

**IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA**

**2008 MTWCC 54**

**WCC No. 2007-1827**

---

**LIBERTY NORTHWEST INSURANCE CORPORATION**

**Petitioner**

**vs.**

**MONTANA STATE FUND**

**Respondent/Insurer**

**IN RE: CLAIM OF GARY MITCHELL**

**Claimant/Intervenor.**

---

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT**

**Summary:** The claimant suffers from a low-back condition as a result of his lifetime of employment in heavy-labor positions. He worked for State Fund's insured in 2002 and his back condition began to worsen at that time, although the claimant continued to work. He was employed by Liberty Northwest's insured from August through October 2005. The claimant filed separate claims with Liberty Northwest and State Fund for his low-back condition. Liberty Northwest argues that it is not liable for the claimant's claim under the last injurious exposure rule. Liberty Northwest also argues that the WCA requires a claimant to prove that the major contributing cause of his OD is the employment where he was last injuriously exposed to the hazard of the disease.

**Held:** The plain meaning of § 39-71-407(9), MCA, contains no requirement that the "employment" which is the major contributing cause of a claimant's occupational disease (OD) derive from a particular employer. Rather, the statute calls for a comparison between occupational and non-occupational factors as part of the determination as to whether the OD is considered to "arise out of employment or be contracted in the course and scope of employment." In the present case, I conclude that the claimant's lifetime of heavy-labor employment was the major contributing cause of his low-back condition, and that the claimant was last injuriously exposed to the hazard of his OD while he was employed by

Liberty Northwest's insured. Therefore, Liberty Northwest is liable for the claimant's low-back condition.

¶ 1 The trial in this matter was held on July 29, 2008, in Missoula, Montana. Petitioner Liberty Northwest Insurance Corporation (Liberty Northwest) was represented by Larry W. Jones. Respondent Montana State Fund (State Fund) was represented by Daniel B. McGregor. Claimant/Intervenor Gary Mitchell (Mitchell) was present and represented by Steven S. Carey and David T. Lighthall.

¶ 2 Exhibits: Exhibits 1 through 41 were admitted without objection.

¶ 3 Witnesses and Depositions: Sworn statements of Gary James Mitchell and Dr. John C. Schumpert were taken and submitted to the Court. The deposition of Dr. Randale C. Sechrest was taken and submitted to the Court. Mitchell was sworn and testified at trial.

¶ 4 Issues Presented: The Final Pretrial Order states the following contested issues of law:

- ¶ 4a Whether Mitchell's claims are barred by the statute of limitations set forth at Section 39-71-601(3), MCA (2005).<sup>1</sup>
- ¶ 4b Whether the 2002 version of the Montana Occupational Disease Act, or the 2005 version of the Montana Workers' Compensation Act, applies to Mitchell's claim against the State Fund.
- ¶ 4c Whether Mitchell suffered a compensable occupational disease in his employment with the State Fund's insured in 2002, pursuant to the applicable law.
- ¶ 4d Whether the major contributing cause burden of proof in § 407 applies to a lifetime of employment or to employment with an individual employer.
- ¶ 4e If Mitchell suffered a compensable occupational disease in the employ of the State Fund's insured in 2002, whether he was last injuriously exposed to the hazard of an OD in his employment with Liberty Northwest's insured in 2005.

---

<sup>1</sup> At trial, the parties stipulated to the withdrawal of issue 4(a).

- ¶ 4f If Mitchell did not suffer an OD in the employ of the State Fund's insured in 2002, whether he suffered a compensable OD in the employee [sic] of Liberty's insured in 2005.
- ¶ 4g If Mitchell's claim for compensation is barred with the application of the "major contributing cause" standard at Section 39-71-407(9), MCA (2005), whether the statutory provision violates an OD claimant's right to equal protection under Mont. Const. Art. II, Section 4.<sup>2</sup>

### FINDINGS OF FACT

- ¶ 5 Gary Mitchell was a credible witness and the Court finds his testimony at trial credible.
- ¶ 6 On September 2, 1994, Mitchell suffered an industrial injury arising out of and in the course of his employment with Washington Construction, Co., in Missoula, Missoula County, Montana. Mitchell suffered a low-back injury.<sup>3</sup>
- ¶ 7 State Fund accepted liability for Mitchell's claim as an industrial injury and paid appropriate medical and wage-loss benefits.<sup>4</sup>
- ¶ 8 On or about January 6, 2006, Mitchell filed a low-back claim with Liberty Northwest alleging that he suffered an occupational disease (OD) involving his low back with Industrial Services, Inc., of Missoula, Montana.<sup>5</sup>
- ¶ 9 At the time of the alleged OD, Industrial Services was enrolled under Compensation Plan No. 2 of the Montana Workers' Compensation Act (WCA) and its insurer was Liberty Northwest. Liberty Northwest denied liability on February 6 and March 29, 2006.<sup>6</sup>

---

<sup>2</sup> Final Pretrial Order at 2-3.

<sup>3</sup> Final Pretrial Order, Uncontested Fact 1.

<sup>4</sup> Final Pretrial Order, Uncontested Fact 2.

<sup>5</sup> Final Pretrial Order, Uncontested Fact 3.

<sup>6</sup> Final Pretrial Order, Uncontested Fact 4.

¶ 10 In May 2006, Mitchell filed a claim with State Fund alleging he had suffered an OD to his low back in 2002 while employed with Environmental Contractors, LLC, in Missoula, Missoula County, Montana.<sup>7</sup>

¶ 11 At the time of the alleged OD exposure, Environmental Contractors was enrolled under Compensation Plan No. 3 of the WCA and its insurer was State Fund.<sup>8</sup>

¶ 12 Both Liberty Northwest and State Fund have denied liability for Mitchell's current low-back condition, although Liberty Northwest has been paying benefits under a reservation of rights in accordance with the *Belton*<sup>9</sup> decision.<sup>10</sup>

¶ 13 Mitchell has worked in heavy labor employment positions his entire working life. He was employed by his father's logging company after completing the eleventh grade and worked as a logger for approximately twenty years. After he left the logging industry, Mitchell joined the laborer's union in Missoula and was employed as a general laborer for several years before becoming an asbestos abatement worker. Mitchell performed asbestos abatement from 1996 through 2005.<sup>11</sup>

¶ 14 In 2002, Mitchell worked for Environmental Contractors at a job in Virginia. The work he performed involved standing and stooping in awkward positions while applying a liner to the top of a tank.<sup>12</sup> Mitchell's back pain worsened in 2002 and never recovered to where it was prior to 2002.<sup>13</sup>

¶ 15 Mitchell was employed as a laborer for Industrial Services from August 10, 2005, to October 11, 2005.<sup>14</sup> He did not miss a day of work during this period of time. He worked on the suspension bridge that runs underneath the Madison Street bridge in

---

<sup>7</sup> Final Pretrial Order, Uncontested Fact 5.

<sup>8</sup> Final Pretrial Order, Uncontested Fact 6.

<sup>9</sup> *Belton v. Carlson Transp.*, 202 Mont. 384, 658 P.2d 405 (1983)

<sup>10</sup> Final Pretrial Order, Uncontested Fact 7.

<sup>11</sup> Trial Test.

<sup>12</sup> Trial Test.

<sup>13</sup> Trial Test.

<sup>14</sup> Final Pretrial Order, Uncontested Fact 8.

Missoula. As a laborer on this project, Mitchell carried lumber, performed concrete work, repaired fences, and performed security duties.<sup>15</sup>

¶ 16 Mitchell testified that his back condition worsened during the time he was employed by Industrial Services from August to October 2005.<sup>16</sup>

Dr. John C. Schumpert

¶ 17 On February 27, 2006, Dr. John C. Schumpert performed an independent medical examination (IME) on Mitchell at Liberty Northwest's request.

¶ 18 Dr. Schumpert concluded that it was not uncommon for a person with Mitchell's work history to develop chronic lumbar region pain.<sup>17</sup>

¶ 19 In his IME report, Dr. Schumpert concluded that Mitchell's employment with Industrial Services was not the "major contributing cause" of Mitchell's low-back condition.<sup>18</sup> Dr. Schumpert concluded that it was "the accumulation of over 30 years of heavy labor that is ultimately responsible for [Mitchell's] current [low-back] condition."<sup>19</sup>

¶ 20 Dr. Schumpert indicated that the objective medical findings in Mitchell's case include tenderness to palpation over the right posterior and superior iliac spine, right paraspinal muscles, right gluteal muscles, and spinous processes. Also, he concluded that Mitchell has evidence of mild-to-moderate loss of range of motion and had a positive Patrick's test on the right with cramping in the gluteal muscles.<sup>20</sup>

¶ 21 Dr. Schumpert testified in his sworn statement that he could "theoretically" assign at least 1% causation of Mitchell's back condition to his work at Industrial Services because he worked there between August 10, 2005, and October 11, 2005, and performed the required heavy labor job duties.<sup>21</sup> However, Dr. Schumpert could not state to a

---

<sup>15</sup> Trial Test.

<sup>16</sup> Trial Test.

<sup>17</sup> Ex. 13 at 9.

<sup>18</sup> Ex. 13 at 10.

<sup>19</sup> *Id.*

<sup>20</sup> Ex. 13 at 11.

<sup>21</sup> Schumpert Sworn Statement 8:20 - 9:17.

reasonable degree of medical certainty the exact percentage of causation to assign to Mitchell's employment at Industrial Services.<sup>22</sup>

¶ 22 Dr. Schumpert acknowledged that it would be difficult to say which employment in Mitchell's employment history was the cause of his low-back condition.<sup>23</sup>

¶ 23 Dr. Schumpert opined that Mitchell's lifetime of employment would be the major contributing cause to the development of his OD.<sup>24</sup>

Dr. Randale C. Sechrest

¶ 24 Dr. Randale C. Sechrest is the medical director of the Montana Spine and Pain Treatment Center and is Mitchell's treating physician.<sup>25</sup> In an August 9, 2007, letter to Mitchell's attorney, Dr. Sechrest opined that Mitchell suffers from an OD because his low-back condition substantially changed during work with Environmental Contractors in 2002.<sup>26</sup>

¶ 25 Dr. Sechrest testified that he reviewed Mitchell's medical record history and did not find any treatment documentation for Mitchell's back condition between 1998 and 2004.<sup>27</sup>

¶ 26 Dr. Sechrest testified that there would not necessarily be any significant change in the diagnostic imaging of Mitchell's low back even if his condition worsened because MRI scans and x-rays are not an accurate reflection of a patient's subjective complaints, nor are they an accurate reflection of the degree of pain from which a patient suffers.<sup>28</sup>

¶ 27 Dr. Sechrest opined that Mitchell's history, subjective complaints, his pattern of behavior since 1994, and his self-reported ability to function, combine to form the objective medical evidence supporting Petitioner's OD claim.<sup>29</sup>

---

<sup>22</sup> Schumpert Sworn Statement 29:22 - 30:5.

<sup>23</sup> Schumpert Sworn Statement 14:8-10.

<sup>24</sup> Schumpert Sworn Statement 16:24 - 17:9.

<sup>25</sup> Sechrest Dep. 4:20-22; 5:10-12.

<sup>26</sup> Ex. 34 at 3.

<sup>27</sup> Sechrest Dep. 9:14-21.

<sup>28</sup> Sechrest Dep. 11:23 - 12:21.

<sup>29</sup> Sechrest Dep. 12:22 - 13:13.

¶ 28 Dr. Sechrest testified that Mitchell's ongoing employment from 2002 through October 2005, contributed to some degree to the development of his OD.<sup>30</sup>

¶ 29 Dr. Sechrest opined that Mitchell's employment from August to October 2005, contributed, though not very much, to his low-back condition.<sup>31</sup>

### CONCLUSIONS OF LAW

¶ 30 In resolving OD claims, the Court generally applies the statute in effect on a claimant's last day of work.<sup>32</sup> In *Fleming v. International Paper Co.*,<sup>33</sup> the Montana Supreme Court explained the rationale for this rule by noting that, "liability for and administration of a claim should correspond with the period in which the injurious exposure occurred."<sup>34</sup> In this case, Mitchell initially filed a claim for his low-back condition with Liberty Northwest, the insurer of his last employer, Industrial Services. After Liberty Northwest rejected his claim, Mitchell filed a separate OD claim with State Fund, Environmental Contractor's insurer, in 2002. Mitchell testified that his heavy-labor job duties for Industrial Services from August to October 2005 caused his back condition to worsen. This is corroborated by Drs. Sechrest and Schumpert, who both agreed that Mitchell's heavy-labor job duties at Industrial Services contributed to his current low-back condition. Applying the Supreme Court's rationale in *Fleming*, I conclude that the 2005 version of the WCA applies to Mitchell's claim against Liberty Northwest because this corresponds to Mitchell's injurious exposure at Industrial Services.

¶ 31 Occupational disease "means harm, damage, or death arising out of or contracted in the course and scope of employment caused by events occurring on more than a single day or work shift."<sup>35</sup> An OD arises out of employment if it is established by objective medical findings and the events occurring on more than a single day or work shift are the major contributing cause of the OD in relation to other factors that contribute to the OD.<sup>36</sup>

---

<sup>30</sup> Sechrest Dep. 22:11-19.

<sup>31</sup> Sechrest Dep. 27:22 - 29:1.

<sup>32</sup> *Grenz v. Fire & Cas. of Conn.*, 278 Mont. 268, 271, 924 P.2d 264, 266 (1996).

<sup>33</sup> *Fleming*, 2008 MT 327, 346 Mont. 141, 194 P.3d 77.

<sup>34</sup> *Fleming*, ¶ 27 (quoting, *Nelson v. Cenex, Inc.*, 2008 MT 108, ¶ 29, 342 Mont. 371, 181 P.3d 619).

<sup>35</sup> § 39-71-116(20)(a), MCA.

<sup>36</sup> § 39-71-407(9)(a) and (b), MCA.

“Major contributing cause” means “a cause that is the leading cause contributing to the result when compared to all other contributing causes.”<sup>37</sup>

¶ 32 Dr. Schumpert concluded that it was “the accumulation of over 30 years of heavy labor that is ultimately responsible for [Mitchell’s] current [low-back] condition.”<sup>38</sup> He opined that the objective medical findings in Mitchell’s case include tenderness to palpation over the right posterior and superior iliac spine, right para-lumbar muscles, right gluteal muscles, and spinous processes. He also found evidence of mild-to-moderate loss of range of motion and a positive Patrick’s test on the right with cramping in Mitchell’s gluteal muscles. Dr. Sechrest opined that Petitioner’s ongoing employment from 2002 through October 2005 contributed to some degree to the development of his OD. Drs. Sechrest’s and Schumpert’s opinions, along with Mitchell’s testimony regarding his medical condition and employment history, lead me to conclude that Mitchell suffers from an OD and that the major contributing cause of the OD is Mitchell’s lifetime of heavy-labor employment. Having made this determination, I must now determine which employer is liable for Mitchell’s low-back condition.

¶ 33 Section 39-71-407(10), MCA, identifies which employer is liable for an OD.

When 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.

¶ 34 While employed by Liberty Northwest’s insured from August through October 2005, Mitchell carried lumber, performed concrete work, repaired fences, and performed security duties. Mitchell testified that his back condition worsened during this time. Drs. Sechrest and Schumpert agreed that Mitchell’s employment with Liberty Northwest’s insured contributed to some degree to his present low-back condition. I therefore conclude that Mitchell was last injuriously exposed to the hazard of his OD at the time of his employment with Liberty Northwest’s insured. Pursuant to § 39-71-407(10), MCA, therefore, Liberty Northwest is liable for Mitchell’s low-back condition. Set within the framework of the foregoing analysis, I now address the issues set forth in the Final Pretrial Order.

**Issue One: Whether the 2001 version of the Montana Occupational Disease Act, or the 2005 version of the Montana Workers’ Compensation Act, applies to Mitchell’s claim against the State Fund.**

---

<sup>37</sup> § 39-71-407(13), MCA.

<sup>38</sup> Ex. 13 at 10.



¶ 35 Pursuant to § 39-71-407(10), MCA, the **only employer liable** for an OD is the employer in whose employment the employee was last injuriously exposed to the hazard of the disease. In this case, I have already determined that Liberty Northwest's insured was the employer of last injurious exposure. Having made this determination, the question of which statutory year may apply to Mitchell's claim against State Fund is not relevant to the ultimate disposition of this case.

**Issue Two: Whether Mitchell suffered a compensable occupational disease in his employment with State Fund's insured in 2002, pursuant to the applicable law.**

¶ 36 For the same reasons as set forth in my resolution of Issue One, whether Mitchell suffered a compensable occupational disease while employed by State Fund's insured is not relevant to the ultimate disposition of this case.

**Issue Three: Whether the major contributing cause burden of proof in § 407 applies to a lifetime of employment or to employment with an individual employer.**

¶ 37 Section 39-71-407(9), MCA, provides, in pertinent part, as follows:

(9) Occupational diseases are considered to arise out of employment or be contracted in the course and scope of employment if:

. . .

(b) 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.

¶ 38 Liberty Northwest argues that § 39-71-407(9)(b), MCA, must be read together with § 39-71-407(10), MCA, which provides that the only employer liable for an OD is the employer in whose employment the employee was last injuriously exposed to the hazard of the disease.<sup>39</sup> The result of Liberty Northwest's interpretation would mean that **the only employer** liable for an OD would be the employer whose employment was the major contributing cause of the claimant's condition **and** was the last injurious exposure. State Fund argues that the major contributing cause requirement of § 39-71-407(9)(b), MCA,

---

<sup>39</sup> Liberty's Motion for Summary Judgment and Supporting Brief at 6. (Docket Item No. 20)

applies not to any specific employer but rather to the employee's total employment history compared to other non-work related contributing causes.

¶ 39 When interpreting a statute, the Court is to read all parts of the statute as a whole and strive to give effect to all of its provisions.<sup>40</sup> The Court first attempts to construe the statute according to its plain meaning.<sup>41</sup> The task is “simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted.”<sup>42</sup> The plain meaning of § 39-71-407(9), MCA, contains no requirement that the “employment,” which is the major contributing cause of a claimant's OD, derive from a particular employer. Rather, the statute calls for a comparison between occupational and non-occupational factors as part of the determination as to whether the OD is considered to “arise out of **employment** or be contracted in the course and scope of **employment**.”<sup>43</sup> If such a determination is made, then the analysis moves forward to § 39-71-407(10), MCA, to assign liability to the **employer** of last injurious exposure. If I were to accept Liberty Northwest's interpretation, a worker who unquestionably had an OD may not be entitled to benefits if the **employer** of last injurious exposure is not also the **employment** that was the major contributing cause of the OD. Nothing in the statutory framework indicates that the Legislature intended such a result.

**Issue Four: If Mitchell suffered a compensable occupational disease in the employ of the State Fund's insured in 2002, whether he was last injuriously exposed to the hazard of an OD in his employment with Liberty Northwest's insured in 2005.**

¶ 40 As set forth above at ¶ 34, I have concluded that Mitchell was last injuriously exposed to the hazard of an OD while employed by Liberty Northwest's insured in 2005. Since § 39-71-407(10), MCA, provides that the only employer liable for an OD is the employer in whose employment the employee was last injuriously exposed to the hazard of the disease, I need not reach the issue of whether Mitchell suffered a compensable OD in the employ of State Fund's insured in 2002.

---

<sup>40</sup> *Barnard v. Liberty Northwest Ins. Corp.*, 2008 MT 254, ¶ 17, 345 Mont. 81, 85 189 P.3d 1196, 1200.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* (Quoting § 1-2-101, MCA.)

<sup>43</sup> § 39-71-407(9), MCA. (Emphasis added.)

**Issue Five: If Mitchell did not suffer an OD in the employ of State Fund's insured in 2002, whether he suffered a compensable OD in the employ of Liberty's insured in 2005.**

¶ 41 As discussed above at ¶¶ 30-34, I have concluded that Mitchell suffers from a compensable OD for which Liberty Northwest is liable as the insurer of the employer of last injurious exposure.

**Issue Six: If Mitchell's claim for compensation is barred with the application of the "major contributing cause" standard at Section 39-71-407(9), MCA (2005), whether the statutory provision violates an OD claimant's right to equal protection under Mont. Const. Art. II, Section 4.**

¶ 42 I have concluded that Mitchell's claim is not barred by application of the "major contributing cause" standard. Therefore, I do not reach Petitioner's constitutional challenge.<sup>44</sup>

#### JUDGMENT

¶ 43 Liberty Northwest is liable for Mitchell's low-back condition.

¶ 44 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 23<sup>rd</sup> day of December, 2008.

(SEAL)

/s/ JAMES JEREMIAH SHEA  
JUDGE

c: Larry W. Jones  
Daniel B. McGregor  
Steven S. Carey  
David T. Lighthall  
Submitted: July 29, 2008

---

<sup>44</sup> See, *Wolfe v. State Dept. of Labor and Industry*, 255 Mont. 336, 339, 843 P.2d 338, 340 (1992). "A court should not rule on the constitutionality of a legislative act if the court can decide the case before it without reaching constitutional considerations."