IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2007 MTWCC 24

WCC No. 2006-1679

NELS OKSENDAHL

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer.

ORDER GRANTING PETITIONER'S MOTION FOR SUMMARY JUDGMENT

Notice of Appeal Filed July 9, 2007
Affirmed April 22, 2008

Summary: Petitioner suffers from arthritis in his thumbs, which his treating physician and an IME doctor both opine would have developed irrespective of his employment. However, both doctors agree that Petitioner's employment probably aggravated or accelerated his thumb condition. Petitioner and Respondent both argue they are entitled to summary judgment as a matter of law as to whether Petitioner's thumb condition is a compensable occupational disease.

Held: Petitioner's motion for summary judgment is granted. Respondent's Motion for Summary Judgment is denied. Petitioner had been a carpenter all his life, the last five years of which were working for Respondent's insured. Both of the doctors who offered opinions stated that Petitioner's work aggravated this condition. The test for causation of an occupational disease is whether Petitioner's employment constituted a significant aggravation or significant contribution to his condition. Petitioner has established that the aggravation or contribution was significant.

Topics:

> **Occupational Disease: Causation.** The correct test for compensability under the Occupational Disease Act is whether occupational factors significantly aggravated or contributed to the injured worker's condition.

Causation: Medical Condition. A doctor's conclusion that the worker's employment was less than a 50% contribution is not grounds to deny compensability. Occupational factors need not play the major or most significant role in causing an OD, but must instead be a significant aggravation or contribution.

Injury and Accident: Aggravation: Occupational Disease. Occupational factors need not play the major or most significant role in causing an OD, but must instead be a significant aggravation or contribution.

Causation: Medical Condition. Where a doctor opined that the employee's work as a lifelong carpenter "probably accelerated" osteoarthritis of the basilar thumb, the employment was a significant aggravation or contribution to the development of the employee's occupational disease.

Injury and Accident: Aggravation: Occupational Disease. Where a doctor opined that the injured worker's arthritic condition would have developed "no matter what," but was probably accelerated by his employment as a carpenter, the worker's employment was a significant aggravation or contribution and therefore his condition was compensable as an occupational disease.

¶ 1 Respondent Liberty Northwest Insurance Corporation moved for summary judgment against Petitioner's claim for occupational disease (OD) benefits. Petitioner cross-motioned for summary judgment. Both parties agreed that the issue of compensability of Petitioner's OD claim can be resolved by summary judgment.

STIPULATED FACTS[1]

¶ 2 Nels Oksendahl (Petitioner) was born on October 20, 1954, and resides in Billings, Montana.[2]

¶ 3 Petitioner has been a carpenter all of his work-life.[3]

¶ 4 Petitioner was employed full time as a carpenter from February 2000 until February 28, 2005, by Laughlin Construction, Incorporated, which at all times material to this matter

[1] The exhibits are taken from the parties' Statement of Stipulated Facts, Docket Item No. 11.

[2] Statement of Stipulated Facts at 1.

[3] Ex. 4 at 1.

was insured by Liberty Northwest Insurance, Incorporated (Respondent) under Plan II of the Montana Workers' Compensation Act.[4]

¶ 5 In early June 2005, Petitioner submitted to Respondent a First Report of Injury and Occupational Disease dated May 30, 2005, which stated that constant use of his hands as a carpenter for Laughlin Construction, Incorporated, had resulted in arthritis in his thumbs.[5]

¶ 6 By letter dated July 8, 2005, Respondent's claims adjuster, Chris Helmer (Helmer), denied Petitioner's claim. Helmer stated that the basis for the denial was that the medical records did not indicate that Petitioner's thumb condition stemmed from his employment and therefore was not compensable as a workers' compensation claim.[6]

¶ 7 Petitioner's treating physician is Curtis Settergren, M.D., an orthopedic surgeon.[7]

¶ 8 On June 29, 2005, Dr. Settergren wrote a letter to Helmer in which he stated:

> I first saw Mr. Oksendahl for bilateral basilar joint arthritis in July of 2004. The exact cause of arthritis is unknown except in those cases of traumatic joint injury and in his case, I cannot say to any degree of medical certainty that his basilar joint arthritis was specifically caused by any type of use of his hand, but certainly heavy use of his hands in carpentry [and] construction, would certainly aggravate the condition and perhaps accelerate it, but I do not know if it is answerable to say that it is actually caused. There is no known trauma or other non-work aggravation reported in his history.[8]

¶ 9 Petitioner was examined by orthopedic surgeon Jeffrey Hansen at the direction of the Employment Relations Division, pursuant to the occupational disease medical evaluator provisions found in §§ 39-72-601, -602, MCA (2003).[9]

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[4] Statement of Stipulated Facts at 1.

[5] Statement of Stipulated Facts at 2; Ex. 1.

[6] Statement of Stipulated Facts at 2; Ex. 2.

[7] Statement of Stipulated Facts at 2.

[8] Ex. 3 at 1.

[9] Statement of Stipulated Facts at 2; Ex. 4.

¶ 10 In his IME report, Dr. Hansen stated, in pertinent part:[10]

¶ 10a The patient has been a carpenter all his life.

¶ 10b His past medical history otherwise is fairly non-contributory.

¶ 10c Certainly his work as a carpenter and laborer contributes to a lot of stress on the basilar thumb joints.

¶ 10d He seems to have worn out his basilar thumb joints without much in the way of diffuse or generalized osteoarthritis.

¶ 10e It would appear that this individual would have developed osteoarthritis of the CMC joints eventually one way or the other. His job as a construction and carpentry laborer probably contributed to the condition developing a bit faster than it would have. It's impossible to quantify how much faster the condition has developed than it would have without this type of exposure. Presumably in order to make a living he would have been using his hands in one fashion or the other.

¶ 10f It is my opinion that the primary causation of his basilar thumb joint is degenerative in nature. There is a less than 50% contributing factor of some occupational exposure. There is no clear-cut evidence that this is an occupational disease. There is not an occupational contributing factor. This is a degenerative condition that would have developed no matter what.

¶ 11 In response to specific questions posed to him, Dr. Hansen opined, in pertinent part:

¶ 11a The patient is not suffering from a true occupational disease. He simply has osteoarthritis of the basilar thumb joints. His work probably accelerated that condition. Therefore they [sic] may be a component of occupational disease but it's not entirely related to his work.

¶ 11b The patient has occupational exposure to repetitive strain and pinching and grasping. Therefore his work probably accelerated the osteoarthritis of the basilar thumb joint that he has developed. The major contributory factor however is the patient's individual predispositions of this condition and the process of degeneration

[10] Ex. 4 at 1-2.

of the joint surface. The patient's employment was a contributory cause but I consider it less than 50% contribution.[11]

¶ 12 Helmer again denied Petitioner's claim by letter dated March 9, 2006.[12]

ISSUE

¶ 13 Whether Respondent is liable for Petitioner's occupational disease claim.

DISCUSSION

¶ 14 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.[13]

¶ 15 For summary judgment to be granted, the moving party must establish that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law.[14] The parties in this matter have met this criteria.

¶ 16 At issue is whether Petitioner's thumb condition is compensable under the ODA. Petitioner and Respondent agree that three cases control the outcome of this case: *Polk v. Planet Ins. Co.*,[15] *Schmill v. Liberty Northwest Ins. Corp.*,[16] and *Montana State Fund v. Murray*.[17]

¶ 17 In *Polk*, the Montana Supreme Court interpreted § 39-72-408, MCA, which stated that to qualify for benefits under the ODA, a claimant must prove that his employment was the proximate cause of his condition. Although the claimant in *Polk* argued that the correct standard of causation was that a work-related exposure aggravated or contributed to his

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[11] Ex. 4 at 2.

[12] Statement of Stipulated Facts at 2; Ex. 5.

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

[14] ARM 24.5.329; *Farmers Union Mut. Ins. Co. v. Horton*, 2003 MT 79, ¶ 10, 315 Mont. 43, 67 P.3d 285 (citation omitted).

[15] *Polk,* 287 Mont. 79, 951 P.2d 1015 (1997).

[16] *Schmill,* 2003 MT 80, 315 Mont. 51, 67 P.3d 290.

[17] *Murray,* 2005 MT 97, 326 Mont. 516, 111 P.3d 210.

illness, the Court concluded that, "the test for compensability is whether the job-related incident significantly aggravated the preexisting condition."[18] The court further held that the aggravation statute, § 39-72-706, MCA, did not circumvent the proximate cause requirement of § 39-72-408, MCA. The court explained that the test for compensability is "whether occupational factors significantly aggravated a preexisting condition, not whether occupational factors played the major or most significant role in causing the claimant's resulting disease."[19]

¶ 18 In *Schmill*, the Montana Supreme Court held that § 39-72-706, MCA, violates the equal protection guarantee found at Article II, Section 4 of the Montana Constitution.[20] In doing so, the Court struck down the apportionment provision of the statute, which had allowed insurers to proportionately decrease occupational disease benefits if the disease was aggravated by a non-compensable disease or infirmity.

¶ 19 Most recently, in *Murray*, the Montana Supreme Court held that the claimant's condition was compensable under the ODA when it was determined that his work "significantly contributed" to his knee condition which had both work-related and nonwork-related contributing factors.[21]

¶ 20 In the present case, Respondent argues that the holding in *Polk* was reached through the "interrelationship" of §§ 39-72-408, and -706, MCA, and that since *Schmill* struck down § 39-72-706, MCA, only § 39-72-408, MCA, applies. Therefore, Respondent argues, Petitioner must prove that his work was 51% of the cause of his thumb condition. Respondent points specifically to § 39-72-408(2), MCA, which states that if a treating physician makes a positive determination that a claimant suffers from an occupational disease, the physician shall then determine by percentage the amount of the occupational disease that is attributable to work rather than other factors. Respondent argues that the existence of this subsection, in the absence of the aggravation statute, requires such a result. This argument is without merit.

¶ 21 In *Murray*, decided two years after *Schmill*, and the most recent case to address this issue, the Montana Supreme Court upheld this Court's finding that the claimant's (Murray) employment significantly contributed to his degenerative knee condition. In addressing the evidence that supported this Court's finding, the Supreme Court noted the opinions of both

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[18] *Polk,* 287 Mont. at 84, 951 P.2d at 1018 (citation omitted).

[19] *Polk,* 287 Mont. at 85, 951 P.2d at 1018.

[20] *Schmill*, ¶ 23.

[21] *Murray*, ¶¶ 21-26.

the surgeon who performed Murray's knee replacement surgeries (Dr. Blavatsky) as well as the occupational medicine specialist who had examined Murray at the request of the Department of Labor and Industry (Dr. Rapaport). Specifically, the Court noted that Dr. Rapaport had acknowledged Murray's previous, off-duty knee injuries but further stated that subsequent recreational and work activities contributed to the advancing degeneration of both knees. With respect to the specific type of work activity Murray performed, Dr. Rapaport opined that it "may have contributed in part to his degenerative joint disease."[22] For his part, Dr. Blavatsky stated that Murray's old, off-duty knee injuries were "huge initiating factors in his osteoarthritis," but further testified that, "in all fairness, work-related activities have some measure."[23] For purposes of assessing Respondent's 51% threshold argument in the present case, I note that, in *Murray*, both doctors apportioned Murray's condition to his work activities at below 50%.[24]

¶ 22 As for the continued validity of the *Polk* decision, post-*Schmill*, it bears noting that, in *Murray*, the Montana Supreme Court specifically invoked *Polk* in stating that "the test for compensability under the Occupational Disease Act [is] whether occupational factors significantly aggravated a preexisting condition."[25] In espousing the "significantly aggravated" standard in *Polk*, the Court held what the standard was ***not***. The *Polk* court held that the test for compensability under the ODA is "not whether occupational factors played the major or most significant role in causing the claimant's resulting disease."[26]

¶ 23 Even if it was not obvious from the holdings in *Polk* and *Murray* that Respondent's 51% threshold argument is meritless, one need only ponder the practical ramifications of Respondent's argument to comprehend its infirmity. Before the Montana Supreme Court in *Schmill* struck down § 39-72-706, MCA, as unconstitutional, an OD claimant who established that his or her condition was less than 50% related to working conditions could nonetheless recover ***something*** under the ODA, albeit only a proportional amount. With *Schmill* holding this statute violated OD claimants' right to equal protection, however, Respondent would now have this Court conclude the end result is that an OD claimant who establishes that his or her condition is less than 50% related to working conditions recovers ***nothing*** under the ODA, not even the proportional amount he could have recovered pre-*Schmill*. In the annals of jurisprudence, this would stand as one of the more paradoxical remedies of a constitutional violation.

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[22] *Murray*, ¶ 25.

[23] *Id*.

[24] *Id*.

[25] *Murray*, ¶ 23.

[26] *Polk*, 287 Mont. at 85, 951 P.2d at 1018.

¶ 24 Finally, though not cited by either party, I find the case of *Hand v. Uninsured Employers' Fund*[27] to be instructive on this issue. In *Hand*, an OD claimant objected to the Department of Labor and Industry's conclusion that he was only entitled to 25% of total disability benefits because the examining physician apportioned 75% of his knee problems to injuries rather than disease.[28] By the time the matter reached the Montana Supreme Court on unrelated issues, *Schmill* had been decided. On the issue of apportionment, however, the Court concluded that "applying *Schmill*," the claimant was entitled to 100% of his total disability benefits provided he suffered a total wage loss as a result of his occupational disease.[29]

¶ 25 In light of the legal standards as discussed above, I must now determine whether Petitioner's employment significantly aggravated or contributed to his thumb condition. For the reasons discussed below, I conclude that it has.

¶ 26 Both of the physicians who offered opinions in this case agree that Petitioner's work as a carpenter and in construction aggravated or contributed to his condition. Dr. Settergren stated: "[C]ertainly heavy use of [Petitioner's] hands in carpentry [and] construction, would certainly aggravate the condition . . . "[30] Dr. Hansen stated: "The patient has occupational exposure to repetitive strain and pinching and grasping. Therefore his work probably accelerated the osteoarthritis of the basilar thumb joint that he has developed. The major contributory factor however is the patient's individual predispositions of this condition and the process of degeneration of the joint surface. The patient's employment was a contributory cause but I consider it less than 50% contribution."[31]

¶ 27 The fact that Dr. Hansen concluded that Petitioner's employment was not a major contributory factor or was less than a 50% contribution is not determinative. Furthermore, although Dr. Hansen states that "no clear-cut evidence" demonstrates that Petitioner's condition is an OD, the standard is not whether the evidence is "clear-cut," but rather whether it is more probable than not. As the Court noted in *Polk*, the test for compensability under the ODA is not whether occupational factors played the "major or most significant role" in causing the claimant's resulting disease.[32]

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[27] *Hand,* 2004 MT 336, 324 Mont. 196, 103 P.3d 994.

[28] *Hand*, ¶ 11.

[29] *Hand*, ¶ 28.

[30] Ex. 3 at 1.

[31] Ex. 4 at 2.

[32] *Polk*, 287 Mont. at 85, 951 P.2d at 1018.

¶ 28 Though occupational factors need not play the major or most significant role in causing an OD, the question remains what constitutes a "significant" aggravation or contribution. On this point, there appear to be no hard and fast answers. Therefore, I find some useful historical guidance from the factual scenarios of the cases which have been discussed herein in juxtaposition with the facts of the present case.

¶ 29 In *Polk*, the claimant (Polk) filed an OD claim for a pulmonary condition. Polk was a long-time heavy smoker. For eight years he also worked in an agriculture factory that processed seeds into oil and meal sold for cattle feed. This job exposed him to dust, fumes, and airborne mold. At his hearing before the Department of Labor and Industry, the hearing examiner heard from eight doctors, each of whom offered a different conclusion as to whether Polk suffered from an OD. Four concluded that he did not. Of those four, one doctor found "no evidence" that Polk suffered from "any occupational disease." The other three, however, believed that to qualify for OD benefits, Polk's employment had to be the major factor causing his pulmonary condition. Moreover, one of these doctors opined that, although Polk's employment did not cause his condition, occupational exposures "would be very likely to play a significant role in exacerbating" his emphysema. Another concluded that an underlying lung disease would be aggravated by exposure to various types of dust and other irritants such as Polk was exposed to at his employment. The Montana Supreme Court concluded that when the testimony of these doctors was reviewed under the correct standard of causation and was added to the testimony of the four doctors who concluded that Polk suffered from an OD, it could support a finding that occupational factors contributed to or aggravated the claimant's condition.[33]

¶ 30 In *Murray*, the claimant (Murray) filed an OD claim for a bilateral degenerative knee condition which he claimed resulted from years of standing on concrete or asphalt while working as a tool room attendant. Before going to work for his employer, Murray suffered bilateral knee injuries which required removal of part or all of the cartilage in both knees.[34] During the seven years immediately preceding his OD claim, Murray suffered several episodes of knee pain, swelling, and effusion in connection with his personal recreational activities.[35] During this same period, and four years before filing his claim, one of Murray's treating physicians advised him that bilateral knee replacements were inevitable because his knees continued to degenerate.[36] At the trial before this Court, three doctors testified by deposition. One doctor offered no opinion regarding whether Murray's employment had

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[33] *Polk*, 287 Mont. at 87-88, 951 P.2d at 1020.

[34] *Murray*, ¶ 6.

[35] *Murray*, ¶ 8.

[36] *Id*.

impacted his knee condition, but deferred to the opinion of Dr. Blavatsky, the doctor who performed Murray's knee replacement surgeries.[37] Dr. Blavatsky stated that Murray's old, off-duty knee injuries, were "***huge initiating factors*** in his osteoarthritis."[38] Dr. Blavatsky further testified, "in all fairness, work-related activities have ***some measure.***"[39]

¶ 31 This Court also considered the testimony of Dr. Rapaport, the occupational medicine specialist who had examined Murray at the request of the Department of Labor and Industry. Acknowledging Murray's previous, off-duty knee injuries, Dr. Rapaport also testified that subsequent recreational and work activities contributed to the advancing degeneration of both knees. With respect to the specific type of work activity Murray was performing, Dr. Rapaport opined that it "may have ***contributed in part*** to his degenerative joint disease."[40]

¶ 32 Dr. Rapaport concluded that 30 to 40 percent of Murray's condition should be apportioned to work activities. Dr. Blavatsky agreed that at least 30 percent was an appropriate apportionment.[41]

¶ 33 The Montana Supreme Court affirmed this Court's finding that Murray's employment significantly contributed to his knee condition.

¶ 34 In the present case, Petitioner has been diagnosed with osteoarthritis of the basilar thumb joints. In his IME report, Dr. Hansen noted that, "Certainly his work as a carpenter and laborer contributes to a lot of stress on the basilar thumb joints."[42] Petitioner has worked as a carpenter all his life, with the last five years working full time for Respondent's insured. Dr. Hansen opined that because Petitioner has occupational exposure to repetitive strain and pinching and grasping, his work probably accelerated the osteoarthritis

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[37] *Murray*, ¶ 17.

[38] *Murray*, ¶ 25 (emphasis added).

[39] *Id*. (emphasis added).

[40] *Id*. (emphasis added).

[41] *Murray*, ¶ 25.

[42] Ex. 4 at 1.

of the basilar thumb joint that he has developed.[43] Dr. Hansen further opined that "[Petitioner's] employment was a contributory cause."[44]

¶ 35 Despite these conclusions, and despite finding that Petitioner "seems to have worn out his basilar thumb joints,"[45] and despite noting that, aside from his background as a carpenter, Petitioner's "past medical history otherwise is fairly non-contributory,"[46] Dr. Hansen concluded that Petitioner is not suffering from a "true occupational disease." [47] Dr. Hansen also concluded that Petitioner's degenerative condition "would have developed no matter what." However, at issue is not simply whether Petitioner's condition was inevitable, but whether his employment accelerated its onset, which Dr. Hansen concedes it did.[48] It is clear from his report that Dr. Hansen was operating under the same "mistaken assumption" rejected in *Polk* – that to qualify for OD benefits, a claimant's occupational exposure must be the "major factor." This is clearly illustrated by Dr. Hansen's answers to the specific questions posed to him in his IME report. Immediately following his conclusion that Petitioner was not suffering from a "true occupational disease," Dr. Hansen states that "[Petitioner's] work probably accelerated [his] condition."[49] He goes on to discount this conclusion, however, by noting that "it's not ***entirely related*** to his work."[50] Immediately after noting that Petitioner has occupational exposure to repetitive strain and pinching and grasping and, therefore his work probably accelerated the osteoarthritis of Petitioner's basilar thumb joint, Dr. Hansen notes that "The ***major contributory factor***, however, is [Petitioner's] individual predispositions of this condition and the process of degeneration of the joint surface."[51] Finally, immediately after concluding that Petitioner's employment was a contributory cause, Dr. Hansen discounts this conclusion by noting that it is less than a 50% contribution.[52]

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[43] Ex. 4 at 2.

[44] *Id*.

[45] Ex. 4 at 2.

[46] Ex. 4 at 1.

[47] Ex. 4 at 2.

[48] *Id.*

[49] *Id.*

[50] Ex. 4 at 2 (emphasis added).

[51] *Id*. (emphasis added).

[52] Ex. 4 at 2.

¶ 36 As in *Polk*, when Dr. Hansen's opinion is reviewed under the correct standard of causation, I conclude that it supports a finding that Petitioner's employment significantly aggravated or contributed to his condition. Moreover, though not nearly as detailed in his assessment as Dr. Hansen, Dr. Settergren unambiguously opined that, "[C]ertainly heavy use of [Petitioner's] hands in carpentry [and] construction would ***certainly aggravate the condition*** and perhaps accelerate it."[53] This serves to further support Petitioner's OD claim under the correct standard.

ORDER AND JUDGMENT

¶ 37 Petitioner's motion for summary judgment is **GRANTED**.

¶ 38 Respondent's motion for summary judgment is **DENIED**.

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

¶ 40 Any party to this dispute may have twenty days in which to request reconsideration from this ORDER AND JUDGMENT.

DATED in Helena, Montana, this 21st day of June, 2007.

(SEAL)

\s\ James Jeremiah Shea
JUDGE

c: Victor R. Halverson
Larry W. Jones
Submitted: February 7, 2007

[53] Ex. 3 (emphasis added).