

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2013 MTWCC 15

WCC No. 2012-3055

STORMY L. LANGSTON

Petitioner

vs.

MACO WORKERS' COMPENSATION TRUST

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Petitioner alleges her workplace environment aggravated her COPD, resulting in a compensable occupational disease. Respondent denies that Petitioner suffered an occupational disease.

Held: Petitioner's claim for occupational disease benefits is not supported by a preponderance of the medical evidence and is therefore denied.

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-116. While Petitioner's physician opined that carbon *monoxide* poisoning can cause neurologic complaints and that therefore her work environment was "suspicious as a potential etiology" for Petitioner's neurologic symptoms, the carbon *monoxide* levels at Petitioner's work were normal while the carbon *dioxide* levels were somewhat elevated. Not only is Petitioner's physician's opinion far below the preponderance of evidence required to support an OD claim, the opinion has nothing to do with Petitioner's claim for a pulmonary condition caused by her work environment.

Occupational Disease: Causation. Despite Petitioner's sincere belief that the conditions at her place of employment exacerbated her COPD, her subjective belief is unsupported by the medical evidence which relates the flare-up of Petitioner's COPD to an upper respiratory infection.

¶ 1 Trial in this matter was held April 16, 2013, at 9:30 a.m., in the Flathead County Justice Center, 920 South Main, Kalispell, Montana. Petitioner Stormy L. Langston was present and represented herself. Respondent MACO Workers' Compensation Trust (MACO) was represented by Norman H. Grosfield.

¶ 2 **Exhibits**: I admitted Exhibits 1 through 9 without objection.

¶ 3 **Witnesses and Depositions**: Petitioner Stormy L. Langston, Terry Langston, Bill Bishoff, and Liz Krzan were sworn and testified.

¶ 4 **Issues Presented**: The Pretrial Order sets forth the following issues:¹

Issue One: Whether Petitioner has suffered a compensable occupational disease.

Issue Two: Whether Petitioner is entitled to recovery of attorney fees and costs.

FINDINGS OF FACT

¶ 5 Langston is the elected Justice of the Peace for Lincoln County, Montana. She has held that position since January 1, 2007.²

¶ 6 On February 22, 2012, Langston filed a claim for occupational disease (OD) benefits in relation to a pulmonary condition. MACO has denied liability for the claim.³

¶ 7 Terry Langston testified at trial. Terry is Langston's husband, to whom he has been married 20 years.⁴ I found Terry to be a credible witness.

¶ 8 Terry was getting ready to go to work on Super Bowl Sunday, February 5, 2012, when Langston began complaining she was having trouble breathing. Langston was transported to Kalispell Regional Medical Center (KRMC) where she was administered oxygen and kept overnight for observation.⁵

¹ Pretrial Order at 2, Docket Item No. 16.

² Pretrial Order, Uncontested Facts.

³ Pretrial Order, Uncontested Facts; Ex. 1 at 1-2; Ex. 8.

⁴ Trial Test.

⁵ Trial Test.; Ex. 3 at 1-2; Ex. 5 at 1.

¶ 9 Prior to that event, Langston had been coming home from work for several months complaining of headaches, watery eyes, and being irritable.⁶

¶ 10 After Langston's hospitalization on February 5-6, 2012, the county closed the Eureka annex building where Langston's courtroom was located. In 2009, there was a fire in the annex and it was closed for about 6 months to effect repairs. After the building reopened, Terry testified that the air had a metallic taste, and after about 45 minutes he experienced watery eyes, headaches, and dry mouth while in the building.⁷

¶ 11 After the county closed the annex building in 2012, the county put in an air exchanger and ventilated windows and reopened it. Terry testified that the air quality in the building is now markedly improved, and his wife does not complain of watery eyes or headaches any more.⁸

¶ 12 Terry admitted that both he and Langston are cigarette smokers, smoking up to a half pack of cigarettes a day.⁹

¶ 13 Langston testified at trial. I found Langston to be a credible witness. Besides corroborating much of her husband's testimony, Langston admitted to being a cigarette smoker for 23 years. Langston was diagnosed at KRMC on February 5-6, 2012, with an exacerbation of chronic obstructive pulmonary disease (COPD), related to an upper respiratory infection.¹⁰

¶ 14 The medical records from February 2012 from both KRMC and the Eureka Health - Prompt Care clinic show that Langston was discharged from the hospital on February 6, 2012, with a prescription for prednisone, to be tapered off slowly.¹¹ By February 16, 2012, Langston's COPD exacerbation was still resolving but much better.¹²

¶ 15 Langston testified as to her belief that the poor air quality in the annex building exacerbated her COPD, causing her need for hospitalization on February 5-6, 2012. Langston testified that since the improvements were made to the Eureka annex building, including the installation of the air handler and ventilated windows, she has not

⁶ Trial Test.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ Trial Test.; Ex. 3 at 11, 22.

¹¹ Ex. 3 at 2; Ex. 4 at 1-2.

¹² Ex. 4 at 9-10.

suffered the problems of headaches and watery eyes that she did prior to those improvements.¹³

¶ 16 Following her hospitalization on February 5-6, 2012, Langston went to the Eureka Health - Prompt Care clinic on February 13, 2012, complaining of left side facial numbness and left arm soreness. It was recommended that she be seen at the emergency room at KRMC to rule out possible neurologic problems.¹⁴ She was discharged later that day from the emergency room in Kalispell with a diagnosis of temporary paresthesia of her left cheek.¹⁵

¶ 17 Bill Bishoff testified at trial. I found Bishoff to be a credible witness. Bishoff is the human resource director for Lincoln County as well as the executive assistant to the Lincoln County commissioners. His duties include directly supervising some department heads and overseeing operations for the county.¹⁶

¶ 18 In February 2012, Bishoff spoke with Marian Roose, a county commissioner from Eureka, who advised Bishoff that some employees working in the Eureka annex building had complained of poor air quality in the building, causing headaches and watering eyes.¹⁷ Bishoff had the fire department check for dangerous fumes and then hired a Missoula company to test the building's air quality. The environmental air quality company found there were normal levels of carbon monoxide but a somewhat elevated level of carbon dioxide in the building.¹⁸

¶ 19 Bishoff then called in his heating specialists who discovered that a fresh air vent had been closed. Bishoff surmised that the vent had probably been closed after the remodeling of the building following the 2009 fire. The vent was reopened, and a forced air return was installed to supplement the vent.¹⁹ Ventilated windows were also added before the building was reopened.²⁰

¶ 20 Liz Krzan testified at trial. I found Krzan to be a credible witness. Krzan has been a claims representative for MACO for six years. When she was assigned Langston's case file, Krzan reviewed the February 20, 2012, medical note of Edward

¹³ Trial Test.

¹⁴ Ex. 4 at 5-7.

¹⁵ Ex. 3 at 28-30.

¹⁶ Trial Test.

¹⁷ *Id.*

¹⁸ Trial Test.; Ex. 2.

¹⁹ Trial Test.

²⁰ *Id.*

Stein, M.D., which referenced a phone call from Langston to Dr. Stein. The note indicated Langston had asked “whether carbon dioxide poisoning could have caused her neurologic symptoms for which she presented on February 13, 2012.” Dr. Stein’s note referenced his opinion that “carbon **monoxide** [emphasis added] poisoning can cause headaches and nonspecific neurologic complaints” and that it was “certainly suspicious as a potential etiology of [Langston’s] symptomatology last week.”²¹ Krzan followed up with Dr. Stein seeking clarification of his opinion, requesting he express it on a more-probable-than-not basis, and to confirm his opinion with objective findings.²² Dr. Stein replied to Krzan’s inquiry by writing:

My opinion & patients medical findings stand as stated in the medical record. I have nothing further to add [at] this point.²³

¶ 21 Krzan then requested an independent medical evaluation from David J. Hewitt, M.D., an Occupational and Environmental Medicine specialist, for the purposes of determining if Langston suffered from an OD as a result of her work with Lincoln County. Krzan also asked Dr. Hewitt to determine whether any disability from which Langston was suffering was temporary or permanent, and to assess other factors that may have contributed to any of Langston’s medical conditions.²⁴

¶ 22 After obtaining a history of her recent illnesses from Langston and reviewing her medical records from February 2012, Dr. Hewitt’s report concluded that Langston was not suffering from a condition caused by her employment with Lincoln County but rather from an exacerbation of her COPD from a documented recent illness that responded to steroids.²⁵ Dr. Hewitt also concluded that the paresthesia suffered by Langston on the left side of her face (for which she was seen on February 13, 2012) was not a known effect from carbon dioxide exposure, but may have instead been caused by either a reaction to the prednisone Langston was prescribed at KRMC or to a transient ischemic attack (TIA), both of which were non-work related.²⁶ Dr. Hewitt’s report also noted that Langston has been performing her job duties “without restrictions or difficulty.”²⁷

¶ 23 Dr. Hewitt’s report compared the carbon dioxide concentration in mainstream cigarette smoke inhaled during smoking (125,000 ppm) to the findings of the air quality

²¹ Trial Test.; Ex. 4 at 12.

²² Ex. 6.

²³ Ex. 7.

²⁴ Ex. 5 at 1.

²⁵ Ex. 5 at 6-7.

²⁶ Ex. 5 at 7.

²⁷ Ex. 5 at 8.

report of the annex building (600-700 ppm).²⁸ Dr. Hewitt noted that increased levels of carbon dioxide of 700 ppm or even higher were not known to be associated with adverse health effects of hypoxia or paresthesia and therefore, carbon dioxide was not a plausible explanation for Langston's health complaints.²⁹ Dr. Hewitt also noted that Langston's initial onset of symptoms were on a Sunday, which "is not temporally consistent with exposure to the building since [Langston] worked Monday through Wednesday and indicates other etiologies."³⁰

¶ 24 Dr. Hewitt's report concluded that Langston's recent conditions – COPD; history of recent hypoxia secondary to COPD exacerbation of probable infectious etiology; left facial paresthesia of undetermined cause; history of possible Wolff-Parkinson-White cardiac syndrome; and history of tobacco dependence – were all unrelated to her claim for OD benefits based upon a reasonable degree of scientific and medical certainty.³¹

CONCLUSIONS OF LAW

¶ 25 If a claimant files an OD claim and remains in the allegedly injurious employment, the law in effect on the date the claim is filed applies.³² This case is governed by the 2011 version of the Montana Workers' Compensation Act since that was the law in effect at the time Langston filed her OD claim while continuing to work.

Issue One: Whether Petitioner has suffered a compensable occupational disease.

¶ 26 The claimant bears the burden of proving by a preponderance of the evidence that she is entitled to the benefits she seeks.³³ Causation is an essential element to an entitlement to benefits, and the claimant has the burden of proving a causal connection by a preponderance of the evidence.³⁴

¶ 27 Langston is seeking benefits for an OD. An OD is defined as "harm, damage, or death arising out of or contracted in the course and scope of employment caused by

²⁸ Ex 5 at 6-7.

²⁹ Ex. 5 at 7.

³⁰ *Id.*

³¹ Ex. 5 at 5, 6-8.

³² *Chapman v. Twin City Fire Ins. Co.*, 2010 MTWCC 36, ¶ 33, citing *Bouldin v. Liberty Northwest Ins. Corp.*, 1997 MTWCC 8.

³³ *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).

³⁴ *Taylor v. Montana State Fund*, 2012 MTWCC 17, ¶ 70, citing *Grenz v. Fire and Cas. of Conn.*, 250 Mont. 373, 380, 820 P.2d 742, 746 (1991).

events occurring on more than a single day or work shift.”³⁵ In order to be held liable for an OD, the OD must be established by objective medical findings.³⁶ “Objective medical findings” is defined as “medical evidence, including range of motion, atrophy, muscle strength, muscle spasm, or other diagnostic evidence, substantiated by clinical findings.”³⁷

¶ 28 In this case, the medical evidence Langston has submitted in support of her claim is her treating physician’s report of February 20, 2012, in which Dr. Stein stated that Langston’s work environment was “suspicious as a potential etiology” as it pertained to her temporary left cheek paresthesia. However, Dr. Stein’s opinion fails to satisfy the criteria of a preponderance of evidence. Moreover, this opinion has nothing to do with Langston’s claim for OD benefits relating to a pulmonary condition (See ¶ 7). Finally, Dr. Stein’s office note refers to carbon *monoxide* poisoning, rather than carbon dioxide. Carbon monoxide levels were found to be normal at the Eureka annex building. Even after Krzan sought clarification of this opinion from Dr. Stein, he responded by reiterating his original opinion and findings and stating that he had nothing further to add.

¶ 29 Although I do not doubt Langston’s sincere belief that the conditions at her workplace exacerbated her COPD, her subjective belief is unsupported by the medical evidence, which relates her hospitalization at KRMC on February 5-6, 2012, to a flare-up of her COPD caused by an upper respiratory infection. I therefore must conclude that Langston has failed to carry her burden in establishing by a preponderance of the evidence that she suffered a compensable OD.

Issue Two: Whether Petitioner is entitled to recovery of attorney fees and costs.

¶ 30 In order to recover attorney fees and costs where there has been a denial of a claim, the claim must first be adjudged compensable.³⁸ Since I have not adjudged Langston’s claim compensable, she is not entitled to recover her attorney fees or costs.

JUDGMENT

¶ 31 Petitioner has failed to meet her burden in demonstrating that she suffered a compensable occupational disease.

¶ 32 Petitioner is not entitled to recover attorney fees or costs.

³⁵ § 39-71-116(23)(a), MCA.

³⁶ § 39-71-407(12)(a), MCA.

³⁷ § 39-71-116(22), MCA.

³⁸ § 39-71-611(1), MCA.

¶ 33 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.

¶ 34 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 22nd day of July, 2013.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Stormy L. Langston
Norman H. Grosfield
Submitted: April 16, 2013