

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2007 MTWCC 30

WCC No. 2006-1551

DEAN L. KRATOVIL

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Appealed to Supreme Court 09/25/07

Affirmed and Remanded for Further Proceedings 12/29/08

Summary: Petitioner worked as a plumber/pipefitter for nearly 30 years and suffered from problems with his hands and wrists which he attributes to an occupational disease. Petitioner also twisted his hands and wrists when a drill he was operating locked up, but he did not file an industrial accident claim on this incident. Petitioner also suffered injuries in a motorcycle accident. Respondent claims it is not liable for Petitioner's occupational disease claim because Petitioner admits he used his hands to break his fall during the motorcycle accident and Petitioner first experienced symptoms in his hands prior to working for Respondent's insured.

Held: Although Respondent argues that it should not be liable for Petitioner's occupational disease because Petitioner experienced soreness in his wrists prior to working as a plumber/pipefitter and subsequently may have injured his hands and wrists in a motorcycle accident, Respondent's insured was the employer of last injurious exposure and, even assuming Petitioner injured his hands and wrists in the motorcycle accident, his employment with Respondent's insured nonetheless significantly aggravated or contributed to his occupational disease. Therefore, Respondent is liable for benefits.

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-72-303. Where Petitioner testified that he began experiencing problems with his hands and wrists more than 30 years ago, but

began to experience more serious pain in his wrists and numbness in his fingers 12 to 15 years ago; Petitioner and his supervisor testified that on a demanding job for Respondent's insured, Petitioner repeatedly complained about pain in his hands and wrists; Petitioner testified that during his final few jobs the numbness in his fingers progressed to a point where it did not alleviate with rest; and Petitioner's treating physician testified that his hand and wrist difficulties developed gradually over time, Respondent is liable for Petitioner's occupational disease under the last injurious exposure rule.

Occupational Disease: Last Injurious Exposure. Where Petitioner testified that he began experiencing problems with his hands and wrists more than 30 years ago, but began to experience more serious pain in his wrists and numbness in his fingers 12 to 15 years ago; Petitioner and his supervisor testified that on a demanding job for Respondent's insured, Petitioner repeatedly complained about pain in his hands and wrists; Petitioner testified that during his final few jobs the numbness in his fingers progressed to a point where it did not alleviate with rest; and Petitioner's treating physician testified that his hand and wrist difficulties developed gradually over time, Respondent is liable for Petitioner's occupational disease under the last injurious exposure rule.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-72-408. The legal standard for determining proximate causation under § 39-72-408, MCA, is whether a claimant's employment significantly aggravated or contributed to his alleged occupational disease. Even if a nonwork-related motorcycle accident contributed to Petitioner's hand and wrist conditions, the Court concludes that Petitioner's employment significantly aggravated or contributed to his occupational disease and did so both before and after the motorcycle accident.

Occupational Disease: Occupational Disease Versus Injury. Where the symptoms of Petitioner's hand and wrist conditions predated a specific drill accident, and an x-ray report which predated the drill accident indicates readily observable degenerative changes in Petitioner's left hand, Petitioner's wrist and hand conditions cannot be attributed to the drill accident.

Occupational Disease: Causation. The legal standard for determining proximate causation under § 39-72-408, MCA, is whether a claimant's employment significantly aggravated or contributed to his alleged occupational disease. Even if a nonwork-related motorcycle accident contributed to Petitioner's hand and wrist conditions, the Court concludes that Petitioner's employment significantly aggravated or contributed to his

occupational disease and did so both before and after the motorcycle accident.

Causation: Impact of Nonwork-Related Incident. The legal standard for determining proximate causation under § 39-72-408, MCA, is whether a claimant's employment significantly aggravated or contributed to his alleged occupational disease. Even if a nonwork-related motorcycle accident contributed to Petitioner's hand and wrist conditions, the Court concludes that Petitioner's employment significantly aggravated or contributed to his occupational disease and did so both before and after the motorcycle accident.

Injury and Accident: Aggravation: Occupational Disease. The legal standard for determining proximate causation under § 39-72-408, MCA, is whether a claimant's employment significantly aggravated or contributed to his alleged occupational disease. Even if a nonwork-related motorcycle accident contributed to Petitioner's hand and wrist conditions, the Court concludes that Petitioner's employment significantly aggravated or contributed to his occupational disease and did so both before and after the motorcycle accident.

¶ 1 The trial in this matter was held on June 27, 2006, in Billings, Montana. Petitioner Dean L. Kratovil was present and represented by R. Russell Plath. Respondent was represented by Larry W. Jones.

¶ 2 Exhibits: Exhibits 1, 2, and 4 were admitted without objection. Exhibits 3 and 5 were withdrawn.

¶ 3 Witnesses and Depositions: The deposition of Petitioner was submitted to the Court and can be considered part of the record. Petitioner and Scott Branstetter were sworn and testified at trial.

¶ 4 Issue Presented: The Pretrial Order sets forth the following issue:

¶ 4a Whether [Respondent] is liable for payment of workers' compensation or occupational disease benefits to Petitioner.¹

¹ Pretrial Order at 3.

FINDINGS OF FACT

¶ 5 On June 17, 2004, G&T Plumbing and Mechanical (G&T Plumbing) was insured by Respondent.²

¶ 6 On January 28, 2005, G&T Plumbing electronically filed a first report of injury regarding Petitioner, listing a date of injury of June 17, 2004, and describing the alleged injury as “drilling holes and bit and bound up and twisted hand; de-burring pipe also caused pain in hands.”³

¶ 7 On April 18, 2005, Petitioner filed a claim for an occupational disease arising out of and in the course of employment with various employers including G&T Plumbing. Petitioner filed a protective occupational disease claim, stating, “Repetitive work as a plumber over time has caused both of my hands to go numb.”⁴

¶ 8 The testimony of both Petitioner and Scott Branstetter (Branstetter) was uncontroverted at trial, and I find them both to be credible witnesses.

¶ 9 Petitioner is a plumber/pipefitter employed through Union Local 30 in Billings. Aside from short gaps between jobs, he has worked as a plumber/pipefitter for nearly 30 years.⁵ Petitioner works as a building trades plumber, specializing in large commercial and industrial projects. In particular, Petitioner specialized in working with copper pipe.⁶

¶ 10 Petitioner explained that working with copper pipe is physically demanding and the steps involved in preparing and installing copper pipe involved continuous use of his wrists and hands. Petitioner testified that he can recall soreness in his wrists dating back more than 30 years, prior to when he began working as a plumber/pipefitter. He believes he first began to experience serious trouble with his wrists about 12 to 15 years ago while working as a plumber. Petitioner, who is right-handed, first noticed slight numbness in the fingers of his right hand, and eventually experienced numbness in both hands. However, he would rest on the weekends and be ready to return to work each Monday.⁷

² Pretrial Order at 2.

³ *Id.*

⁴ *Id.*

⁵ Trial Test.

⁶ *Id.*

⁷ *Id.*

¶ 11 Petitioner worked on several jobs with Branstetter. Branstetter is a journeyman pipefitter/plumber who is employed through Union Local 30 in Billings. Petitioner testified that the first job he worked with Branstetter was at the Transtech building in Billings. It was during the course of that job that Petitioner first began to experience numbness in his fingers that did not alleviate with rest. The problem continued and worsened into Petitioner's next job assignment, which was an out-of-town job for which he and Branstetter commuted together.⁸

¶ 12 Branstetter testified that he initially met Petitioner on a job, and they have known each other for about 12 years. The jobs which Petitioner and Branstetter worked together include a job on the Crow Agency near the end of 2003. Branstetter testified that he supervised Petitioner on this job. Branstetter also supervised Petitioner in late 2003 and early 2004 on a job in Busby. Branstetter testified that the Busby job was a difficult job which required the installation of a large amount of copper pipe. Branstetter stated that he is the person to whom Petitioner should have reported any injuries or physical problems, and that Petitioner told him on several occasions that he was having problems with his hands.⁹

¶ 13 Petitioner testified that by the time he began the job in Busby, he was having difficulty sleeping at night because of pain in his hands and wrists. He was again commuting with Branstetter and he regularly complained to Branstetter about the pain in his hands and wrists. However, Petitioner did not see a doctor.¹⁰ Petitioner's hands got weaker over time.¹¹ Petitioner worked in Busby until approximately October 2003. He subsequently worked on some jobs in Billings.¹²

¶ 14 On March 26, 2004, Petitioner was involved in a motorcycle accident in Billings. While avoiding a collision with another vehicle, Petitioner slid through an intersection with his motorcycle on its side. Petitioner put his arms out to break his fall. Afterwards, his left hand was x-rayed at the hospital.¹³ Petitioner does not believe he had a high impact on his hands, in part because the gloves he was wearing at the time sustained little damage.¹⁴

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ Petitioner Dep. 35:13-16.

¹² Trial Test.

¹³ *Id.*

¹⁴ Petitioner Dep. 33:7-10.

¶ 15 Petitioner was examined at Saint Vincent Healthcare on March 29, 2004. Three x-rays were taken of his left hand, with the following findings and conclusion:

FINDINGS: No fracture or dislocation noted. There is moderate to marked thumb metacarpocarpal degenerative change with sclerosis. Degenerative cyst formation, bone upon bone and osteophytes.

CONCLUSION:

No acute fracture. Thumb metacarpocarpal degenerative change, moderate to marked.¹⁵

¶ 16 Petitioner believes his left hip absorbed the brunt of his fall. He asserted that it was common knowledge that he was having problems with his hands before the motorcycle accident and that the accident was merely another insult to an already existing injury. Petitioner missed a few days of work because of the accident and then returned to the job he was working at for G&T Plumbing on the Spring Hill Motel in Billings.¹⁶ Petitioner worked for a few months after his motorcycle accident and he did not find his hands to be any worse after the accident than they were before.¹⁷

¶ 17 Petitioner testified that because he was having difficulty performing his job due to problems with his hands, he asked his supervisor on the Spring Hill Motel job to purchase a ratchet cutter which would allow him to cut pipe without having to use his wrists to twist the pipe, and his supervisor did so.¹⁸

¶ 18 On June 14, 2004, Petitioner was installing plumbing for bathroom fixtures on the main floor of the motel, which had a concrete floor. He had to widen some holes which had been left in the concrete for the plumbing, so he borrowed a large drill from another worker. While he was drilling, Petitioner's drill bit hit something solid and locked up the drill, twisting his hands and wrists. However, Petitioner did not file a claim for any injury and he did not see a doctor.¹⁹

¶ 19 The Spring Hill Motel job ended on July 18, 2004. Petitioner has not worked since that job ended. Petitioner testified that since that time, he has been inactive, doing things

¹⁵ Ex. 15 of Petitioner's Dep.

¹⁶ Trial Test.

¹⁷ Petitioner Dep. 19:25 - 20:6.

¹⁸ Trial Test.

¹⁹ *Id.*

like watching television, and has not done any activities which would cause stress on his wrists. Petitioner further testified that he has not been riding his motorcycle on the advice of the doctor who treated his hip injury.²⁰

¶ 20 On January 10, 2005, Petitioner saw Dr. Jeffrey N. Hansen, an orthopedic surgeon.²¹ Dr. Hansen's notes indicate that he and Petitioner discussed several of Petitioner's physical ailments. Dr. Hansen took a history regarding Petitioner's motorcycle accident and his occupation as a pipefitter. Dr. Hansen noted that Petitioner had tingling and numbness in his hands and significant pain in his right wrist. Dr. Hansen recorded that Petitioner could recall at least three specific incidents where he injured his right wrist on the job, and that Petitioner informed him that he had reported these incidents to his boss, but never filed a formal workers' compensation claim.²²

¶ 21 Dr. Hansen further recorded that Petitioner's hand numbness had a gradual onset and worsened over time. Dr. Hansen diagnosed Petitioner with radial carpal swelling consistent with radial carpal arthritis in his right wrist, with limited range of motion. Dr. Hansen concluded that Petitioner had bilateral carpal tunnel syndrome, advanced slack wrist condition in the right wrist, a left-hand thumb CMC joint injury with subluxation and arthritis with a degenerative component. Dr. Hansen further noted a painful deformity of Petitioner's left thumb joint, which Petitioner informed Dr. Hansen came from the motorcycle accident, because Petitioner did not recall having the deformity prior to the accident. Although Petitioner believed his thumb condition arose from the motorcycle accident, Dr. Hansen believed that, while there may be a superimposed injury component, the thumb condition predated the motorcycle accident.²³

¶ 22 On March 25, 2005, Dr. Hansen wrote a letter to the insurer liable for Petitioner's motorcycle accident, stating that Petitioner had been unable to work since September 20, 2004, due to orthopedic problems in his left hip and both hands. Dr. Hansen stated:

The exacerbation of his hip injury is the prime reason of why he's unable to work but he actually exacerbated underlying conditions in both of his hands and wrist as well, so that's a contributing factor. I would simply estimate that the inability to work is 2/3^{rds} related to his hip and 1/3rd related to his hands but it's actually a fairly arbitrary designation.²⁴

²⁰ *Id.*

²¹ *Id.*

²² Ex. 14 at 1 of Petitioner's Dep.; Ex. 2 at 241.

²³ Ex. 14 at 1-2 of Petitioner's Dep.; Ex. 2 at 241-42.

²⁴ Ex. 12 of Petitioner's Dep.; Ex. 2 at 84.

¶ 23 In his notes from a January 24, 2005, appointment with Petitioner, Dr. Hansen stated that while Petitioner jammed his right wrist and left thumb in the March 2005 motorcycle accident,

He is quite clear about the fact that he had symptoms in his right wrist and his left thumb before the accident in question. In fact, he recalls specific episodes of injury to his wrist several times in the past. He never did file a work comp claim. He reported it to his employer a few times and felt the symptoms would gradually resolve.²⁵

¶ 24 Dr. Hansen concluded that Petitioner had probably exacerbated his wrist and thumb injuries during the motorcycle accident, but further concluded that there was clearly a preexisting condition in Petitioner's wrist and thumb.²⁶

CONCLUSIONS OF LAW

¶ 25 The law in effect on an employee's last day of work governs the resolution of a claim under the Occupational Disease Act (ODA). Therefore, in the present case, the 2003 statutes apply.²⁷

¶ 26 Petitioner bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.²⁸

¶ 27 At issue is whether Petitioner's hand and wrist conditions are compensable under the ODA. While Petitioner argues that he suffers from an occupational disease, Respondent responds that because Petitioner injured his hands and wrists in the motorcycle accident, he cannot prove by objective medical findings that his employment caused an occupational disease. In a somewhat internally contradictory argument, Respondent also argues that the fact that Petitioner experienced hand and wrist symptoms prior to working as a plumber/pipefitter precludes Petitioner from establishing proximate causation under § 39-72-408, MCA.

²⁵ Ex. 13 at 1 of Petitioner's Dep.; Ex. 2 at 96.

²⁶ *Id.*

²⁷ *Hardgrove v. Transportation Ins. Co.*, 2004 MT 340, ¶ 2, 324 Mont. 238, 103 P.3d 999 (citation omitted).

²⁸ *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).

¶ 28 I find my recent decision in *Oksendahl v. Liberty Northwest Ins. Corp.*²⁹ to offer helpful guidance in the present case. In *Oksendahl*, I had occasion to determine the compensability of the claimant's occupational disease claim, taking into consideration the Montana Supreme Court's decisions in *Polk v. Planet Ins. Co.*,³⁰ *Schmill v. Liberty Northwest Ins. Corp.*,³¹ *Montana State Fund v. Murray*,³² and *Hand v. Uninsured Employers' Fund*.³³ In light of those cases, I determined in *Oksendahl* that the legal standard for proximate causation under § 39-72-408, MCA, is whether a claimant's employment significantly aggravated or contributed to his alleged occupational disease.³⁴ The same rule and analysis applies here.

¶ 29 Therefore, under this standard I must determine whether Petitioner's employment significantly aggravated or contributed to his hand and wrist conditions. I conclude that it has.

¶ 30 Respondent argues on the one hand³⁵ that it cannot be liable for Petitioner's hand and wrist condition because Petitioner testified that he experienced pain and numbness prior to working as a plumber/pipefitter. On the other hand,³⁶ Respondent argues that it cannot be liable because Petitioner testified that he used his hands and wrists to break his fall during his motorcycle accident in March 2004. Respondent's arguments fail on both accounts, albeit for different reasons.

¶ 31 Addressing first Respondent's argument that Petitioner began experiencing problems with his hands and wrists prior to working as a plumber/pipefitter, Petitioner did, in fact, testify that he first began to experience mild symptoms more than 30 years ago, prior to his work as a plumber/pipefitter. Petitioner further testified, however, that it was approximately 12 to 15 years ago that he began experiencing more serious pain in his wrists and eventual numbness in his fingers. Consistent with Petitioner's recollection, Dr. Hansen also opined that Petitioner's hand and wrist difficulties developed gradually over time. Petitioner and Branstetter both testified that the tasks Petitioner performed for his last

²⁹ *Oksendahl*, 2007 MTWCC 24.

³⁰ *Polk*, 287 Mont. 79, 951 P.2d 1015 (1997).

³¹ *Schmill*, 2003 MT 80, 315 Mont. 51, 67 P.3d 290.

³² *Murray*, 2005 MT 97, 326 Mont. 516, 111 P.3d 210.

³³ *Hand*, 2004 MT 336, 324 Mont. 196, 103 P.3d 994.

³⁴ *Oksendahl*, ¶ 25.

³⁵ Pun not intended.

³⁶ *Id.*

employer involved constant use of his hands and wrists. Branstetter testified that the Busby job was particularly demanding. Petitioner and Branstetter both testified that Petitioner complained about pain in his hands and wrists on multiple occasions while working for his final employer. Furthermore, Petitioner testified that it was only during the final few jobs that the numbness in his fingers progressed to a point where it did not alleviate with rest. The testimony of Petitioner and Branstetter and the medical opinions of Dr. Hansen are uncontroverted.

¶ 32 Pursuant to § 39-72-303(1), MCA, where compensation is payable for an occupational disease, the only employer liable is the employer in whose employment the employee was last injuriously exposed to the hazard of the disease. It is clear to me from the testimony and medical evidence presented that Petitioner was last injuriously exposed to the hazard of the occupational disease he developed in his wrists and hands while he was working for G&T Plumbing.

¶ 33 Respondent further argues, however, that Petitioner's motorcycle accident absolves it of liability because Petitioner injured his hands and wrists while breaking his fall during that accident. Although Petitioner testified that he believes he put his arms out to break his fall, and although Petitioner informed Dr. Hansen that he believed the motorcycle accident caused the deformity on his left thumb, the evidence does not support Respondent's contention that Petitioner injured his hands and wrists in the motorcycle accident. The findings from the x-rays taken three days after Petitioner's motorcycle accident categorized the conditions in Petitioner's left hand as being degenerative in nature, not as injuries from the accident. Dr. Hansen concluded that while the motorcycle accident may have exacerbated the problems with Petitioner's hands and wrists, the underlying conditions predated the accident. As noted above, the legal standard for determining proximate causation under § 39-72-408, MCA, is whether a claimant's employment significantly aggravated or contributed to his alleged occupational disease.³⁷ Even if the motorcycle accident did in some way contribute to the conditions of Petitioner's hands and wrists, it is nonetheless abundantly clear from the evidence in this case that Petitioner's employment significantly aggravated or contributed to his occupational disease, and did so both before and after the motorcycle accident.

¶ 34 One other aspect of Petitioner's case which bears scrutiny is whether Petitioner's wrist and hand conditions can be attributed to the June 14, 2004, drill accident. I conclude that his wrist and hand conditions cannot be attributed to the June 14, 2004, drill accident. The evidence clearly shows that Petitioner's symptoms predated the drill accident, and furthermore the March 29, 2004, x-ray report indicates that degenerative changes were readily observable in Petitioner's left hand.

³⁷ *Oksendahl*, ¶ 25.

¶ 35 Petitioner has met his burden of proof. Therefore, as the insurer of the employer where Petitioner was last injuriously exposed to the hazards which caused his occupational disease, Respondent is liable for payment of occupational disease benefits to Petitioner.

JUDGMENT

¶ 36 Respondent is liable for payment of occupational disease benefits to Petitioner.

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

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

DATED in Helena, Montana, this 17th day of July, 2007.

(SEAL)

\s\ James Jeremiah Shea
JUDGE

c: R. Russell Plath
Larry W. Jones
Submitted: June 27, 2006