b) arises out of or is contracted in the course and scope of employment. An occupational disease is considered to arise out of or be contracted in the course and scope of employment if 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.

¶ 52 Pursuant to § 39-71-116(22), MCA, objective medical findings means "medical evidence, including range of motion, atrophy, muscle strength, muscle spasm, or other diagnostic evidence, substantiated by clinical findings."

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<sup>100</sup> § 39-71-407(12), MCA.

<sup>101</sup> Final Pretrial Order at 2.

<sup>102</sup> Proposed Findings of Fact and Conclusions of Law at 11-14 (Petitioner's Proposed Findings), Docket Item No. 22.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 11.

¶ 53 Section 39-71-407(16), MCA, defines “major contributing cause” as “a cause that is the leading cause contributing to the result when compared to all other contributing causes.”

¶ 54 In *Grande v. Montana State Fund*, this Court held that for a condition to be compensable as an occupational disease, the worker’s job duties need not be the only contributing factor, but per § 39-71-407(16), MCA, must be the cause that ranks first among all causes, including a pre-existing condition.<sup>105</sup> This Court explained, “a ‘leading cause’ under the statute is that cause which ranks first among all causes ‘contributing to the result’ – i.e., the condition for which benefits are sought – regardless of the respective percentages of the multiple contributing causes.”<sup>106</sup>

¶ 55 A worker is required to prove causation through medical expertise or opinion.<sup>107</sup> However, Kramlich presented no expert testimony, but chose to rely solely upon the contents of his medical records as the medical expertise or opinion to support his occupational disease claim.<sup>108</sup> Among other references, Kramlich points to Dr. Harbour’s April 17, 2013, comments,<sup>109</sup> Dr. Tenney’s June 4, 2013, disability evaluation letter and June 11, 2013, Attending Physician’s Statement for MPERA,<sup>110</sup> and Dr. Kohler’s August 7, 2013, treatment note.<sup>111</sup>

¶ 56 Kramlich’s medical records do not offer sufficient evidence to prove that his employment was the major contributing cause of his conditions. Although Kramlich argues that his working conditions caused him to develop COPD, which in turn led to his other conditions, the evidence presented has not convinced the Court that Kramlich actually suffers from COPD. The only reference to the condition in a medical record is a radiologist’s report from July 2007.<sup>112</sup> Although Dr. Tenney referred to COPD as one of Kramlich’s diagnoses in a June 2013 physician’s statement for MPERA, the Court has seen no corresponding medical record where Dr. Tenney made this diagnosis, nor did Dr. Tenney include COPD as a diagnosis in any of the medical records submitted. Furthermore, Dr. Harbour specifically noted that Kramlich had no history of COPD.<sup>113</sup>

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<sup>105</sup> *Grande*, 2011 MTWCC 15, ¶¶ 29-31 (*aff’d* 2012 MT 67, 364 Mont. 333, 274 P.3d 728) (citing § 39-71-407(13), MCA (2009)).

<sup>106</sup> *Id.*, ¶ 31.

<sup>107</sup> *Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶¶ 44-49, 365 Mont. 405, 282 P.3d 687.

<sup>108</sup> Petitioner’s Proposed Findings at 10.

<sup>109</sup> See ¶¶ 22-23, above.

<sup>110</sup> See ¶¶ 29-30, above.

<sup>111</sup> See ¶ 35, above.

<sup>112</sup> See Ex. 27 at 1.

<sup>113</sup> See Ex. 5 at 2.

Dr. Hewitt testified that Kramlich's medical records do not support a diagnosis of COPD and that his history of work-related exposures to irritants was insufficient to cause COPD.<sup>114</sup>

¶ 57 Even if Kramlich has COPD, no medical evidence indicates that his work for the City of Lewistown was the major contributing cause of it. Although Kramlich insists that his work was the major contributing cause, he must prove this with medical evidence.<sup>115</sup> There is no evidence that Kramlich's treating physicians evaluated the potential causes of his alleged COPD, determined which were actually causes, and then determined which was the leading cause, as § 39-71-407(16), MCA, requires.

¶ 58 Moreover, no medical evidence supports Kramlich's position that COPD, and not his sleep apnea, was the major contributing cause of his hypoxia and resulting congestive heart failure. In fact, Kramlich's treating physicians apparently thought that obstructive sleep apnea was the major contributing cause of his hypoxia and resulting congestive heart failure. On April 22, 2013, Dr. Sura opined that Kramlich's obstructive sleep apnea was the "most likely cause" of his pulmonary artery hypertension, which led to his right heart failure and edema.<sup>116</sup> Likewise, on April 24, 2013, Dr. Tenney opined that Kramlich's "major problem" was sleep apnea and indicated that it caused his right heart failure.<sup>117</sup> In his June 4, 2013, letter, Dr. Tenney opined that Kramlich's conditions required him to limit his exposure to fumes, dust, and vapors, but he made no statement as to the underlying cause of those conditions.<sup>118</sup> No evidence indicates that either Dr. Sura or Dr. Tenney thought that Kramlich's work was a contributing cause to his sleep apnea. Dr. Hewitt testified that Kramlich's sleep apnea was not work-related. Dr. Hewitt testified that Dr. Sura's and Dr. Tenney's opinions that obstructive sleep apnea was Kramlich's major problem are consistent with his opinions that Kramlich's obstructive sleep apnea caused his hypoxemia which resulted in his right heart failure and sequelae. Although Kramlich questioned Dr. Hewitt as to whether his shortness of breath could have been the cause – rather than a symptom – of his conditions, Dr. Hewitt did not agree, and Kramlich presented no medical evidence in support of this theory.

¶ 59 In filling out the MPERA form on June 11, 2013, Dr. Tenney did indicate that Kramlich's employment contributed to his condition.<sup>119</sup> Dr. Forke interpreted

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<sup>114</sup> See ¶¶ 43-44, above.

<sup>115</sup> See *Ford*, ¶ 48.

<sup>116</sup> Ex. 23 at 10.

<sup>117</sup> See ¶ 27, above.

<sup>118</sup> See ¶ 29, above.

<sup>119</sup> See ¶ 30, above.

Dr. Tenney's records as stating that Kramlich had sleep apnea but that "dust, smoke and other inhalants contributed to his hospitalization and continued SOB."<sup>120</sup> Likewise, Dr. Tenney and Dr. Harbour indicated that Kramlich's work exacerbated his conditions and symptoms. Notwithstanding, as set forth above, § 39-71-407(12), MCA, requires not just that the employment be **a** contributing cause of an alleged occupational disease, but that the employment be the **major** contributing cause. The statements Kramlich relies upon are insufficient to fulfill that requirement.

¶ 60 Kramlich also contends that Dr. Kohler opined, "problems with breathing related to exposure to dust and fumes."<sup>121</sup> This is a misleading excerpt from Dr. Kohler's August 7, 2013, treatment note. Dr. Kohler stated, "[Kramlich] describes problems with breathing related to exposures to dust and fumes."<sup>122</sup> Dr. Kohler was simply recording Kramlich's subjective complaints and was not offering an opinion as to causation.

¶ 61 At trial, Kramlich also attempted to make his case by attacking Dr. Hewitt's credibility and arguing that the opinions of his treating physicians are entitled to greater weight. Although the opinion of a treating physician is generally accorded greater weight than that of other expert witnesses, this general rule is applied in cases where there are conflicting medical opinions.<sup>123</sup> In this case, there are no conflicting medical opinions; Kramlich's treating physicians have not opined that his work was the major contributing cause of his conditions.

¶ 62 Kramlich lacks sufficient evidence to meet his burden of proof. The Court does not doubt that Kramlich subjectively believes his job duties caused several of his medical conditions. However, his subjective beliefs are insufficient to prove an occupational disease.<sup>124</sup> Therefore, the Court concludes that Kramlich is not suffering from a compensable occupational disease.

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<sup>120</sup> See ¶ 36, above.

<sup>121</sup> Petitioner's Proposed Findings at 10.

<sup>122</sup> Ex. 1 at 1.

<sup>123</sup> See *EBI/Orion Group v. Blythe*, 1998 MT 90, ¶¶ 12-13, 288 Mont. 356, 957 P.2d 1134. (Citation omitted.)

<sup>124</sup> *Langston v. MACO Workers' Comp. Trust*, 2013 MTWCC 15, ¶ 29.

**Issue Two: Whether Respondent reasonably denied Petitioner's April 17, 2013, claim.**

¶ 63 Kramlich contends that MMIA should have accepted his claim and paid benefits, and because of its refusal to do so, he has been forced “to live a life of devastation.”<sup>125</sup> MMIA responds that it acted reasonably when it denied Kramlich's claim.<sup>126</sup>

¶ 64 As set forth above, MMIA denied liability for Kramlich's occupational disease claim after Dr. Carpenter reviewed Kramlich's medical records and opined that Kramlich's conditions were not work-related. A few months later, MMIA's claims examiner informed Kramlich's attorney that although MMIA was continuing to deny Kramlich any entitlement to TTD benefits, she intended to obtain an IME. Dr. Hewitt subsequently conducted an IME of Kramlich and opined that Kramlich's only claim-related condition was a history of dust exposure.

¶ 65 Like MMIA's claims examiner, the Court sees no clear-cut causation opinions in Kramlich's medical providers' records. MMIA was not unreasonable when it initially denied Kramlich's claim, and when it continued to maintain its denial after further investigation.

**Issue Three: Whether Petitioner is entitled to attorney fees, penalty, and costs.**

¶ 66 Since Kramlich is not the prevailing party, he is not entitled to his costs, attorney fees, or a penalty.<sup>127</sup>

JUDGMENT

¶ 67 Petitioner is not suffering from a compensable occupational disease.

¶ 68 Respondent reasonably denied Petitioner's April 17, 2013, claim.

¶ 69 Petitioner is not entitled to attorney fees, penalty, and costs.

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

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<sup>125</sup> Final Pretrial Order at 2.

<sup>126</sup> *Id.* at 3.

<sup>127</sup> §§ 39-71-611 and -2907, MCA.

DATED in Helena, Montana, this 17<sup>th</sup> day of December, 2014.

(SEAL)

/s/ DAVID M. SANDLER  
JUDGE

c: Jack R. Stone  
Oliver H. Goe/Morgan M. Weber  
Submitted: November 10, 2014