IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2005 MTWCC 17

WCC No. 2002-0627

DAVID STEWART

Petitioner

vs.

ATLANTIC RICHFIELD COMPANY

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: The claimant suffered a hearing loss due to workplace noise while working for The Anaconda Company. He retired from the Company in 1984 and was provided a hearing aid pursuant to a collective bargaining agreement between the Company and his union but never filed or pursued a claim for workers' compensation or occupational disease benefits until 2002, when he brought his present petition.

Held: The claimant's only potential entitlement is under the Occupational Disease Act. Under that Act, his claim is barred by section 39-72-403(3), MCA (1983), which is a statute of repose and is not subject to tolling for any reason.

Topics:

Injury: Accident. A condition which is the result of long-time occupational exposure and develops gradually does not satisfy the injury and accident definitions of the 1983 Workers' Compensation Act even under the micro-trauma doctrine, and is not compensable under that Act.

Occupational Disease: Defined. A condition which is the result of long-time occupational exposure and develops gradually is a compensable occupational disease.

Limitations Periods: Claim Filing: Occupational Disease. Under section 39-72-403(3), MCA, of the 1983 version of the Occupational Disease Act, an occupational disease claim not filed within three years of retirement is

extinguished and barred. The limitations period cannot be tolled since the section is a statute of repose.

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-72-403(3), MCA (1983). Under section 39-72-403(3), MCA, of the 1983 version of the Occupational Disease Act, an occupational disease claim not filed within three years of retirement is extinguished and barred. The limitations period cannot be tolled since the section is a statute of repose.

¶1 The trial in this matter was held in Helena, Montana, on October 27, 2004. The petitioner was present and represented himself. The respondent was represented by Mr. Andrew J. Utick. Following trial, the respondent's counsel was to consult with his client about possible settlement. The Court learned on March 15, 2005, that no settlement occurred and the case was deemed submitted for decision on that date.

¶2 Exhibits: Exhibits 1 through 9 were admitted without objection.

¶3 Witnesses and Depositions: The petitioner testified. His deposition was also submitted to the Court for consideration.

¶4 Issues Presented: The Court restates the issues as follows:

¶4a Whether claimant's request for judgment directing the respondent to pay for hearing aids is barred by the statute of limitations or repose, by the doctrine of equitable estoppel, or by the doctrine of laches.

¶4b If the claimant's request for payment of hearing aids is not barred, whether he is entitled to such payment under either occupational deafness provisions of the Workers' Compensation Act, §§ 39-71-801 to -813, MCA (1983), or the Occupational Disease Act.

¶5 Having considered the Pretrial Order, the testimony presented at trial, the demeanor and credibility of the witness, the deposition and exhibits, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

¶6 The petitioner, David Stewart (claimant), was employed by The Anaconda Company, from 1947 to September 1, 1984, when he retired. Atlantic Richfield Company is the successor company to The Anaconda Company (the "Company") and inherited its liability, if any, with respect to the present controversy.

¶7 During the times relevant to the present controversy, the Company was self-insured pursuant to Plan No. 1 of the Workers' Compensation Act (WCA).

¶8 During his employment with the Company, the claimant sustained a significant hearing loss due to loud noise at his workplace.

¶9 Over the years of his employment, the claimant noticed a hearing loss and attributed it to his employment.

¶10 During his employment, the claimant was tested for hearing loss. (Ex. 7.) The Company arranged and paid for the testing and was provided with the results.

¶11 At the time of his retirement in 1984, the claimant's employment was governed by a collective bargaining agreement between the Company and the International Union of Operating Engineers. (Ex. 9.) The agreement provided for the Company to provide a hearing aid for employment-related hearing loss. Section 8 of Article 24 of the agreement states:

> **Section 8. Impaired Hearing:**
> In cases where the Company is satisfied that an employee's hearing is impaired, that such impairment is due primarily to noise conditions occurring on the job and necessarily associated with his employment and through no fault of the employee, and that a hearing aid is required, it will provide one at no cost to the employee upon claim therefore.

(*Id*. at 27-28.)

¶12 Upon the claimant's retirement in 1984, the Company sent the claimant to Dr. Neal Rogers, an otolaryngologist, for testing of his hearing. Dr. Rogers examined the claimant on October 19, 1984. He reported his findings to the Company in an October 22, 1984 letter, in which he wrote as follows:

> Mr. Stewart was examined on 10/19/84. He has a severe bilateral sensory neural hearing loss.
>
> He has a 69% binaural hearing impairment and is in need of fitting for aids binaurally at Easter Seals. He definitely needs two aids and please have him fitted that way.

(Ex. 3.)

¶13 The claimant was thereafter fitted at Easter Seals and received one hearing aid. The hearing aid was paid for by the Company.

¶14 The claimant did not recall discussion by supervisors about any entitlement to hearing aids. He did recall the Company having his hearing tested periodically and understood that he could only get one hearing aid. He was not aware of the provision in the collective bargaining agreement concerning hearing aids.

¶15 The claimant wore the hearing aid for about six months but discontinued wearing it because it did not help his hearing.

¶16 The claimant did not file a written claim for compensation with respect to his hearing loss, either within three years of his retirement or ever.

¶17 Over the years since 1984, the claimant's hearing has worsened.

¶18 In 2002 the claimant returned to Dr. Rogers for a further hearing evaluation. At that time Dr. Rogers recommended a new hearing aid. On May 7, 2002, the doctor wrote to Michele Fairclough, an adjuster handling claims for the respondent, as follows:

> Mr. Stewart worked in the Anaconda Company for years around noise. About 20 or more years ago he got hearing aids from the Easter Seals and has the age break down and has not used them for a long period of time. He has an amazingly difficult problem hearing. On audiogram he has bilateral profound sensory neural hearing loss averaging about 90 decibels of loss. He can only hear when someone talks straight at him and he is reading lips. He has not been dizzy. He has not had any significant tinnitus.
>
> . . . .
>
> My impression is his profound hearing loss. He needs help with amplification. Digital aids might be very appropriate in this patient.

(Ex. 2.)

¶19 The respondent refused to authorize or pay for new hearing aids and on August 20, 2002, the claimant filed his present petition.

CONCLUSIONS OF LAW

¶20 This case is governed by the 1983 version of the Montana Occupational Disease Act (ODA) since that was the law in effect at the time of the claimant's retirement from employment and at that time the claimant was aware of his condition and that it was related to his employment. *Hardgrove v. Transportation Ins. Co.*, 2004 MT 340, ¶ 2, 324 Mont. 238. Similarly, the 1983 version of occupational deafness provisions in the WCA apply since section 39-71-808(2)(b), MCA (1983), provides that "time of injury" and "date of injury" for purposes of the part on occupational deafness, Title 39, ch. 71, part 8, is the date of retirement where the employee retires. Thus, the law in effect on that date applies. *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶21 As an initial matter, the Court must determine what provisions of the ODA and/or the WCA govern the claimant's request for hearing aids. The task is not as simple as it seems.

¶22 I start by determining whether the medical pay provision, § 39-71-704, MCA (1983), of the WCA apply. In order for it to apply, the claimant must have suffered an injury compensable under the WCA. Here, the evidence indicates that the claimant's hearing loss was due to long-term exposure to workplace noise. The noise occurred over years, indeed decades, and the hearing loss was gradual. While the definition of injury under the 1983 version of the WCA encompassed "micro-trauma,"[1] i.e., repetitive trauma over a period of time as distinguished from a single traumatic incident, *Hoehne v. Granite Lumber Co.,* 189 Mont. 221, 615 P.2d 863 (1980), Supreme Court decisions following *Hoehne* show that the "time definiteness" requirement applicable to injuries is not satisfied where the micro-trauma occurs over a period of years and the consequent conditions develop slowly and incrementally over those years. *McMahon v. The Anaconda Co.*, 208 Mont. 482, 485, 678 Mont. 661, 663 (1984); *Whittington v. Ramsey Constr. and Fabrication,* 229 Mont. 115, 122-23, 744 P.2d 1251, 1255 (1987); *Wear v. Buttrey Foods Inc.,* 234 Mont. 477, 479-80, 764 P.2d 139, 140 (1988); *Bodily v. John Jump Trucking, Inc.*, 250 Mont 274, 288-89, 819 P.2d 1262, 1271 (1991). I therefore find and conclude that the claimant's hearing loss does not meet the injury definition of the 1983 WCA and that he is not entitled to medical benefits under section 39-71-704, MCA (1983).

¶23 I next consider the application of occupational deafness provisions found within the WCA at part 8 of Title 39, chapter 71. Section 39-71-801, MCA (1983), provides: "Regardless of other definitions of injury and time limitations imposed by this chapter [chapter 71], compensation is awarded for occupational deafness as provided in this part."

¶24 "Occupational deafness" is defined as permanent loss of hearing "due to **prolonged** exposure to noise in employment." § 39-71-802(1), MCA (1983) (emphasis added). It is expressly "distinguished from traumatic loss of hearing which is governed by the specific loss schedule provided for in 39-71-705." § 39-71-803, MCA (1983). The definition and express distinction indicate that the compensation provisions of the WCA still govern occupational deafness occurring as a result of an "injury" within the meaning of that Act, but not long-term exposure such as would fall under the ODA. The exposure here was long term, thus the provisions of part 8 apply in this case. However, those provisions provide only for certain indemnity benefits. There is no provision for hearing aids or medical benefits in general. Thus, the claimant is not entitled to hearing aids under part 8.

¶25 Remaining for consideration is the claimant's possible entitlement under the ODA. While part 8 of the WCA expressly supercedes other compensation provisions of the WCA, § 39-71-801, MCA (quoted in ¶ 22), it does not mention or expressly supercede the ODA. The

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[1]The 1987 legislature overturned the micro-trauma rule by defining injury as being "caused by a specific event on a single day or during a single work shift." § 39-71-119(2)(d), MCA (1987).

lack of any reference to the ODA, while expressly referencing the WCA, is a strong indication that the legislature did *not* intend part 8 to be the exclusive remedy for occupational deafness. *Stephens v. City of Great Falls,* 119 Mont. 368, 381, 175 P.2d 408, 415 (1946) ("[T]he express mention of one thing implies the exclusion of another."). The Supreme Court has previously held that where a claimant has a condition which is by its nature compensable under both the WCA and ODA, he or she may elect to recover under either Act. *Ridenour v. Equity Supply Co.,* 204 Mont. 473, 477-78, 665 P.2d 783, 786 (1983). The same is true here if the claimant's hearing loss meets the definition of an occupational disease.

¶26 Under the 1983 ODA, occupational disease was defined as "all diseases arising out of or contracted from and in the course of employment." § 39-72-102(11), MCA (1983). An occupational disease encompasses physical harm resulting from long-term workplace exposures. *McMahon v. The Anaconda Co.,* 208 Mont. 482, 484-85, 678 P. 2d 661, 663 (1984). Thus, the claimant's hearing loss due to long-term exposure to loud noise at his workplace constitutes an occupational disease and is compensable unless barred by one or more affirmative defenses raised by the respondent.

¶27 I consider the claimant's entitlement to hearing aids under the ODA before addressing the affirmative defenses since it is unnecessary to consider the affirmative defenses unless the claimant would be entitled to hearing aids. His entitlement is governed by section 39-72-704, MCA (1983), which provides for payment of medical and hospital expenses for compensable occupational diseases. The section requires the insurer or Plan No. 1 employer to pay "without limitation" for all "reasonable medical services, hospitalization, medicines, and other treatment approved by the division [Division of Workers' Compensation][2]." While a hearing aid is a medical "appliance," it provides a "medical service" (hearing amplification), and is therefore a compensable medical service. The claimant is therefore entitled to payment for his hearing aids unless his claim is barred.

¶28 The respondent raises a host of affirmative defenses to the claimant's hearing aid request, the primary one being the statute of repose provided in section 39-72-403(3), MCA (1983). The subsection in question provides that:

> [N]o claim to recover benefits under this chapter may be maintained unless the claim is properly filed within 3 years after the last day upon which the claimant or the deceased employee actually worked for the employer against whom compensation is claimed.

In *Hardgrove v. Transportation Ins. Co.,* 2004 MT 340, 324 Mont. 238, the Montana Supreme Court held that this section is a true statute of repose. Thus, unless the claimant filed his claim within three years of retirement his underlying right to compensation was extinguished. *Id*. at

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[2]In 1989 the Division of Workers' Compensation was dissolved and its functions transferred to the Department of Labor and Industry.

¶ 10. Since the underlying right to compensation is extinguished, an insurer or Plan No. 1 employer cannot be estopped from interposing the defense. "Courts may equitably toll statutes of limitations for latent injuries, but no event short of a legislative mandate can toll statutes of repose." *Id.* In my prior Order Denying Summary Judgment, I erroneously treated section 39-72-403(3), MCA (1983) as a statute of limitations subject to tolling by estoppel.[3] I correct that error now, holding that the section cannot be tolled and that the claim at issue in this case is barred because the claimant did not in fact file an occupational disease claim within three years of his retirement.

JUDGMENT

¶29 The claimant is not entitled to payment for a hearing aid since his claim is barred by section 39-72-403(3), MCA (1983). His petition is therefore **dismissed with prejudice**.

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

¶31 Any party to this dispute may have twenty days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 12th day of April, 2005.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. David Stewart, Pro Sé
Mr. Andrew J. Utick
Submitted: March 15, 2005

[3]My error was especially egregious in light of the fact that seven months prior to my denial of summary judgment I had issued a decision in *Hardgrove v. Transporation Ins. Co.,* 2003 MTWCC 57, holding that section 39-72-403(3), MCA (1983), is a statute of repose not subject to tolling. As indicated, the Supreme Court agreed and affirmed on appeal.